

# PROBING ENVIRONMENTAL DISCRETION: AN ARGUMENT FOR REGULATING GREENHOUSE GASES FROM MOTOR VEHICLES UNDER THE CLEAN AIR ACT.

OMARI JACKSON\*

## I. INTRODUCTION

On October 20, 1999, the International Center for Technology Assessment (ICTA) and a number of environmental groups petitioned the Environmental Protection Agency (EPA) to regulate certain greenhouse gas (GHG) emissions from new motor vehicles and engines.<sup>1</sup> The organizations argued that section 202(a)(1) of the Clean Air Act (CAA)<sup>2</sup> provided the EPA Administrator with mandatory discretion to regulation GHG emissions.<sup>3</sup> Petitioners contended that statements made on the EPA's website and other documents concluded that the emissions they sought to control may reasonably be anticipated to endanger the public welfare.<sup>4</sup> They also claimed that motor vehicle emissions from the GHGs could be significantly reduced by increasing the fuel economy of vehicles, eliminating tailpipe emissions altogether, or using other

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\* J.D. Candidate, 2007, Thurgood Marshall School of Law, Texas Southern University, B.A. 2003, Morehouse College. I would like to thank my parents for their love and support during the preparation of this comment.

<sup>1</sup> Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Environmental Protection Agency Sept. 8, 2003) [hereinafter Control of Emissions] (to be codified at 40 C.F.R. pt. 2).

<sup>2</sup> Section 202 requires the Administrator to regulate emissions of any "air pollutant" from motor vehicles where in the Administrator's judgment such emissions contribute to air pollution which may reasonably be anticipated to endanger public health or welfare. *See* 42 U.S.C. § 7521(a)(1).

<sup>3</sup> Control of Emissions, *supra* note 1, at 52,923. Petitioners specifically sought regulation of carbon dioxide (CO[2]), methane (CH[4]), nitrous oxide (N[2]O) and hydrofluorocarbon (HFCs) emissions. *Id.*

<sup>4</sup> Control of Emissions, *supra* note 1, at 52,923.

current and developing technologies. However, the EPA concluded that it did not possess the legal authority to regulate the GHG emissions and denied their petition.<sup>5</sup>

In *Massachusetts v. Environmental Protection Agency*<sup>6</sup>, the D.C. Circuit addressed the issue of whether the Clean Air Act authorized the EPA Administrator to control GHG emissions of new motor vehicles and engines. A three-judge panel voted 2-1 against reviewing the EPA's decision that it lacked authority under federal law to regulate GHGs.<sup>7</sup> The majority held that the Administrator properly exercised his discretion under section 202(a)(1) in denying the petition for rulemaking.<sup>8</sup> In an en banc hearing, the D.C. Circuit rejected a petition for rehearing.<sup>9</sup> Late last term, the Supreme Court granted certiorari to hear arguments to resolve this controversy.<sup>10</sup>

This comment asserts that the CAA authorizes the EPA to regulate GHG emissions from new motor vehicles. The Court's decision in *Chevron USA, Inc. v. Natural Resources Defense Council, Inc.*<sup>11</sup> held that if a statute was silent or ambiguous with respect to the specific issue, the question became whether the agency's action involved a permissible construction of the statute. Part II discusses the historical background of climate change policy regarding GHG emissions. Part III focuses on the various environmental law cases addressing the issue of Article III standing. Part IV analyzes the *Chevron* test and the three opinions by the *Massachusetts v. Environmental Protection Agency* judges. Part V advances the belief that section 202(a)(1)

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<sup>5</sup> Control of Emissions, *supra* note 1, at 52,933. The EPA also held it should not regulate GHG emissions from U.S. motor vehicles under the CAA. See Control of Emissions, *supra* note 1, at 52,925.

<sup>6</sup> 415 F.3d 50 (D.C. Cir. 2005).

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

<sup>8</sup> *Id.* at 58. In his majority opinion, Judge Randolph assumed *arguendo* that "the EPA possessed statutory authority to regulate greenhouse gases from new motor vehicles." *Id.* at 56.

<sup>9</sup> *Massachusetts v. Environmental Protection Agency*, 433 F.3d 66 (D.C. Cir. 2005).

<sup>10</sup> *Massachusetts v. Environmental Protection Agency*, 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 126 S. Ct. 2960 (2006).

<sup>11</sup> 467 U.S. 837 (1984).

of the CAA provides mandatory authority and predicts the outcome of the Supreme Court's decision in *Massachusetts v. Environmental Protection Agency*. Part VI concludes that failure to control the production of GHG emissions from new motor vehicles and engines limits the impact of the CAA to protect the public welfare from threats to the environment.

