

Massachusetts v. EPA: The D.C. Circuit Stretches Precedent and Ignores the Statutory Standard to Uphold EPA’s Unlawful Rulemaking Petition Denial

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I. OVERVIEW OF THE CASE

In 2003, a group of environmental organizations petitioned the Environmental Protection Agency (EPA) to regulate new motor vehicle emissions of greenhouse gases under section 202(a)(1) of the Clean Air Act (CAA).¹ In September 2003, the EPA found that CAA does not authorize the agency to regulate global climate change and denied the rulemaking petition.² Twelve states, three cities, an American territory, and several environmental organizations (petitioners) filed timely petitions for review of final agency action with the D.C. Circuit.³ Ten states and several industry associations joined the EPA as intervenors.⁴ Three D.C. Circuit judges heard the case and issued a plurality opinion.⁵ Judge Randolph, delivering the judgment for the United States Court of Appeals for the District of Columbia Circuit, *held* that the EPA properly exercised the discretion granted by section 202(a)(1) by relying on policy judgments to find no endangerment to public health and denying the petition for rulemaking. *Massachusetts v. EPA*, 415 F.3d 50, 58-59 (D.C. Cir. 2005), *reh’g en banc denied*, 433 F.3d 66 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (2006).

1. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,922-23 (Sept. 8, 2003).

2. *Id.* at 52,922.

3. *Massachusetts v. EPA*, 415 F.3d 50, 52 (D.C. Cir. 2005), *reh’g en banc denied*, 433 F.3d 66 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (2006).

4. *Id.*

5. *Id.*

II. BACKGROUND

A build up of heat-trapping, or greenhouse, gases in the atmosphere leads to a rise in global temperatures.⁶ This phenomenon, known as global warming, causes, and will continue to cause, harmful effects on public health and welfare both domestically and worldwide.⁷ These harmful effects include rising sea levels, loss of coastline, and unnatural disruption of delicate bio-systems.⁸ Motor vehicles produce a vast amount of greenhouse gases, and without regulation, such emissions will cause the adverse effects of global warming to multiply and increase in magnitude.⁹ Environmentalists, citizens, and politicians alike claim that immediate and drastic regulation is necessary to stop global warming's harmful effects from becoming widespread and irreversible.¹⁰ In his New York University speech on September 18, 2006, Al Gore called for an immediate freeze of carbon dioxide emissions and the commencement of sharp reductions in future emissions.¹¹ Gore explained that “[m]erely engaging in high-minded debates about theoretical future reductions while continuing to steadily increase emissions represents a self-delusional and reckless approach [to mitigating the effects of global warming].”¹²

Congress enacted CAA section 202 in 1965.¹³ Section 202(a)(1) authorizes EPA regulation of new motor vehicle emissions that, in the Administrator's judgment, cause or are likely to cause air pollution which endangers public health or welfare.¹⁴ In 1970, Congress added section 302(h), asserting that “[a]ll language referring to effects on welfare includes . . . effects on . . . weather . . . and climate.”¹⁵

In *Ethyl Corp. v. EPA*, the D.C. Circuit, sitting *en banc*, held that the “will endanger” standard of section 202 is preventative in nature, such

6. Final Brief for the Petitioners in Consolidated Cases at 5-6, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (No. 03-1361) [hereinafter Petitioners' Final Brief].

7. *Id.*

8. *Id.* at 6-9.

9. *Id.* at 5-6.

10. Andrew C. Revkin, *Gore Calls for Immediate Freeze On Heat-Trapping Gas Emissions*, N.Y. TIMES, Sept. 19, 2006, at A20.

