MASSACHUSETTS V. ENVIRONMENTAL PROTECTION AGENCY

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I. INTRODUCTION

The effects of global warming are already being felt. The world is much warmer now than it was centuries or even decades ago.[1] Sea levels have risen more than ten to twenty centimeters over the past century and mountain glaciers are retreating.[2] Climate change is occurring. However, United States regulation of the greenhouse gas ("GHG") emissions that contribute to it has not taken place. Instead, in 2003 the Environmental Protection Agency ("EPA") declined to regulate these emissions because they were beyond their statutory authority under the Clean Air Act ("CAA"), suggesting that voluntary action and continued study were the best way to address this potentially catastrophic issue.[3] After the EPA denied their petition for rulemaking, Massachusetts and other plaintiffs filed suit to compel the agency to reconsider its denial. The Supreme Court granted certiorari[4] and decided *Massachusetts v. Environmental Protection Agency* on April 2, 2007.[5] The Court ruled in favor of the petitioners after thoroughly analyzing the scope of the CAA and the EPA's discretion to decline rulemaking. The Court's reliance on Massachusetts' status as a state in order to determine standing makes the effect of this decision uncertain.

II. BACKGROUND

In the early twentieth century, the states played a significant role in regulating interstate air pollution through public nuisance suits.[6] Public nuisance suits are predicated on the idea that sovereign entities have the right to sue on behalf of their citizens when the actions of a defendant affect the sovereign interests of the state.[7] As a sovereign entity, a state has an interest "in all the earth and air within its domain. It has the last word as to whether

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[1] Jerry M. Mellilo, *Warm, Warm on the Range*, 283 SCIENCE 183 (1999).

[2] Mark B. Dyurgerov & Mark F. Meier, *Twentieth Century Climate Change: Evidence from Small Glaciers*, 97 PROC. OF THE NAT'L ACAD. OF SCI. OF THE U.S. 1406 (2000); John A. Church, *How Fast Are Sea Levels Rising?*, 294 SCIENCE 810 (2001).

[3] Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922 (Sept. 8, 2003).

[4] Massachusetts v. EPA, 126 S. Ct. 2960 (2006).

[5] 127 S. Ct. 1438 (2007).

[6] *See* Georgia v. Tennessee Copper Co., 206 U.S. 230, 237 (1901).

[7] *See* Romualdo P. Eclavea, *State's Standing To Sue on Behalf of Its Citizens*, 42 A.L.R. FED. 23, § 2(a). For a discussion of the development of public nuisance doctrine in earlier times, see J.R. Spencer, *Public Nuisance - A Critical Examination*, 48 CAMBRIDGE L.J. 55 (1989).

its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."[8] In the early 1900s the Supreme Court held that a state had a right to sue under original jurisdiction when a defendant's action injured that interest.[9] Thus, a state could bring an action in equity to enjoin an out-of-state polluter, even though a similarly situated private plaintiff would only be entitled to damages.[10] This became known as the "*parens patriae*" doctrine.[11] Its use with respect to public nuisance suits has decreased as federal regulation has expanded and effectively preempted public nuisance suits in many areas of environmental law.[12] Interstate air pollution is one area where the common law has been preempted by statute.[13]

In 1970, Congress, in response to growing levels of air pollution, passed the Clean Air Act.[14] The CAA, as originally drafted and as later amended in 1974, 1977, and 1990, gave authority to the EPA Administrator ("the Administrator") to designate air pollutants, determine acceptable concentrations of those pollutants, review state implementation plans for the regulation of stationary emissions sources, and directly regulate mobile source emissions.[15] In the case of mobile sources, the 1977 amendments to the CAA gave the Administrator the power to regulate pollutants that "in his

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[8] *Tennessee Copper*, 206 U.S. at 237. The Court also found that Article III § 2 of the Constitution gave it original jurisdiction over all actions between a state and citizens of another state.

[9] *See, e.g.*, North Dakota v. Minnesota, 263 U.S. 365 (1923); Wyoming v. Colorado, 259 U.S. 419 (1922); New York v. New Jersey, 256 U.S. 296 (1921); Kansas v. Colorado, 206 U.S. 46 (1907); Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907); Kansas v. Colorado, 185 U.S. 125 (1902); Missouri v. Illinois, 180 U.S. 208 (1901). The rationale behind allowing states to sue to protect their own citizens was that if the states had been independent of the federal system they could have, through war or diplomacy, legally stopped the offending party. Therefore, since they remained sovereign entities, in parallel with federal constitutional limits on their sovereignty they could enforce their sovereign rights in federal courts. *See* Alfred L. Snapp & Son v. Puerto Rico, 458 U.S. 592, 601 (1982) (quoting Georgia v. Penn. Railroad Co., 324 U.S. 439, 450 (1945)).