## II. HISTORY OF CLIMATE CHANGE

### A. *The Evolution of Climate Change Policy*

In 1896, Swedish scientist Svante August Arrhenius calculated that carbon dioxide being spewed into the atmosphere by industrial smokestacks could eventually change the Earth's climate by intensifying the greenhouse effect.<sup>12</sup> Arrhenius estimated that, at then-current rates of emission, it would take thousands of years for higher carbon dioxide emissions to have a perceptible effect.<sup>13</sup> At the time, legal action directed at climate change was not a priority for policy makers and lawyers. However, the rapid industrialization of the twentieth century sent atmospheric levels of carbon dioxide and other GHGs soaring.<sup>14</sup>

During the 1980s, scientific discussions about the possibility of global climate change led to public concern both in the United States and abroad.<sup>15</sup> By then, computer climate models predicted a host of horrendous consequences if emissions of carbon dioxide and other GHGs were not brought under control within decades rather than centuries.<sup>16</sup> Such events included intense heat waves, melting glaciers, rising sea levels, floods, droughts, tropical storms and

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<sup>12</sup> Kristin Choo, *Feeling the Heat: The Growing Debate Over Climate Change Takes on Legal Overtones*, A.B.A. J., July 2006, at 31.

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

<sup>14</sup> *Id.* Methane and nitrous oxide were other GHGs affected by the movement towards industrialization. *Id.*

<sup>15</sup> Control of Emissions, *supra* note 1, at 52,926.

<sup>16</sup> Choo, *supra* note 12, at 31.

hurricanes.<sup>17</sup> In 1988, the United Nations Environment Programme and the World Meteorological Organization appointed an international group of scientists called the Intergovernmental Panel on Climate Change (IPCC) to investigate climate change.<sup>18</sup> The United States Senate recognized the IPCC as the preeminent international body established to provide objective scientific and technical assessments on climate change.<sup>19</sup>

In 1995, the IPCC's Second Assessment Report on climate change found that "the balance of evidence, from changes in global mean surface temperature and from changes in geographical, seasonal and vertical patterns of atmospheric temperature suggests a discernible human influence on global climate."<sup>20</sup> After this report, additional data, improved analysis, and more rigorous evaluation provided the IPCC with a greater understanding of climate change.<sup>21</sup> In 2001, it concluded that most of the activities surrounding global warming in the last fifty years were attributable to human activities.<sup>22</sup> Furthermore, the report summarized regional changes in climate affecting a diverse set of physical and biological systems in many parts of the world.<sup>23</sup>

#### *B. The Domestic Agenda for Combating Climate Change*

In the 1980s, the United States joined other nations to develop the United Nations Framework Convention on Climate Change (UNFCCC).<sup>24</sup> Upon approval from the Senate,

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<sup>17</sup> *Id.*

<sup>18</sup> Final Brief for Petitioners in Consolidated Cases at 7, *Massachusetts v. Environmental Prot. Agency*, No. 03-1361 (D.C. Cir. Jan. 24, 2005).

<sup>19</sup> *Id.*; see also S. Exec. Rep. No. 102-55, at 9 (1992) (stating that IPCC's work is "viewed throughout most of the international scientific and global diplomatic community as the definitive statement on the state-of-the-knowledge about global climate change.").

<sup>20</sup> IPCC SECOND ASSESSMENT REPORT, SYNTHESIS REPORT 5 (1995).

<sup>21</sup> IPCC THIRD ASSESSMENT REPORT, SUMMARY FOR POLICYMAKERS 2 (2001). The report also determined that the 1990s was the warmest decade since records were first kept in 1861. *Id.*

<sup>22</sup> *Id.* at 7-8.

<sup>23</sup> *Id.* at 3.

<sup>24</sup> Control of Emissions, *supra* note 1, at 52,926.

President George H.W. Bush signed the UNFCCC in 1992.<sup>25</sup> The UNFCCC constituted the international community's first major step to address climate change on a global level.<sup>26</sup> The Convention sought to stabilize GHG concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.<sup>27</sup> All parties to it agreed on the need for further research to determine the level at which GHG concentrations should be stabilized, acknowledging that "there are many uncertainties in predictions of climate change, particularly with regard to the timing, magnitude and regional patterns thereof."<sup>28</sup>

Shortly before the UNFCCC's adoption, Congress developed the 1990 CAA amendments.<sup>29</sup> In the amendments, Congress called on the EPA to develop information concerning global climate change and "nonregulatory" strategies for reducing carbon dioxide emissions.<sup>30</sup> A Senate committee included in its bill to amend the CAA a provision requiring the EPA to set CO<sub>2</sub> emission standards for motor vehicles.<sup>31</sup> However, the provision did not appear on the bill on which the full Senate voted, and the bill eventually enacted remained silent with regard to motor vehicle carbon dioxide emissions.<sup>32</sup> During the same period, other

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<sup>25</sup> Control of Emissions, *supra* note 1 at 52,926. The UNFCCC went into effect in 1994. *Id.*

<sup>26</sup> J. Kevin Healy & Jeffrey M. Tapick, *Climate Change: It's Not Just a Policy Issue for Corporate Counsel – it's a Legal Problem*, 29 COLUM. J. ENVTL. L. 89, 94 (2004). The UNFCCC is credited for the development of the Kyoto Protocol, which mandates that once developed nations, known as Annex I Parties, ratify the protocol, they must meet individual, legally-binding emissions targets. *Id.* at 94-95.