11. *Id.*

12. *Id.*

13. Petitioners' Final Brief, *supra* note 6, at 21.

14. Clean Air Act (CAA) § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2000).

15. CAA § 302(h), 42 U.S.C. § 7602(h); *Massachusetts v. EPA*, 415 F.3d 50, 69 (D.C. Cir. 2005) (Tatel, J., dissenting).

that actual harm is not a necessary precedent to regulation.¹⁶ In 1977, Congress agreed with *Ethyl Corp.* and amended the endangerment standard of section 202 to cement the statute's precautionary and preventative purpose.¹⁷ Section 202(a)(1) now reads, in pertinent part: "The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from . . . new motor vehicles . . . which in his judgment, cause, or contribute to, air pollution which may be *reasonably anticipated to endanger* public health or welfare."¹⁸ Section 302(g) broadly defines air pollutants as "[a]ny air pollution agent or combination of such agents, including any physical [or] chemical . . . substance or matter which is emitted into or otherwise enters the ambient air."¹⁹

Section 307(d)(9)(A) provides that reviewing courts may reverse [final agency action] where "any such action [is] found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."²⁰

The D.C. Circuit has shown deference to agency action where policy considerations or exercises of discretion are undertaken in accordance with the statute. In *Ethyl Corp.*, the D.C. Circuit evaluated the EPA Administrator's decision to consider the cumulative effects of lead exposure when making an endangerment finding and promulgating regulation.²¹ The D.C. Circuit acknowledged that it is impossible to make a predictive endangerment finding based on a purely factual basis.²² The D.C. Circuit reasoned that agencies must necessarily be able to analyze risks and consider policy concerns when a determination involves weighing evidence and making judgments.²³ Thus, an endangerment finding "is necessarily a question of policy that is to be based on an assessment of risks."²⁴ In a related holding, the D.C. Circuit asserted that courts have a special interest in protecting public welfare in the face of

16. See 541 F.2d 1, 17 (D.C. Cir. 1976) (en banc) ("[W]e conclude that the 'will endanger' standard is precautionary in nature and does not require proof of actual harm before regulation is appropriate.')

17. *Massachusetts*, 415 F.3d at 77 (Tatel, J., dissenting).

18. CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1).

19. CAA § 302(g), 42 U.S.C. § 7602(g).

20. CAA § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A) (2000).

21. *Ethyl*, 541 F.2d at 12.

22. *Id.* at 24.

23. See *id.* at 20 n.37.

24. *Id.* at 24.

scientific uncertainty.²⁵ As such, “the statutes—and common sense—demand regulatory action to prevent harm, even if the regulator is less than certain that harm is otherwise inevitable.”²⁶

In *Natural Resources Defense Council, Inc. v. EPA*, the D.C. Circuit analyzed the EPA’s decision to abandon amendments to vinyl chloride emission standards set under CAA section 112.²⁷ Section 112 authorizes the EPA to promulgate solutions which are adequate “to protect the public health . . . with an ample margin of safety.”²⁸ The EPA provided no findings on the rejected emission standards’ health effects, and instead based its decision on cost and feasibility.²⁹ When reviewing agency action, courts must determine whether agency discretion, as exercised, is consistent with the legislative intent of the statute.³⁰ The D.C. Circuit ruled that an agency must use its discretion to meet the statutory mandate, and found the mandate of section 112 to be the protection of public health.³¹ Because the cost and feasibility considerations did not relate to public health, the D.C. Circuit issued the petition for review and remanded the case to the EPA.³²

In April 1998, the EPA’s former General Counsel Jonathan Cannon sent a memorandum to the EPA’s Administrator stating that carbon dioxide falls within the definition of “air pollutant” of CAA section 302(g).³³ This statement was later affirmed by subsequent General Counsel Gary Guzy in testimony made to U.S. House of Representatives subcommittees regarding the EPA’s authority to regulate greenhouse gas emissions.³⁴ On August 29, 2003, the EPA’s General Counsel Robert Fabricant withdrew the Cannon memorandum and Gary Guzy’s

25. See *id.* (“[There is a] special judicial interest in favor of protecting the health and welfare of the people, even in areas where certainty does not exist.” (citing *Envtl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971))).

26. *Id.* at 25.

27. 824 F.2d 1146, 1148 (D.C. Cir. 1987).

28. CAA § 112, 42 U.S.C. § 7412 (2000).

29. *Natural Res. Def. Council*, 824 F.2d at 1163-64.

30. *Id.* at 1163 (citing *Lead Indus. Ass’n v. EPA*, 647 F.2d 1130, 1146-47 (D.C. Cir. 1980)).

31. *Id.* at 1164-65.

32. *Id.* at 1165.