[10] *See Tennessee Copper*, 206 U.S. at 237.

[11] "Parens patriae" literally means "parent of his or her country." BLACK'S LAW DICTIONARY 1003 (8th ed. 2004). This doctrine was originally used to allow the states to enforce the rights of citizens who were disabled or legally unable to enforce their own rights but it has grown since then. *See* Eclavea, *supra* note 7, § 2.3.

[12] *See* Milwaukee v. Illinois, 451 U.S. 304, 310 (1981). *Parens patriae* is still asserted by states seeking redress under federal statutes. *See Snapp*, 458 U.S. at 608 ("[T]his means ensuring that the State and its residents are not excluded from the benefits that are to flow from participation in the federal system.").

[13] United States v. Kin-Buc, Inc., 532 F. Supp. 699, 702 (D.N.J. 1982) (holding that Congress's enactment of the CAA created a comprehensive regulatory program that preempts the federal common law of nuisance in the field of air pollution).

[14] *See* 42 U.S.C. § 7401 (2006) (describing congressional findings and purpose behind the Clean Air Act); *see also* 116 CONG. REC. S5966 (daily ed. Mar. 4, 1970) (statement of Sen. Muskie). For a description of the history and circumstances surrounding the 1970 Clean Air Act Amendments, see David Schoenbrod, *Goal Statutes or Rule Statutes: The Case of the Clean Air Act*, 30 UCLA L. REV. 740, 744-47 (1983).

[15] The Administrator has different powers and responsibilities depending on the type and source of the pollutant. For a description of these duties and responsibilities and a basic overview of the Administrator's authority for stationary and mobile sources, see FRANK P. GRAD, TREATISE ON ENVIRONMENTAL LAW §§ 2.03, 2.06 (2004).

judgment . . . can be reasonably anticipated to endanger public health and welfare."[16] Despite this broad mandate and growing evidence of global warming, the EPA did not consider whether it could use the CAA to regulate the emissions of GHGs until 1998.

In 1998 the then-Administrator, Carol Browner, in response to an inquiry by Congressman Tom DeLay, asked the EPA General Counsel, Jonathon Cannon, for a memorandum detailing the EPA's authority to regulate carbon dioxide ("CO_2") under the CAA.[17] The Cannon Memorandum found CO_2 to be an air pollutant under section 302(g) of the CAA,[18] but stated that the EPA could not regulate it because the Administrator had not made the requisite finding that it endangered public health or welfare.[19]

Despite the EPA's reluctance to find that global warming is a threat to public health or welfare, evidence of its existence is growing and the United States' contribution in terms of absolute GHG emissions continues to increase. The EPA estimates that in 2005 the United States emitted a net equivalent of 6.43 billion metric tons of CO_2.[20] Approximately 33% of these emissions were generated by the transportation sector.[21] The United States' transportation sector emissions account for approximately 7% of global GHG emissions.[22] The International Panel on Climate Change ("IPCC") has predicted that as a result of the accumulation of these GHG emissions, average temperatures will increase by 1.9 to 4.6 degrees Celsius over the next century, that the frequency of extreme weather events such as floods and droughts will increase, and that sea levels will rise by at least 0.3 to 0.8

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[16] *See* 42 U.S.C. §§ 7521-7554. Section 7521 states that "[t]he administrator shall regulate air pollutants that are produced by new motor vehicles or motor vehicle engines when, in his judgment, they cause or contribute to air pollution that does or can be reasonably anticipated to endanger public health and welfare." *Id.* § 7521(a)(1). However, the scope of these powers is not unlimited; for a full description see GRAD, *supra* note 15, § 2.06.

[17] Memorandum from Jonathan Z. Cannon, EPA Gen. Counsel, to Carol M. Browner, EPA Adm'r 1 (Apr. 10, 1998) (on file with the Harvard Environmental Law Review) [hereinafter Cannon Memo].

[18] 42 U.S.C. § 7602(g) (2006) ("The term 'air pollutant' means any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive (including source material, special nuclear material, and byproduct material) substance or matter which is emitted into or otherwise enters the ambient air. Such term includes any precursors to the formation of any air pollutant to the extent the Administrator has identified such precursor or precursors for the particular purpose of which the term 'air pollutant' is used.").