<sup>27</sup> Control of Emissions, *supra* note 1, at 52,926.

<sup>28</sup> Control of Emissions, *supra* note 1, at 52,926.

<sup>29</sup> Control of Emissions, *supra* note 1, at 52,926.

<sup>30</sup> Control of Emissions, *supra* note 1, at 52,926.

<sup>31</sup> Control of Emissions, *supra* note 1, at 52,926.

<sup>32</sup> Control of Emissions, *supra* note 1, at 52,926.

legislative proposals sought to control GHG emissions, but did not receive enough support from the majority of Congress.<sup>33</sup>

In 2001, at the request of the Bush Administration, the National Academy of Sciences (NAS) analyzed some of the key findings in the IPCC's Third Assessment Report.<sup>34</sup> The NAS report concluded that "a causal linkage" between GHG emissions and global warming "cannot be unequivocally established."<sup>35</sup> Although the report noted that the earth regularly experiences climate cycles of global cooling after periods of global warming, it stated that an increase in carbon dioxide levels is not always accompanied by a corresponding rise in global temperatures.<sup>36</sup> However, the NAS report further concluded that GHG atmospheric concentrations are increasing "as a result of human activities."<sup>37</sup>

After the publication of the NAS report, the United States submitted the U.S. Climate Action Report 2002<sup>38</sup> (CAR) to the Secretariat of the UNFCCC.<sup>39</sup> The CAR recites at length the detrimental effects to public health and welfare caused by climate change.<sup>40</sup> Additionally, it presented regional assessments determining that a wide variety of adverse effects to the public

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<sup>33</sup> See, e.g., S. 324, 101st Cong. (1989); S. 1224, 101st Cong. (1989); H.R. 5966, 101st Cong. (1990).

<sup>34</sup> NATIONAL RESEARCH COUNCIL, CLIMATE CHANGE SCIENCE: AN ANALYSIS OF SOME KEY QUESTIONS (2001). The Academy's principal operating agency for providing advice to the federal government on scientific and technical matters is the National Research Council (NRC). *Massachusetts*, 415 F.3d at 56-57.

<sup>35</sup> NATIONAL RESEARCH COUNCIL, *supra* note 34, at 17.

<sup>36</sup> *Id.* at 7, 16. The NRC explained that although carbon dioxide levels increased steadily during the twentieth century, global temperatures decreased between 1946 and 1975. *Id.* at 16.

<sup>37</sup> *Id.* at 9.

<sup>38</sup> UNITED STATES CLIMATE ACTION REPORT [hereinafter CLIMATE REPORT] (2002).

<sup>39</sup> See Final Brief for Petitioners, *supra* note 18, at 8-9. The EPA served as the lead agency in the preparation of the Climate Action Report and coordinated the involvement of a dozen other federal agencies and the Executive Office of the President. See 66 Fed. Reg. 15470 (Environmental Protection Agency Mar. 19, 2001).

<sup>40</sup> Final Brief for Petitioners, *supra* note 18, at 9 ("[H]eat waves are 'very likely' to increase in frequency and severity."); CLIMATE REPORT, *supra* note 38, at 106.

welfare are “very likely” or “likely” to occur in the United States as a result of climate change.<sup>41</sup>

The CAR also recognized that GHG emissions from United States transportation activities account for a major part of the country’s overall GHG emissions.<sup>42</sup>

### III. CONFRONTING ARTICLE III STANDING

#### A. *Developing Standing Jurisprudence*

Early Supreme Court decisions indirectly established standing requirements by limiting suits to common law forms of action or the statute at issue.<sup>43</sup> Since 1944, the Court interpreted Article III of the U.S. Constitution’s limitation of judicial decisions to cases and controversies by implying that federal courts should require plaintiffs to meet certain standing criteria to ensure that the plaintiff has a genuine interest and stake in a case.<sup>44</sup> Although Article III establishes the parameters of the federal judicial branch, it does not contain explicit standing requirements for suits in federal courts.<sup>45</sup> Some legal scholars argue that the Court’s development of formal standing requirements derived from the rise of new administrative agencies during the 1930s and the need to clarify whether potential beneficiaries of regulation could challenge administrative decisions.<sup>46</sup>

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<sup>41</sup> Final Brief for Petitioners, *supra* note 18, at 9-10.

<sup>42</sup> CLIMATE REPORT, *supra* note 38, at 36. The report noted that nearly two-thirds of GHG emissions result from motor vehicles. *Id.* at 40.