33. See *Control of Emissions from New Highway Vehicles and Engines*, 68 Fed. Reg. 52,922, 52,923 (Sept. 8, 2003) (citing Memorandum, J. Cannon to C. Browner (Apr. 10, 1998)).

34. See *Is CO₂ A Pollutant and Does EPA Have the Power to Regulate It?: Joint Hearing Before the Subcomm. on National Economic Growth, Natural Resources and Regulatory Affairs of the H. Comm. on Government Reform and the Subcomm. on Energy and Environment of the Comm. on Science*, 106th Cong. 19 (1999) (prepared statement of Gary S. Guzy, General Counsel, EPA (“Given the clarity of the statutory provisions defining ‘air pollutant’ and providing authority to regulate air pollutants, there is no statutory ambiguity that could be clarified by referring to the legislative history.”)).

statements as “no longer expressing the views of [the] EPA’s General Counsel.”³⁵ In a memo to the acting EPA Administrator, General Counsel Fabricant stated that carbon dioxide and other greenhouse gases cannot be considered air pollutants for any contribution they may make to global climate change.³⁶

On September 8, 2003, the EPA denied a petition for rulemaking instituted by several environmental organizations in 1999.³⁷ The petitioners sought EPA regulation of certain greenhouse gas emissions from new motor vehicles under CAA section 202.³⁸

In the first part of its argument, the EPA analyzed whether section 202(a)(1) grants the agency the authority to regulate global climate change. In light of other congressional acts, the EPA concluded that global climate change regulation under CAA requires an expression of congressional intent to authorize such action.³⁹

General Counsel Fabricant also considered the Supreme Court’s dicta in *FDA v. Brown & Williamson Tobacco Corp.* that encourages judicious interpretations of statutory grants of authority.⁴⁰ The EPA concluded that global climate change is a policy issue of such magnitude that the agency cannot simply assume a statutory grant of regulation authority.⁴¹ Given the lack of statutory authority to regulate, the EPA asserted that greenhouse gases pertaining to global climate change cannot be interpreted to fall under CAA’s air pollution definition.⁴²

In the second part of its denial, the EPA argued that section 202(a)(1) is not mandatory, and therefore the agency may refuse to make an endangerment finding under the statute. The EPA reasoned that section 202(1)(a) conditions its mandate to act on “a discretionary exercise of the Administrator’s judgment” regarding the endangerment standard.⁴³ The EPA explained that it had never determined whether the air pollution caused by carbon dioxide and other greenhouse gases may

35. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,925.

36. *Id.* (citing Memorandum, R. Fabricant to M. Horinko (Aug. 28, 2003)).

37. *Id.* at 52,922.

38. *Id.* Petitioners sought EPA regulation of carbon dioxide, methane, nitrous oxide, and hydrofluorocarbon emissions.

39. *Id.* at 52,928. The EPA cites Congress’s history of declining to explicitly authorize regulation of global climate change in the face of scientific uncertainty.

40. *Id.* at 52,925 (citing *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 190-91 (2000)).

41. *See id.* at 52,928 (“An administrative agency properly awaits congressional direction before addressing a fundamental policy issue such as global climate change.”).

42. *Id.*

43. *Id.* at 52,929.

endanger the public health or welfare.⁴⁴ The EPA supported its decision not to make an endangerment determination with a claim that EPA regulation of greenhouse gases would be ineffective and inappropriate.⁴⁵ The EPA cited several policy considerations in making this argument. First, the EPA relied on a National Resource Council report stating that “a causal linkage between . . . greenhouse gases . . . and the observed climate changes during the 20th century cannot be unequivocally established.”⁴⁶ The EPA concluded that scientific uncertainty as to the impact of greenhouse gas regulations on global climate change warranted forbearance.⁴⁷ The EPA also cited a concern that regulation under section 202(a)(1) would “result in an inefficient, piecemeal approach to addressing the [global] climate change issue.”⁴⁸ Other policy concerns included: fear that unilateral regulation would reduce negotiation power with developing countries; concern about the impact of current regulation methods; and recognition that EPA regulation might interfere with voluntary emission reduction plans already in place.⁴⁹

The EPA also argued that, were the Administrator to make an endangerment finding, section 202(a)(1) would not require the agency to regulate greenhouse gas emissions from motor vehicles.⁵⁰