[19] *See* Cannon Memo, *supra* note 17, at 3, 4. These findings were repeated and expanded upon by the subsequent EPA General Counsel, Gary Guzy, in congressional testimony. *Joint Hearing of the House Subcomm. on Nat'l Econ. Growth, Natural Res. and Regulatory Affairs of the Comm. on Gov't Reform, and the House Subcomm. on Energy and Env't, Comm. on Sci.*, 106th Cong. 3-4 (Oct. 6, 1999) (on file with the Harvard Environmental Law Review) (statement of Gary S. Guzy, EPA General Counsel).

[20] *See* ENVIRONMENTAL PROTECTION AGENCY, 2007 DRAFT GREENHOUSE GAS EMISSIONS AND SINKS 1990-2005, ES-6 (2007) (on file with the Harvard Environmental Law Review).

[21] *Id.* at ES-8.

[22] Brief for the Federal Respondent at 13, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120) [hereinafter Brief for the Federal Respondent].

meters before 2100.[23] These changes in climate are expected to result in altered growing seasons, increased weather-related costs, greater spread of tropical diseases, and loss of coastline.[24]

Because of these significant impacts, the International Center for Technology Assessment ("ICTA") submitted a petition to compel the EPA to regulate the emissions of four GHGs, CO_2, methane, nitrous oxide, and hydro-fluorocarbons, all of which are emitted by new mobile sources, under CAA section 202(a)(1).[25] The petition argued that GHGs are air pollutants and that previous federal reports had effectively found that global warming will endanger public health and the environment,[26] thus obligating the EPA to regulate GHG emissions from new mobile sources.[27]

In September 2003, after a notice and comment period, the EPA published a denial of the petition for rulemaking. The denial relied on the findings of a memorandum authored by then-EPA General Counsel, Robert Fabricant.[28] The Fabricant Memorandum reversed the Cannon Memorandum and determined that GHGs were not pollutants under CAA section 302(g). Fabricant argued that under the Supreme Court's decision in *Food and Drug Administration v. Brown & Williamson Tobacco Corp.*,[29] when a statute includes a facially broad grant of authority and an agency attempts to use that grant in an economically or politically sensitive area, the agency must determine that Congress intended for the grant to give the agency authority to regulate in that specific area. Fabricant determined that using the CAA to regulate GHGs triggered such an inquiry.[30] He found that Congress did not intend the CAA to give the EPA authority to regulate GHG emissions from mobile sources.[31] Finally, the published denial of the petition for rulemaking

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[23] RICHARD B. ALLEY ET AL., SUMMARY FOR POLICYMAKERS, *in* WORKING GROUP I, IPCC, CLIMATE CHANGE 2007: THE PHYSICAL SCIENCE BASIS, SUMMARY FOR POLICYMAKERS 17 (Susan Solomon et al. eds., 2006), *available at* http://ipcc-wg1.ucar.edu/wg1/wg1-report.html.

[24] *See* International Center for Technology Assessment, Petition for Rulemaking and Collateral Relief Seeking the Regulation of Greenhouse Gas Emissions from New Motor Vehicles Under § 202 of the Clean Air Act 13-24 (Oct. 20, 1999), *available at* http://www.icta.org/doc/ghgpet2.pdf (petition to the EPA Administrator).

[25] *See generally id.*

[26] *Id.* at 9.

[27] *Id.*

[28] Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922 (Sept. 8, 2003); Memorandum from Robert Fabricant, EPA Gen. Counsel, to Maryann Horinko, Acting EPA Adm'r (Aug. 28, 2003) (on file with the Harvard Environmental Law Review) [hereinafter Fabricant Memo].

[29] 529 U.S. 120 (2000). In this case, the Court held that the Food and Drug Administration ("FDA") did not have the statutory authority to regulate tobacco products despite the facial inclusion of nicotine as a drug within the definitions of the the Food, Drug, and Cosmetic Act, because if nicotine was a drug then the agency would be compelled to ban tobacco products, a result inconsistent with congressional intent as indicated by post-enactment legislative actions designed to deal with tobacco by means other than an outright ban.

[30] *See* Fabricant Memo, *supra* note 28, at 4-5.