<sup>43</sup> Robert V. Percival, “Greening” the Constitution - Harmonizing Environmental and Constitutional Values, 32 ENVTL. L. 809, 827 (2002).

<sup>44</sup> Cass R. Sunstein, *What’s Standing After Lujan? Of Citizen Suits, “Injuries,” and Article III*, 91 MICH. L. REV. 163, 170 (1992); Bradford C. Mank, *Standing and Global Warming: Is Injury to All Injury to None?*, 35 ENVTL. L. 1, 22 (2005).

<sup>45</sup> *Id.* Article III indirectly places limits on the federal judicial power by stating that the “judicial Power shall extend to all Cases ... [and] ... Controversies,” thus excluding advisory opinions. *See* U.S. CONST. art. III, § 2, cl. 1.; Sunstein, *supra* note 44, at 170-75; Mank, *supra* note 44, at 22.

<sup>46</sup> *See* Mank, *supra* note 44, at 22-23; Percival, *supra* note 43, at 827; Sunstein, *supra* note 44, at 179.

In previous years, courts issued conflicting decisions about whether to allow standing for plaintiffs who file suits alleging general injuries to the public at large.<sup>47</sup> Regarding cases involving generalized, abstract injuries affecting the public as a whole, such as misuse of taxpayer funds<sup>48</sup>, courts often concluded that it is inappropriate to allow a plaintiff standing to pursue such a suit because the political branches are better suited than the judicial branch to resolve such controversies.<sup>49</sup> In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*<sup>50</sup>, the Court found adequate proof of injury when plaintiffs complained that a proposed nuclear power plant would expose them to radiation, and that the plant would not be constructed in the absence of a challenged limitation of liability in case of accident.<sup>51</sup> It stated that a court could deny standing if a suit would raise "general prudential concerns 'about the proper - and properly limited - role of the courts in a democratic society.'"<sup>52</sup>

Other Supreme Court decisions on standing implied that plaintiffs could establish standing even if they suffered an injury common to many people.<sup>53</sup> In *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*<sup>54</sup>, the Court declared that "to deny

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<sup>47</sup> Such cases involve disputes in which every citizen possesses a small, yet common injury. Mank, *supra* note 44, at 21.

<sup>48</sup> *Flast v. Cohen*, 392 U.S. 83, 88 (1968) (holding that a federal taxpayer did not have standing to challenge spending allegedly in violation of Constitution); *Cantrell v. City of Long Beach*, 241 F.3d 674, 683-84 (9th Cir. 2001) (stating that federal courts require a taxpayer seeking standing to demonstrate direct injury in a case alleging mishandling of municipal or state tax funds).

<sup>49</sup> David A. Grossman, *Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation*, 28 COLUM. J. ENVTL. L. 1, 40 n.217 (2003); Mank, *supra* note 44, at 21; *Florida Audubon Soc'y v. Bentsen*, 94 F.3d 658, 667 n.4 (D.C. Cir. 1996) ("The plaintiff must show that he is not simply injured as is everyone else, lest the injury be too general for court action.").

<sup>50</sup> 438 U.S. 59 (1978).

<sup>51</sup> *Id.*; see also DAVID P. CURRIE, *FEDERAL JURISDICTION IN A NUTSHELL* 22 (4th ed. 1999).

<sup>52</sup> *Id.* at 80 (quoting *Warth v. Seldin*, 422 U.S. 490, 498 (1975)).

<sup>53</sup> Mank, *supra* note 44, at 22.

<sup>54</sup> 412 U.S. 669 (1973) (permitting park users to challenge a rate decision of the Interstate Commerce Commission (ICC) on the basis of allegations that it would discourage transportation of recycled materials).

standing to persons who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread ... actions could be questioned by nobody."<sup>55</sup> Two years later, it held that a plaintiff may be able to satisfy Article III standing requirements "even if it is an injury shared by a large class of other possible litigants."<sup>56</sup> In *Warth v. Seldin*, the Court stated that a substantial likelihood of injury can be found after an examination of the pleadings.<sup>57</sup>

### B. *The Effect of Lujan*

Standing exists only if the complainant suffers an injury in fact that is fairly traceable to the challenged action and is likely to be redressed by a favorable decision.<sup>58</sup> In *Lujan v. Defenders of Wildlife*<sup>59</sup>, the Supreme Court broke new ground in construing the current standing doctrine.<sup>60</sup> In *Lujan*, the environmental group Defenders of Wildlife (Defenders) argued that the federal government provided partial funding for dam projects in Sri Lanka and Egypt that would likely damage the habitat of endangered and threatened species in those countries.<sup>61</sup> Defenders sought standing based on the affidavits of two of its members who traveled to those countries in the past, were concerned about endangered species in those two countries, and sought to revisit the countries in the future but had no current travel plans.<sup>62</sup>

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<sup>55</sup> *Id.* at 688.