III. THE COURT’S DECISION

In the noted case, the D.C. Circuit split three ways and issued a plurality opinion denying the petition for review of the EPA’s final action. In his opinion issuing the court’s judgment, Judge Randolph analyzed the EPA’s decision-making in light of *Ethyl Corp.* and held that the agency could exercise its discretion and use policy considerations to deny the rulemaking petition.⁵¹

Judge Randolph began by establishing the D.C. Circuit’s jurisdiction to review the EPA’s petition denial pursuant to CAA section 307(b)(1). Section 307(b)(1) gives the D.C. Circuit exclusive jurisdiction over

44. *See id.* (“[N]o Administrator has made any finding that satisfies the criteria for setting [carbon dioxide] standards for motor vehicles or any other emission source.”).

45. *Id.* at 52,929-30.

46. *Id.* at 52,930 (quoting NAT’L RES. COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME OF THE KEY QUESTIONS (2001)).

47. *Id.* at 52,931.

48. *Id.* at 52,930-31.

49. *Id.* at 52,931.

50. *See id.* at 52,929 (“[The] EPA also disagrees with the premise of the petitioner’s claim—that if the Administrator were to find that GHGs, in general, may reasonably be anticipated to endanger public health or welfare, she must necessarily regulate GHG emissions from motor vehicles.”).

51. *Massachusetts v. EPA*, 415 F.3d 50, 53-54 (D.C. Cir. 2005).

“nationally applicable regulations promulgated, or final actions taken, by the [EPA] Administrator.”⁵² Because the EPA’s petition denial constituted final agency action and was national in scope, the D.C. Circuit has exclusive jurisdiction to review the denial.⁵³

Judge Randolph also considered the EPA’s claim that petitioners lacked standing under Article III of the United States Constitution.⁵⁴ Judge Randolph determined that the EPA’s denial was based on evidence that contradicted the petitioners’ general claim that greenhouse gases cause global warming.⁵⁵ As such, Judge Randolph found the standing inquiry overlapped with the merits inquiry, such that it would be “exceedingly artificial to draw a distinction between the two.”⁵⁶ Judge Randolph determined that where the merits and standing inquiries overlap, the Supreme Court has not established the proper order of decision.⁵⁷ Thus, he did not determine whether petitioners had standing, and Judge Randolph proceeded to the merits.⁵⁸

Judge Randolph declined to address the EPA’s conclusion that CAA does not authorize the agency to regulate greenhouse gas emissions from new motor vehicles. Instead, he assumed *arguendo* that CAA grants the EPA the authority to do so, and then considered the validity of the EPA’s refusal to exercise that authority.⁵⁹

Judge Randolph then rejected petitioners’ claim that the EPA improperly applied policy considerations to deny the rulemaking petition.⁶⁰ In light of *Ethyl Corp. v. EPA*, Judge Randolph reasoned that section 202(b)(1) grants the EPA broad discretion because an endangerment finding is “necessarily a question of policy.”⁶¹ Courts will uphold agency action based on policy when reviewing issues “on the frontiers of scientific knowledge.”⁶² Therefore, Judge Randolph upheld the EPA’s petition denial on the grounds that the agency was allowed to take policy into account when deciding whether to regulate greenhouse gas emissions under section 202(a)(1).⁶³

52. CAA § 307(b)(1), 42 U.S.C. § 7607(b)(1) (2000).

53. *Massachusetts*, 415 F.3d at 58-59.

54. *Id.* at 55-56.

55. *Id.* at 55.

56. *Id.* at 56 (quoting *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 97 n.2 (1998)).

57. *Id.* (citing *Steel*, 523 U.S. at 97).

58. *Id.*

59. *Id.*

60. *Id.* at 58.

61. *Id.* (quoting *Ethyl Corp. v. EPA*, 541 F.2d 1, 24 (D.C. Cir. 1976) (en banc)).

62. *Id.* (quoting *Env’tl. Def. Fund v. EPA*, 598 F.2d 62, 82 (D.C. Cir. 1978)).