[31] *Id.* In making this determination, Fabricant relied on Congress' vote in 1990 rejecting amendments that would have given the EPA explicit authority to regulate GHGs, Congress' explicit mandate in the CAA for EPA to study GHG emissions, and later statutes that expressly

further justified the decision by arguing that any regulation would conflict with the mileage standards promulgated by the Department of Transportation pursuant to the Energy Policy Conservation Act.[32] Fabricant also noted that authority to regulate under CAA section 201 is discretionary, and that given the state of scientific uncertainty and policy considerations, even if the EPA had the authority to regulate the emissions of GHGs from mobile sources it would decline to do so using that discretion.[33]

The petitioners responded by filing a lawsuit pursuant to CAA section 307, which provides for judicial review of denials of petitions to regulate.[34] The D.C. Circuit, in a split decision, ruled against the petitioners. The controlling opinion found that the Administrator's denial of rulemaking was proper.[35] The petitioners requested a rehearing and an *en banc* hearing, both of which were denied.[36] On March 2, 2006, Massachusetts filed a petition for a writ of certiorari with the Supreme Court and certiorari was granted on June 26, 2006.[37]

The petitioner's brief put forth several arguments in urging the court to reject the EPA's reasoning for not regulating under CAA section 202(a)(1) and to find that the EPA has the authority to regulate GHG emissions under that provision.[38] First, the EPA's determination that GHGs were not air pollutants within the meaning of section 202(a)(1) violated the plain language of the statute.[39] CAA section 302(g), in relevant part, defines an air pollutant as an "air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive substance or matter that is emitted into or otherwise enters the ambient air."[40] CO_2 and other GHGs are chemicals emitted into the ambient air by new motor vehicles, and thus are air pollutants that can be regulated under section 202(a)(1).[41]

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required research on GHGs as cumulative evidence that Congress did not intend the CAA to grant EPA the authority to regulate carbon dioxide without further direction.

[32] *See* 49 U.S.C. §§ 32101-32919 (2006).

[33] *See* Notice of Denial of Petition for Rulemaking, 68 Fed. Reg. 52,922, 52,929-33 (Sept. 8, 2003). The EPA declined to undertake rulemaking because scientific uncertainty remained as to the linkage between GHGs and global warming, regulating GHG emissions would weaken U.S. foreign policy efforts, and regulation of only new mobile sources would result in an inefficient, piecemeal approach to regulation. *Id.*

[34] Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005) (filing petition under 42 U.S.C. § 7607(b) (2006)). There were multiple cases filed by different actors, including the state of Massachusetts and the ICTA. The cases were consolidated into Massachusetts v. EPA. *See* Massachusetts v. EPA, 415 F.3d 50 (D.C. Cir. 2005).

[35] *Massachusetts*, 415 F.3d at 58.

[36] Massachusetts v. EPA, No. 03-1361, 2005 U.S. App. LEXIS 26560 (D.C. Cir. Dec. 2, 2005) (denying rehearing); Massachusetts v. EPA, 433 F.3d 66 (D.C. Cir. 2005) (denying rehearing *en banc*).

[37] Massachusetts v. EPA, 126 S. Ct. 2960 (2006).

[38] *See generally* Brief for the Petitioners, Massachusetts v. EPA, 127 S. Ct. 1438 (2007) (No. 05-1120) [hereinafter Brief for the Petitioners].

[39] *Id.* at 11.

[40] *Id.* at 12.

[41] *Id.* at 11-18.

Furthermore, the EPA misapplied *Brown & Williamson* because that case was never intended to give agencies the power to depart from the plain language of the statute in order to artificially narrow Congress' grant of regulatory power.[42] Instead, *Brown & Williamson* only prevents an agency from expanding its statutory grant to directly undermine more explicit statutes that Congress has enacted.[43] The EPA's reliance on rejected amendments and subsequent statutes to justify its decision to disregard the plain language of the CAA "reads like a list of anti-rules for statutory interpretation,"[44] and fails to contravene the petitioner's argument that the power to regulate GHG emissions is inherent in the statute.[45]

Finally, the EPA misinterpreted its discretion under section 202(a)(1) by reading the mandate that the Administrator "shall by regulation prescribe . . . standards applicable to the emission of any air pollutant . . . which *in his judgment* cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare"[46] to mean that the EPA had no obligation to regulate until it made a determination that GHGs endangered public health or welfare.[47] The "in his judgment" language only modifies the causation and endangerment portion of §202(a)(1) and does not relate to the Administrator's obligation to regulate.[48] Therefore, the Court needed to limit the EPA to the plain language of the CAA in its determination regarding whether to regulate GHGs.