<sup>56</sup> *Warth v. Seldin*, 422 U.S. 490, 501 (1975).

<sup>57</sup> CURRIE, *supra* note 51, at 21.

<sup>58</sup> *Massachusetts*, 415 F.3d at 54 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

<sup>59</sup> 504 U.S. 555 (1992).

<sup>60</sup> Brian Mayer, *Climate Change, Insurance, NEPA, and Article III: Does a Policy Holder Have Standing to Sue a Federal Agency for Failing to Address Climate Change under NEPA?*, 74 UMKC L. REV. 435, 442 (2005).

<sup>61</sup> *Lujan*, 504 U.S. at 563.

<sup>62</sup> *Id.* at 563.

A divided Court concluded that the group lacked standing to challenge a Department of Interior rule interpreting section 7 of the Endangered Species Act (ESA)<sup>63</sup> as not applying to extraterritorial impacts of federal action.<sup>64</sup> Writing for the majority, Justice Scalia held that, to satisfy the injury-in-fact test, a plaintiff must demonstrate that he or she suffered a “concrete and particularized” and “actual and imminent” invasion of a legally protected interest.<sup>65</sup> Second, it stated that a causal connection between the injury and the defendant’s conduct.<sup>66</sup> Finally, the plaintiff must show, beyond mere speculation, that his or her injury will be “redressed by a favorable decision.”<sup>67</sup>

The Court’s insistence that injury is a constitutional requirement means that Congress cannot confer standing on a person with nothing to gain by suing.<sup>68</sup> If a plaintiff only possesses a general grievance and seeks relief that provides him no more benefit than the public at large, there is no injury in fact.<sup>69</sup> On the other hand, Congress can often create standing by conferring a cash bounty on the victorious plaintiff.<sup>70</sup> This would assure that the plaintiff’s relief gives him or her tangible benefit not available to the public at large.<sup>71</sup>

### *C. Should the Political Branches Decide?*

While serving on the D.C. Circuit Court of Appeals, then-Judge Scalia wrote a law review article that disagreed with the relaxed approach to standing adopted by the Supreme

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<sup>63</sup> Endangered Species Act of 1973, 16 U.S.C. 1531-1544 (2000).

<sup>64</sup> *Lujan*, 504 U.S. at 578.

<sup>65</sup> *Id.* at 560; Mayer, *supra* note 60, at 442.

<sup>66</sup> *Id.*

<sup>67</sup> *Lujan*, 504 U.S. at 561 (quoting *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)); Mayer, *supra* note 60 at 442. The third standing prong requires that the plaintiffs’ harms be redressable by favorable judicial decisions. Grossman, *supra* note 49, at 41.

<sup>68</sup> CURRIE, *supra* note 51, at 22.

<sup>69</sup> JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 2.12, at 93 (7th ed. 2004).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

Court and many lower court decisions.<sup>72</sup> Scalia favored a narrower approach to standing because standing doctrine created a "crucial and inseparable element" of separation-of-powers principles, and more restrictive standing rules would limit judicial interference with the popularly elected legislative and executive branches.<sup>73</sup> He argued that when "allegedly wrongful governmental action ... affects "all who breathe," no one has standing to seek redress in court, and the political branches should resolve the issue instead.<sup>74</sup>

Criticizing judges who suggested that courts adopt a more lenient approach to standing in environmental cases, Scalia questioned "the judiciary's long love affair with environmental litigation."<sup>75</sup> Responding to Judge Skelly Wright's pro-environmentalist opinion in *Calvert Cliffs Coordinating Committee v. Atomic Energy Commission*<sup>76</sup> that "our duty, in short, is to see that important legislative purposes, heralded in the halls of Congress, are not lost or misdirected in the vast hallways of the federal bureaucracy,"<sup>77</sup> Scalia suggested that judicial nonenforcement of certain laws because of standing barriers could actually have positive social impacts.<sup>78</sup> He stated that judges who enforce environmental laws are "likely to be enforcing the political prejudices of their own class."<sup>79</sup> Furthermore, Scalia claimed that the ability to misdirect laws by denying standing where no particular harm to certain individuals can be said to be one of the prime engines of social change.<sup>80</sup>

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<sup>72</sup> See Antonin Scalia, *The Doctrine of Standing as an Essential Element of the Separation of Powers*, 17 SUFFOLK U. L. REV. 881 (1983).

<sup>73</sup> *Id.* at 881.

<sup>74</sup> *Id.* at 896.

<sup>75</sup> *Id.* at 884.

<sup>76</sup> 449 F.2d 1109 (D.C. Cir. 1971).

<sup>77</sup> *Id.* at 1111.

<sup>78</sup> Scalia, *supra* note 72, at 897.

<sup>79</sup> *Id.* at 896.

<sup>80</sup> *Id.* at 897.