63. *Id.*

Judge Sentell issued an opinion dissenting in part, and concurring in judgment.⁶⁴ Judge Sentell asserted that petitioners' claims were not justiciable, on the grounds that "[t]he generalized public good that petitioners seek is the thing of legislatures and presidents, not of courts."⁶⁵ Judge Sentell then joined Judge Randolph to issue a judgment closest to that which he would impose, and denied the petitions of review of final agency action.⁶⁶

Judge Tatel dissented from the plurality's judgment; he would have granted the petition for review and remanded to the EPA to determine endangerment or offer a lawful reason for refusing to do so.⁶⁷

Judge Tatel began by arguing that petitioners properly established standing sufficient to proceed to the merits. Judge Tatel found Massachusetts' claimed injury, the substantial probability of loss of coastal land, to be sufficiently particularized.⁶⁸ Judge Tatel reasoned that Massachusetts also established causation and redressability because a number of EPA policies and reports link global warming protections with greenhouse gas emission reductions.⁶⁹

Judge Tatel then analyzed whether CAA grants the EPA the authority to regulate greenhouse gas emissions under section 202(a)(1). Judge Tatel found that a plain reading of section 202(a)(1) authorizes regulation of air pollutants reasonably anticipated to endanger public health or welfare.⁷⁰ Judge Tatel also reasoned that "Congress . . . left [the] EPA little discretion" to define air pollutants, and instead issued a broad mandate to consider all "physical [and] chemical substance[s] or matter . . . emitted into . . . the ambient air."⁷¹ Judge Tatel noted that in 1990, Congress included carbon dioxide in the list of air pollutants under section 103(g).⁷² Upon determining that the EPA offered no extraordinarily convincing justification for avoiding the statutory

64. *Id.* at 61 (Sentell, J., dissenting in part and concurring in part).

65. *Id.* at 60.

66. *Id.*

67. *Id.* at 82 (Tatel, J., dissenting).

68. *See id.* at 65 ("Massachusetts' harm is thus a far cry from the kind of generalized harm that the Supreme Court has found inadequate to support Article III standing. . .").

69. *See id.* at 66 (finding that many of the EPA's voluntary reduction programs were based on the idea that "'national policy decisions made now . . . will influence the extent of any damage' caused by global warming" (quoting NAT'L RES. COUNCIL, *supra* note 46, at 1)).

70. *See id.* at 67 (noting that the merits inquiry begins with a plain reading of the statute (citing *Consumer Elecs. Ass'n v. FCC*, 347 F.3d 291, 297 (D.C. Cir. 2003))).

71. *Id.*; CAA § 302(g), 42 U.S.C. § 706(g) (2000).

72. *Massachusetts*, 415 F.3d at 67 (Tatel, J., dissenting) (citing CAA § 103(g), 42 U.S.C. § 7403(g)).

language, Judge Tatel concluded that the EPA has authority to regulate greenhouse gases under CAA.⁷³

Judge Tatel then analyzed the EPA's argument that even if it had statutory authority to regulate greenhouse, the agency properly exercised its discretion in refusing to do so. Judge Tatel stressed that even under a deferential "arbitrary and capricious standard" of review, the agency decision must still be reasoned and cannot reflect plain errors of law.⁷⁴ Departing from Judge Randolph, Judge Tatel found that the EPA used policy to justify making no endangerment finding whatsoever.⁷⁵ Relying on *Natural Resources Defense Council, Inc. v. EPA*, Judge Tatel reasoned that section 202(a)(1) limits the EPA's discretion to weighing the evidence and determining whether the statutory standard (reasonably anticipated to endanger public health or welfare) has been met.⁷⁶ Judge Tatel also applied the holding in *Ethyl Corp.*, but asserted that any policy-based justifications may only be used when actually making an endangerment finding.⁷⁷ Therefore, section 202(a)(1) does not provide the EPA with discretion to avoid making an endangerment finding, and the agency may not base its reasons for doing so on unrelated policy considerations.⁷⁸

Judge Tatel also analyzed the EPA's scientific uncertainty rationale under the endangerment standard of section 202(a)(1). Judge Tatel noted that the 1977 amendments reflect a legislative intent for regulation to precede certainty.⁷⁹ Because the EPA's "unequivocally established [causal linkage]" standard is in direct conflict with the legislative intent and plain

73. See *id.* at 68 ("For the EPA to avoid a literal interpretation at *Chevron* step one, it must either show that, as a matter of historical fact, Congress did not mean what appears to have said, or that, as a matter of logic and statutory structure, it almost surely could not have meant it." (quoting *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1089 (D.C. Cir. 1996))). Judge Tatel also distinguished the noted case from *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). This argument will not be analyzed for the purposes of this Note.