The EPA responded with the argument that the petitioners lacked standing under Article III of the Constitution. The Supreme Court has interpreted the case-or-controversy requirement of Article III to require that plaintiffs show that their case is a type of dispute suitable for resolution by the judiciary by demonstrating that they have been injured by the challenged act, that their injury is "fairly traceable" to that act, and that a court decision in their favor will redress the plaintiffs' injury.[49] A suit bringing a "generally available grievance," complaining of an injury that all citizens suffer equally, is not justiciable under Article III.[50]

The EPA asserted that the petitioners could not meet the redressability and "fairly traceable" prongs of the standing test, since it was unlikely that the relief the petitioners sought would materially redress the alleged harm (by ameliorating climate change) and the plaintffs' injury was only tenuously connected to the EPA's failure to regulate.[51] Specifically, the United States transportation sector accounts for only 7% of global GHG emissions and

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[42] *Id.*
[43] *See id.* at 18-20.
[44] Brief for the Petitioners, *supra* note 38, at 20.
[45] *Id.* at 20-32.
[46] 42 U.S.C. § 7521 (2006) (emphasis added).
[47] Brief for the Federal Respondent, *supra* note 22, at 40.
[48] Brief for the Petitioners, *supra* note 38, at 44-45.
[49] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-60 (1992).
[50] *Id.* at 573-74.
[51] Brief for the Federal Respondent, *supra* note 22, at 7-8.

CAA section 202(a)(1) only allows the EPA to regulate new vehicles.[52] Therefore, any agency action under that provision would be unlikely to directly affect the climate of Massachusetts.[53]

Further, there was an insufficient causal link between the regulation and the harms alleged.[54] Every increase in GHG emissions has not led to a corresponding rise in temperature. Instead, any causation is attenuated because though the GHGs could lead to warming, there was not a direct correlation.[55] The petitioners themselves relied on the assumption that the EPA's actions would act as a catalyst to spur more comprehensive GHG regulation to make the requisite causation argument.[56] Thus the causal link was too attenuated and the remedy too speculative to satisfy the case or controversy requirement of Article III.

The EPA went on to argue that its decision that the CAA did not grant it authority to regulate GHGs was reasonable. Specifically, the regulation of GHGs would raise "significant economic and political issues."[57] Therefore, in light of the Court's decision in *Brown & Williamson*, the EPA had an obligation to determine if Congress specifically intended the broad language of the CAA to apply to carbon dioxide, and found such intent to be absent.[58] While the litigants made other arguments about the scope of the EPA's discretion to deny rulemaking, the Court focused on these two issues of standing and interpretation of the plain language of the statute.

On April 2, 2007, the Supreme Court decided *Massachusetts v. Environmental Protection Agency*.[59] In a 5-4 decision the Court found that Massachusetts, and by association the other petitioners,[60] had standing to assert their claim under the CAA. The CAA gave the Administrator authority to regulate the emissions of GHGs from mobile sources and the EPA's decision not to do so had not been reasonably explained.[61]

Justice Stevens' opinion explained that Massachusetts, because of the special solicitude afforded states, had standing to protest the denial of rulemaking.[62] The Court determined that Massachusetts, in challenging the proper construction of a Congressional statute, brought "a question eminently suitable to resolution in federal court" and a question that Congress,

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[52] *Id.* at 13.
[53] *Id.*
[54] *Id.* at 14-15.
[55] *Id.*
[56] *Id.*
[57] Brief for the Federal Respondent, *supra* note 22, at 21.
[58] *See id.* at 37; *supra* notes 29-31 and accompanying text.
[59] 127 S. Ct. 1438 (2007).
[60] *Id.* at 1453 (citing Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 52 n.2 (2006) (stating that only one party need have standing to satisfy the case or controversy requirement)).
[61] *Massachusetts*, 127 S. Ct. at 1452-63.
[62] *Id.* at 1454-59.

The Court then addressed EPA's interpretation of *Brown & Williamson* and found that the agency had wrongly relied on that case in using post-enactment actions to invalidate unambiguous statutory text.[74] The Court stated that *Brown & Williamson* was inappropriate because, in the case of the Food and Drug Administration, the ban on tobacco products clashed with a common sense interpretation of the statute and Congress had taken an unbroken series of actions in the field of tobacco regulation that could only be explained if the FDA could not ban tobacco products.[75] In the case of GHG emissions, section 202(a)(1) did not require the EPA to ban GHG emissions from vehicles and regulating such emissions was consistent with subsequent congressional enactments.[76] Finally, the Court found that the EPA could not determine that GHGs were uncovered because regulating them requires the EPA to tighten mileage standards, a task that Congress exclusively delegated to the Department of Transportation.[77]