In *Federal Election Commission v. Akins*<sup>81</sup>, the Court sought to clarify its contrasting decisions about whether plaintiffs who suffer common injuries are entitled to standing. The *Akins* Court addressed why it permitted standing in some cases involving widespread injuries, but denied it in other disputes when "the political process, rather than the judicial process, may provide the more appropriate remedy for a widely shared grievance."<sup>82</sup> Justice Breyer's majority opinion reasoned that standing for widely shared, generalized injuries would not suffice if the harm is both widely shared and also of "an abstract and indefinite nature."<sup>83</sup> He maintained that the Court denied standing if the injury is too abstract, but allowed standing even if many people suffered the same harm as long as that harm is concrete.<sup>84</sup>

The *Akins* Court implied that Congress may grant standing to all citizens concretely harmed by a particular injury even if every other citizen is similarly adversely affected.<sup>85</sup> However, Justice Breyer's majority opinion was fundamentally inconsistent with Justice Scalia's article and the *Lujan* decision.<sup>86</sup> Justice Breyer's majority opinion implicitly rejected the conclusion in *Lujan* that "to permit Congress to convert the undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts" is to permit Congress to transfer to the judicial branch "the Chief Executive's most important constitutional duty."<sup>87</sup> However, Justice Scalia's central argument in dissent was that the political branches, not the judiciary, should address broadly held grievances.<sup>88</sup>

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<sup>81</sup> 524 U.S. 11 (1998).

<sup>82</sup> *Id.* at 23.

<sup>83</sup> *Id.* at 24.

<sup>84</sup> *Id.* at 24-25.

<sup>85</sup> *Id.*

<sup>86</sup> Mank, *supra* note 44, at 38.

<sup>87</sup> *Id.* at 36 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 577 (1992)); *see generally* Cass Sunstein, *Information Regulation and Informational Standing: Akins and Beyond*, 147 U.

#### IV. EXAMINING THE CLEAN AIR ACT

##### A. *The Chevron Test*

In *Chevron USA Inc. v. Natural Resources Defense Council, Inc.*<sup>89</sup>, the Supreme Court addressed whether the EPA’s decision to allow States to treat all of the pollution-emitting devices within the same industrial grouping was based on a reasonable construction of the “stationary source” of section 172(b)(6) of the CAA Amendments of 1977.<sup>90</sup> In this case, the amendments required non-attainment States to establish a permit program regulating “new or modified major stationary sources” of air pollution.<sup>91</sup> The EPA regulation promulgated to implement this permit requirement allowed a State to adopt a plantwide definition of the term “stationary source.”<sup>92</sup> Under this definition, an existing plant that contains several pollution-emitting devices may install or modify one piece of equipment without meeting the permit conditions if the alteration will not increase the total emissions from the plant.<sup>93</sup>

Several environmental groups argued before the D.C. Circuit that the EPA’s definition of “stationary source” ran contrary to the terms, legislative history, and purposes of the CAA amendments.<sup>94</sup> The court noted that the relevant part of the amended CAA did not provide an explicit definition of what Congress envisioned as a stationary source to which the permit

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PA. L. REV. 613, 638-53 (1999) (discussing differences in standing philosophy between *Lujan* and *Akins*).

<sup>88</sup> *Akins*, 524 U.S. at 37 (Scalia, J., joined by O’Connor & Thomas, JJ., dissenting); *see generally* Scalia, *supra* note 72. Justice Scalia argued that the statute should not be interpreted to allow a private party to bring an executive agency into court to compel its enforcement of the law against a third party, and second, that if the statute means that, it is unconstitutional because it transfers from the Executive to the courts the responsibility to “take Care that the Laws be faithfully executed.” *Akins*, 524 U.S. at 37; NOWAK & ROTUNDA, *supra* note 69, at 93 n.205.

<sup>89</sup> 467 U.S. 837 (1984).

<sup>90</sup> *See* 42 U.S.C. § 7502(b)(6) (2005).

<sup>91</sup> *Id.*; *see also* *Chevron*, 467 U.S. at 839.

<sup>92</sup> 42 U.S.C. § 7502(b)(6)(i) (2005); *Chevron*, 467 U.S. at 839.

<sup>93</sup> *Chevron*, 467 U.S. at 839.