74. *Id.* at 73 (citing *Am. Lung. Ass'n v. EPA*, 134 F.3d 388, 392-93 (D.C. Cir. 1998)).

75. *Id.* at 74. Pursuant to its petition denial, the EPA believes that the decision to make the endangerment finding is entirely discretionary.

76. *Id.* at 75; *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1146, 1164 (D.C. Cir. 1987).

77. *Massachusetts*, 415 F.3d at 75 (Tatel, J., dissenting); *Ethyl Corp. v. EPA*, 541 F.2d 1, 20 n.37 (D.C. Cir. 1976).

78. *Massachusetts*, 415 F.3d at 81 (Tatel, J., dissenting) (finding that the EPA unlawfully failed to relate its policy reasons to the statutory standard, and therefore unlawfully refused to make an endangerment finding under section 202(a)(1)).

79. *Id.* at 76 ("In order to emphasize the precautionary or preventative purpose of the act (and, therefore, the Administrator's *duty* to assess risks rather than wait for proof of actual harm) . . . the committee . . . added the words 'may reasonably be anticipated to' [to the endangerment standard]." (quoting H.R. REP. NO. 95-294, at 51 (1977) (emphasis in the original))).

language of section 202(a)(1), Judge Tatel would have granted review of the EPA's rulemaking denial and ordered remand.⁸⁰

On December 2, 2005, the D.C. Circuit denied petitioners' timely petition for rehearing, and denied the petition for rehearing en banc by a 4-3 margin.⁸¹ On June 26, 2006 the United States Supreme Court granted certiorari.⁸²

IV. ANALYSIS

In its current session, the Supreme Court will adjudicate the EPA's legally complex and politically charged duty to regulate greenhouse gas emissions under CAA section 202(a)(1).⁸³ In order to proceed to the merits, the Court must first reconcile traditional standing requirements with the mandate under section 202(a)(1) that regulation precede proof of actual or imminent harm.⁸⁴ Provided that it finds petitioners have standing, the Court will review Judge Randolph's opinion delivering the D.C. Circuit's judgment in *Massachusetts v. EPA*. The Court will likely also apply the rules of statutory construction to discern whether Congress intended EPA regulation of global climate change under CAA.

In light of precedent and the statutory standards of section 202(a)(1), the Supreme Court should reverse Judge Randolph's judgment in *Massachusetts v. EPA* and remand the rulemaking petition to the EPA. Section 307(d)(9)(A) requires reviewing courts to ensure that agency decisions are not arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.⁸⁵ However, Judge Randolph shirked his statutory duty by applying a deferential standard of review, and Judge Randolph never analyzed whether the EPA's petition denial was in accordance with section 202(a)(1).⁸⁶ Because the EPA did not ground its rulemaking petition denial in any aspect of the statute, the decision was made unlawfully and requires remand.

Judge Randolph implied that the EPA used policy to make an endangerment determination when he justified the agency decision under *Ethyl Corp.* However, the EPA never actually made an endangerment

80. *Id.* at 80-81.

81. *Massachusetts v. EPA, reh'g en banc denied*, 433 F.3d 66 (D.C. Cir. 2005).

82. *Massachusetts v. EPA, cert. granted*, 126 S. Ct. 2960 (2006).

83. *Id.*

84. *Massachusetts v. EPA*, 415 F.3d 50, 76 (D.C. Cir.), *reh'g en banc denied*, 433 F.3d 66, *cert. granted*, 126 S. Ct. 2960 (citing H.R. REP. NO. 95-294, at 51 (1977)).