The court also rejected the EPA's alternative argument that if GHGs were air pollutants then the agency could still decline to regulate them.[78] The Court found that the EPA's grounds for declining to regulate GHGs were inadequate and rested on "reasoning divorced from the statutory text."[79] Justice Stevens held that none of the statutory language authorized the EPA to take into account the effect that regulating GHGs would have on foreign affairs or other areas of executive authority.[80] Finally, while scientific uncertainty is a factor that an agency may consider, the uncertainty must be so great as to make regulation unlawful, not just imprudent, in order to justify the decision not to regulate.[81]

III. Analysis

The Court's decision on the merits subjects agency decisions not to regulate to active judicial oversight. Its decision on standing, however, limits the number of plaintiffs that can bring such challenges and makes the states more responsible for protecting the rights of their citizens. Furthermore, the EPA retains discretion on just how to regulate mobile source GHG emissions, further reducing the efficacy of judicial review.

The Court held that agency decisions to decline rulemaking are judicially reviewable and that they are subject to review under the arbitrary and capricious standard.[82] This part of the opinion clarified how the Court's deci-

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[74] *Massachusetts*, 127 S. Ct. at 1460-62.
[75] *Id.* at 1461.
[76] *Id.*
[77] *Id.* at 1461-62.
[78] *Id.* at 1462.
[79] *Id.*
[80] *Massachusetts*, 127 S. Ct. at 1462-63.
[81] *Id.* at 1463.
[82] *Id.* at 1459.

sion in *Heckler v. Chaney*[83] applied to an agency's decision not to engage in rulemaking. In *Heckler*, the Court ruled that enforcement decisions were presumptively unreviewable because of the high level of agency coordination and expertise required for effective enforcement and the lack of danger that the agency is exercising its coercive power when it refuses to act.[84] Lower courts had split on the issue of whether this reasoning required them to find declinations of rulemaking unreviewable.[85] The Court, however, sidestepped *Heckler* and instead found that decisions not to regulate involved legal interpretations, were less frequent, and required public notice, and were thus sufficiently different from enforcement actions as to be reviewable.[86] It further justified review in this case by looking to the requirements of the CAA and finding that 42 U.S.C. § 7607(b)(1) allows for review when the agency has made a finding that an action is not within its statutory authority under the CAA.[87]

The Court's decision that rulemaking decisions are reviewable comports with the principles of administrative law much more then an extension of the reasoning in *Heckler* would have. If the Court had relied on the rationale of *Heckler v. Chaney* it would have meant that an agency's decision not to engage in rulemaking would only be reviewable when the plaintiff was able to show that the decision was contrary to the specific requirements of the statute or that it had been based solely on the agency's belief that it did not have jurisdiction.[88] This, however, would be at odds with the presumption that agency decisions are reviewable unless they are shown to fit within an exception to judicial review under § 701 of the Administrative Procedure Act ("APA").[89] The decision to subject declinations of rulemaking to review is consistent with 5 U.S.C. §§ 701(a) and 706(b), the judicial review portion of the APA, since § 701(a) says that all actions, unless excepted, are subject to judicial review and 5 U.S.C. § 706(b) states that review will ensure that the decisions were not arbitrary and capricious, an abuse of discretion, or otherwise contrary to law.[90] Therefore, this decision brings the standards for

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[83] 470 U.S. 821 (1985).

[84] *Id.* at 831-32. The Heckler court also justified its decision by stating that enforcement actions are akin to decisions not to prosecute.

[85] *See e.g.* Am. Horse Protection Ass'n v. Lyng, 812 F.2d 3 (D.C. Cir. 1986); Am. Agric. Movement v. Bd. of Trade, 977 F.2d 1147, 1165 (7th Cir. 1992).

[86] *Massachusetts*, 127 S. Ct. at 1459.

[87] *Id.*

[88] *See Heckler*, 470 U.S. at 829-30. Under this second exception, which the Court mentions in note 4, it is possible that the Court could have extended *Heckler* and still found the EPA's decision in this case to be reviewable because the EPA based its declination on a lack of jurisdiction.

[89] Martin Shapiro, *Administrative Discretion: The Next Stage*, 92 YALE L.J. 1487, 1489 n.11 (1983); 5 U.S.C § 701(a) (2006); *see also* Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) (holding that decisions of administrative agencies are reviewable unless there is a showing of clear and convincing evidence that Congress intended to make the decision unreviewable or the statute is drawn in such broad terms such that there is no law to apply).

[90] *See* 5 U.S.C. §§ 701(a), 706(2)(B).

reviewing declinations of rulemaking into compliance with statutory requirements and past precedent.