<sup>94</sup> *Id.* at 842 n.7.

program should apply.<sup>95</sup> In light of its conclusion that the legislative history was contradictory at best, the court reasoned that “the purposes of the non-attainment program” should guide its decision.<sup>96</sup> It stated that the bubble concept was “mandatory” in programs designed merely to maintain air quality, but held that it was improper in programs enacted to improve air quality.<sup>97</sup> Arguing that the purpose of the permit program was to improve air quality, the court held that the bubble concept was inapplicable and set aside the regulations.<sup>98</sup>

The Court reversed the D.C. Circuit’s decision holding that the EPA regulations allowing states to treat all of the pollution-emitting devices within the same grouping were based on a reasonable construction of the “stationary source” term in section 172(b)(6).<sup>99</sup> Expressing the unanimous view of the six participating members of the Court, Justice Stevens argued that the parsing of general terms in the text of the statute would not reveal an actual intent of Congress.<sup>100</sup> In reviewing the legislative history of section 172(b)(6), the Court stated that Congress did not address the issue presented before them by the EPA’s decision.<sup>101</sup> Thus, Justice Stevens reasoned that when a statute fails to provide a specific congressional intent regarding its application, an agency’s reasonable construction may provide the best source for interpretation.<sup>102</sup>

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<sup>95</sup> *National Res. Def. Council, Inc. v. Gorsuch*, 685 F.2d 718, 723 (D.C. Cir. 1982). The court further stated that the precise issue was not “squarely addressed in the legislative history.” *Id.*

<sup>96</sup> *Id.* at 726 n.39.

<sup>97</sup> *Id.* at 726.

<sup>98</sup> *Chevron*, 467 U.S. at 842.

<sup>99</sup> *Id.* at 860-61.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.* at 862.

<sup>102</sup> *Id.* at 862-66.

## B. *Contrasting the D.C. Circuit’s Opinions in Massachusetts v. EPA*

### 1. *Judge Randolph’s Majority Opinion*

Writing the opinion for the court, Judge Randolph initially discussed the issue of whether the petitioners lacked standing under Article III of the Constitution.<sup>103</sup> He noted the two declarations cited as grounds to challenge the EPA’s decision.<sup>104</sup> However, Judge Randolph failed to explicitly state whether the petitioners lacked standing to seek the EPA to enforce the regulation of GHGs from new motor vehicles.<sup>105</sup> Instead, he followed the statutory standing cases and assumed *arguendo* that the EPA possessed proper statutory authority under the CAA.<sup>106</sup>

Judge Randolph noted that section 202(a)(1) provides the EPA Administrator considerable discretion in regulating GHGs for new motor vehicles.<sup>107</sup> Moreover, he stated that the Administrator expressed concern that unilateral regulation of American motor vehicle emissions “could weaken efforts to persuade developing countries to reduce the intensity of GHGs thrown off by their economies.”<sup>108</sup> Judge Randolph also mentioned other scientific evidence the EPA took into consideration prior to issuing its decision.<sup>109</sup> Thus, he concluded that the EPA Administrator properly exercised his discretion in denying the petition for rulemaking.<sup>110</sup>

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<sup>103</sup> *Massachusetts*, 415 F.3d at 54.

<sup>104</sup> *Id.* at 54-55.

<sup>105</sup> *Id.* at 56.

<sup>106</sup> *Id.*

<sup>107</sup> *Id.* at 58.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 58-59.

## 2. Judge Sentelle's Concurrence and Dissent

In concluding that the EPA correctly asserted that the petitioners failed to demonstrate any injury necessary to establish standing under Article III, Judge Sentelle issued his dissent from Judge Randolph's opinion.<sup>111</sup> Citing the D.C. Circuit's decision in *Florida Audubon Society v. Bentsen*<sup>112</sup>, he argued that the alleged harm did not provide a "specific" and "justiciable" claim for the court to resolve.<sup>113</sup> Judge Sentelle reasoned that the claimed injury was common to all members of the public that should be recommended to the Executive Branch and Congress for resolution.<sup>114</sup> However, he concurred in with Judge Randolph's decision to deny the petitioners from final action of the EPA.<sup>115</sup>

## 3. Judge Tatel's Dissent

In his dissenting opinion, Judge Tatel initially examined the National Research Council scientific research on GHGs.<sup>116</sup> In addressing the issue of standing, he asserted that only one petitioner needs to establish the elements of injury, causation and redressability before a court can reach the merits of the petitioners' claim.<sup>117</sup> Judge Tatel argued that the declarations submitted by petitioners clearly establish that the Commonwealth of Massachusetts satisfied each element under Article III.<sup>118</sup> Furthermore, he stated that the potential harm that the

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<sup>111</sup> *Id.* at 59 (Sentelle, J., concurring in part, dissenting in part).

<sup>112</sup> 94 F.3d 658 (D.C. Cir. 1996).

<sup>113</sup> *Massachusetts*, 415 F.3d at 60 (Sentelle, J., concurring in part, dissenting in part). Judge Sentelle noted that his opinion was not to suggest that the petitioners were without redress. *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.* at 61 (Sentelle, J., concurring in part, dissenting in part).

<sup>116</sup> *Id.* at 62-64 (Tatel, J., dissenting).

<sup>117</sup> *Id.* at 64 (Tatel, J., dissenting) (citing *Nuclear Energy Institute, Inc. v. Environmental Protection Agency*, 373 F.3d 1251, 1266 (D.C. Cir. 2004)).