85. CAA § 307(d)(9)(A), 42 U.S.C. § 7607(d)(9)(A) (2000).

86. *Massachusetts*, 415 F.3d at 58.

finding.⁸⁷ By allowing the EPA to avoid making the mandatory threshold determination, Judge Randolph gave effect to the EPA's claim that it could refuse to make an endangerment finding under section 202(a)(1).⁸⁸ In *Natural Resources Defense Council, Inc. v. EPA*, the district court held that any discretion implied or written into a statute must be exercised to satisfy the statutory standard.⁸⁹ Therefore, the EPA's statutory judgment only goes to determining whether the endangerment standard had been met.⁹⁰ Agency discretion does not extend to its ability to avoid a statutory duty. The Supreme Court should reverse and remand the petition denial and order the EPA to make the endangerment finding, as required by law.

Even if the EPA had found that greenhouse gas emission pollution cannot reasonably be anticipated to endanger the public health or welfare, precedent does not allow the EPA to base its decision on unrelated policy considerations. Judge Randolph quoted *Ethyl Corp.* to support the EPA's use of policy in its phantom endangerment finding.⁹¹ However, according to *Ethyl Corp.*, policy considerations must relate to risk assessments under the statute.⁹² Because the EPA's policy considerations did not relate to assessing risk of endangerment, they cannot be said to be in accordance with the law and must be rejected to the extent that they inform the EPA's petition denial.

In *Ethyl Corp.*, the D.C. Circuit also acknowledged the court's special interest in protecting the public health and welfare in the face of scientific uncertainty.⁹³ Given the D.C. Circuit's exclusive jurisdiction over national concerns, one could say section 202(a)(1) imparts a *responsibility* on the court to protect the public welfare, despite any uncertainty surrounding global warming. However, in *Massachusetts v. EPA*, Judge Randolph allowed the EPA to avoid regulation because the agency lacked an "unequivocally established [casual linkage]" between greenhouse gas emissions and global warming.⁹⁴ The precautionary intent of Section 202(a)(1), precedent, and the plain language of section

87. Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,929 (Sept. 8, 2003) ("[N]o Administrator has made any finding that satisfies the criteria for setting [carbon dioxide] standards for motor vehicles or any other emission source?").

88. *Id.*

89. 824 F.2d 1146, 1164-65 (D.C. Cir. 1987).

90. *Id.*

91. *Massachusetts*, 415 F.3d at 57-58.

92. *Ethyl Corp. v. EPA*, 541 F.2d 1, 24 (D.C. Cir. 1976).

93. *See id.* ("[There is a] special judicial interest in favor of protecting the health and welfare of the people, even in areas where certainty does not exist." (citing *Env'tl. Def. Fund, Inc. v. Ruckelshaus*, 439 F.2d 584, 598 (D.C. Cir. 1971))).

94. *Massachusetts*, 415 F.3d at 57 (quoting *NAT'L RES. COUNCIL*, *supra* note 46, at 17).

202(a)(1) demand that regulation precede certainty.⁹⁵ For these reasons, the Supreme Court should reverse the EPA's petition denial based on an unlawful scientific certainty standard, and order the EPA to apply the precautionary endangerment standard of Section 202(a)(1).

V. CONCLUSION

Should the Supreme Court establish petitioners' standing and proceed to the merits, it will likely reverse *Massachusetts v. EPA*, remand, and order the EPA to make a lawful decision within the demands of section 202(a)(1). Judge Randolph did not review the lawfulness of the EPA's rulemaking petition.⁹⁶ He also allowed the EPA to avoid making a mandatory threshold determination of endangerment.⁹⁷ Judge Randolph then misapplied *Ethyl Corp.* and allowed the EPA to justify a phantom endangerment finding with policy considerations unrelated to the statutory standard.⁹⁸ Judge Randolph also ignored the precautionary "may reasonably be anticipated to endanger the public health or welfare" standard, and upheld the EPA's unlawful scientific uncertainty standard.⁹⁹ The Supreme Court should reverse and remand *Massachusetts v. EPA* to remedy Judge Randolph's misapplication of the law and compel the EPA to comply with section 202(a)(1) when making decisions about greenhouse gas emission regulation under CAA.

Erica Rancilio*

95. CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1) (2000); *Ethyl*, 541 F.2d at 24.

96. *Massachusetts*, 415 F.3d at 58.

97. *Id.* at 57-58.

98. *Id.*

99. *Id.* at 57.

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