Massachusetts v. EPA also limited the EPA's ability to independently interpret the plain language of its organic statute. In this case the Court held that the EPA was bound by the plain language because none of the evidence the agency presented showed that Congress intended for the CAA not to apply to the emission of GHGs.[91] The Court then ruled that when an agency declined to engage in rulemaking, it could only do so based on factors enumerated in the statute.[92] These decisions limit the discretion that the Administrator has in making the decision not to regulate and allow for effective judicial review of his decision.

The effectiveness of this review, however, is undercut by the Court's decision on standing. The discussion of standing changes the traditional conception of standing for states and creates a two-tiered system separating states from other petitioners for review. Prior to this decision a state could only sue under a federal statute when it had, in its capacity as an individual party, suffered a concrete injury sufficient for Article III standing or as *parens patriae* for its citizens who suffered an injury that affected the state's quasi-sovereign interests.[93] However, Justice Stevens found that Massachusetts' injury to its quasi-sovereign interest was sufficient for standing.[94] The text of the decision argues that this is simply how the Court has historically dealt with state standing and references *Georgia v. Tennessee Copper Co*. However, as Justice Roberts noted in dissent, *Tennessee Copper* only held that a state's quasi-sovereign interests were sufficient to meet damage thresholds for original jurisdiction.[95] In that decision, the state's quasi-sovereign interest in the use and management of natural resources allowed the state to sue for equitable relief while a private petitioner would be limited to damage claims, given the degree of state ownership.[96] Nowhere did the Court state that a quasi-sovereign interest entitled a state to special solicitude in standing

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[91] *Massachusetts*, 127 S. Ct. at 1460-61. This holding comported with the traditional principles of agency discretion as outlined in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844-45 (1984), since that case provided that an agency is entitled to deference for its reasonable interpretations of ambiguous terms in a statute but not for a judgment that there is a gap in the statute.

[92] *Massachusetts*, 127 S. Ct. at 1462-63. This holding was consistent with precedent regarding the limits on the agency discretion when engaging in rulemaking or setting National Ambient Air Quality Standards under the CAA. *See* Whitman v. Am. Trucking Ass'ns, 531 U.S. 457, 465-71 (2001) (finding that the CAA § 109(a)(1) language stating that the Administrator must base his decision on public health concerns precluded the Administrator from considering costs in his decision).

[93] Eclavea, *supra* note 7, § 2.3.

[94] *Massachusetts*, 127 S. Ct. at 1454. The court mentioned the physical damage that Massachusetts suffered but found that this only reinforced the fact that the state had suffered a concrete injury and was not necessary to the determination of standing. *Id.*

[95] *Id.* at 1465 (Roberts, C.J., dissenting).

[96] *Id.* (citing Georgia v. Tennessee Copper Co., 206 U.S. 230 (1907)).

analysis.[97] Furthermore, 42 U.S.C. § 7607(b)(1) does not give states a special right to sue. The section only gives a general right for parties to seek review of the Administrator's actions, implying that any party with a concrete injury could bring a suit. However, the language the Court uses in *Massachusetts v. EPA* implies that these factors make the standing test more relaxed for Massachusetts, allowing the state's harm to be less likely, its causation more attenuated, and its remedy more speculative than the Court would allow in the case of a private plaintiff.[98]

In effect this creates a two-tiered standing framework, with a top tier for state attorneys general bringing actions and the second, lower tier for private plaintiffs and other groups that have no state backing. However it is unclear how "special solicitude" operates in this case because Massachusetts has standing under the *Defenders of Wildlife* test as traditionally applied.[99] The loss of coastal land owned by the state is certainly an ongoing perceptible harm. The rise in sea levels causing the harm is fairly traceable to global warming, caused in part by the motor vehicles that are regulable by the EPA whose actions will undoubtedly bring about change in their products. The injury is redressable because EPA regulation would decrease the rate of GHG emissions into the atmosphere and thus the rate of sea level rise.

The creation and use of the concept of "special solicitude" in a situation where a non-sovereign entity would be entitled to standing implies that the standing requirements for private plaintiffs have been heightened. The Court's general trend towards a narrower interpretation of the case-and-controversy requirement supports this conclusion and suggests that the decision in *Massachusetts v. EPA* will lead to further restrictions on the ability of private plaintiffs to sue federal agencies. Since the decision in *United States v. Students Challenging Regulatory Agency Procedures*,[100] where the Court held that in their pleadings the plaintiffs merely had to show a specific and perceptible harm that distinguishes them from other individuals as more than

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[97] *Massachusetts*, 127 S. Ct. at 1465 (Roberts, C.J., dissenting). There is the additional issue that it is unclear whether the *parens patriae* doctrine can be asserted against the federal government. In the dicta of *Alfred L. Snapp & Son v. Puerto Rico*, 458 U.S. 592, 610 n.16 (1982), the Court stated that a state cannot bring a *parens patriae* complaint against the federal government because the federal government itself would have the duty to protect a state's citizens in any area in which it legislated, preempting state action based on that same duty. The Court addresses this issue in footnote 17 of the opinion by stating that a state cannot challenge federal statutes under *parens patriae* doctrine but it may assert its quasi-sovereign rights against a government agency. *Massachusetts*, 127 S. Ct. at 1455 n.17. This construction does not seem to remedy the problem since a federal agency ostensibly also represents the same citizens as a state.

[98] *Massachusetts*, 127 S. Ct. at 1455.

[99] *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 562 (1992).

[100] 412 U.S. 669 (1972) (holding that a student group had standing to challenge the decision of the Interstate Commerce Commission to allow the railroads to surcharge all freight transported because the surcharge discouraged recycling, incentivizing manufacturers to use non-recycled goods in part from the recreational lands that the students enjoyed).

a generally aggrieved citizen,[101] subsequent Supreme Court opinions have consistently tightened that test. In *Lujan* v. *National Wildlife Federation,* the Court determined that for plaintiffs to have standing under a statute the harm alleged must fall under the "zone of interests protected by the statute."[102] Further, in *Allen v. Wright*, the Court explained that the harm must be fairly traceable to the government action, putting limits on the attenuation between the government action and the harm alleged.[103] Other decisions have reduced the elasticity of the imminence requirement[104] and limited the allowable attenuation of causation,[105] effectively narrowing the cases and controversies that a non-sovereign plaintiff can bring before a federal court.

The text of the opinion and dissent supports the view that this decision will raise the standing requirements for non–sovereign plaintiffs. In applying the *Defenders of Wildlife* test, the Court focused on the fact that Massachusetts owns a substantial amount of coastal property,[106] implying that there is a requirement that the plaintiff be substantially harmed. Furthermore, the Court did not hold that the remedy requested would be *likely* to bring relief, but rather that the regulation of mobile sources *would* bring relief, effectively reading out "likely" and requiring that a plaintiff prove that a favorable court decision will at least in part remedy their harm.[107]

The Chief Justice, in dissent, articulated a similarly narrow view of the standing test. He explicitly argued that the plaintiff must prove that the specific emissions to be regulated must be fully traced through a complex web of causation in order to meet the plaintiff's burden under *Defenders of Wildlife*.[108] This conception of causation requires a level of specificity not contemplated by previous decisions. Justice Roberts would also demand that a plaintiff prove that any redress would not be overwhelmed by the actions of third parties.[109]

This interpretation of Article III's case-or-controversy requirement creates contradictions that later judgments will have to resolve. For in its opinion on the merits, the Court held that decisions denying rulemaking are subject to judicial review under the traditional *Chevron* framework, and therefore the decision not to regulate must comport with the text of the statute and any decision under that statutory language must not be arbitrary or capricious.[110] These holdings are consistent with the idea that agency decisions should be reviewable and that unambiguous statutory language cabins agency action.

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[101] *Id*. at 690.
[102] 497 U.S. 871, 883 (1990).
[103] *See* 468 U.S. 737, 751 (1984).
[104] *See Defenders of Wildlife*, 504 U.S. at 564.
[105] *See id.* at 562.
[106] Massachusetts v. EPA, 127 S. Ct. 1438, 1456 (2007).
[107] *Id.* at 1458.
[108] *Id.* at 1469 (Roberts, C.J., dissenting).
[109] *Id.* at 1469-70.
[110] *See* Chevron U.S.A. Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984).

The new system for standing, however, minimizes the effect of these holdings by limiting the number of plaintiffs that can challenge agency decisions, including decisions not to regulate. Non-sovereign plaintiffs, in order to bring suit, will likely have to find a harm that the failure to regulate directly causes and prove that the behavior of a third party who is also responsible for the harm will not negate any court-ordered actions. Otherwise, plaintiffs will have to appeal to their state governments and convince them to file a suit challenging a particular agency action. In essence, they will have to expend time and resources to convince their state attorney general that a lawsuit is in the best interests of the state as a whole. So while the decision adds to the breadth of challenges that states can bring, it also reduces the rights of private plaintiffs and could lead to less review of agency decisionmaking. And regardless of its ultimate effect, *Massachusetts v. EPA* has produced a doctrine of judicial review that lacks coherence and rationality.