<sup>118</sup> *Id.* at 64 (Tatel, J., dissenting) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Judge Tatel specifically examined the declarations of Professor Paul Kirshen of Tufts University, Michael MacCracken, senior scientist on global change at the Office of the U.S. Global Change Research Program, and Michael Walsh, a consultant on motor vehicle pollution

Commonwealth could suffer as a result of lack of regulation by the EPA is a “far cry from the kind of generalized harm that the Supreme Court has found inadequate to support Article III standing.”<sup>119</sup> Judge Tatel concluded that the Commonwealth of Massachusetts sufficiently demonstrated its standing and that the court’s jurisdiction was “plain”.<sup>120</sup>

In addressing the merits, Judge Tatel centered on the language of section 202(a)(1) to determine if the EPA has the authority to regulate GHG emissions.<sup>121</sup> He also discussed other sections of the CAA to examine the EPA’s discretion.<sup>122</sup> Although Judge Tatel acknowledged that Congress did not provide much regulation on the issue of global warming, he noted that they instructed the EPA to “be on the lookout for climate-related problems in evaluating risks to ‘welfare’”.<sup>123</sup> He went on to cite several CAA provisions addressing the regulation of air pollutants and establishing air quality standards.<sup>124</sup> Judge Tatel further distinguished the authority presented by the EPA to support its argument by stating that it previously took the position that it possessed the authority to regulate GHG emissions under section 202(a)(1).<sup>125</sup> Accordingly, he concluded that GHGs fell within the EPA’s authority to regulate under section 202(a)(1).<sup>126</sup>

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technology and former director of EPA’s motor vehicle pollution control efforts, to support his conclusion that Petitioners properly established standing under Article III. *Id.* at 64-66 (Tatel, J., dissenting).

<sup>119</sup> *Id.* at 65 (Tatel, J., dissenting).

<sup>120</sup> *Id.* at 67 (Tatel, J., dissenting).

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 68 (Tatel, J., dissenting).

<sup>124</sup> *Id.* at 69-71 (Tatel, J., dissenting).

<sup>125</sup> *Id.* at 72 (Tatel, J., dissenting).

<sup>126</sup> *Id.* at 73 (Tatel, J., dissenting).

## V. PROMOTING REGULATION THROUGH THE CLEAN AIR ACT

### A. Article III Standing

Judge Richard Posner observed that there is a scientific consensus that global warming is a serious problem that may be increased by dissent.<sup>127</sup> While scientists continue to debate the uncertainty regarding the effects of global climate change, litigation relating to its various aspects is beginning to emerge.<sup>128</sup> Hence, the issue of Article III standing continues to arise in many environmental cases addressing global warming.<sup>129</sup> This was the case in *Massachusetts* where the D.C. Circuit judges hearing the case made three different approaches to the issue of standing.

The Commonwealth of Massachusetts presented sufficient evidence to support its position that the EPA's decision to not regulate GHG emissions from new motor vehicles would create significant damage to its environmental policy.<sup>130</sup> It further argued that such damage varied from the other parties seeking the EPA's regulation of GHG emissions to prevent future environmental hazards.<sup>131</sup> This infringement upon Massachusetts' ability to properly enforce its own policies due to lack of federal assistance in enforcing the CAA clearly arises to a "concrete injury" as the Court's Article III jurisprudence established. Such an injury derives in connection with the lack of federal regulation as a result of the EPA's decision. The petitioners' only manner of correcting such inaction would be through an action from the federal courts. Hence, the Commonwealth of Massachusetts presented enough evidence to meet the requisite elements of Article III standing.

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<sup>127</sup> RICHARD A. POSNER, *CATASTROPHE: RISK AND RESPONSE* 55-58 (2004).

<sup>128</sup> Daniel A. Farber, *Idea: Uncertainty as a Basis for Standing*, 33 HOFSTRA L. REV. 1123, 1128 (2005).

<sup>129</sup> *Id.*; see also Mank, *supra* note 44.

<sup>130</sup> *Massachusetts*, 415 F.3d at 64-66.

<sup>131</sup> *Id.*

Professor Daniel Farber asserts that, despite uncertainties, the risk of global warming is “large enough to have real economic consequences”.<sup>132</sup> He argues that plaintiffs may still be able to establish standing even though the effects of global warming are speculative at best. Farber further contends that it is a mistake to think that standing in global warming cases “depends on proof by the plaintiffs that harmful effects will in fact occur or at least be more likely than not.”<sup>133</sup> He cites economic actors’ reliance on uncertain and low-probability events as relevant in making financial decisions.<sup>134</sup>

Farber’s arguments strongly support a new approach to examining Article III standing with respect to global warming cases. As more scientific evidence regarding climate change develops, risks of potential damage from natural disasters will remain prevalent throughout the world. Courts should not allow these risks to continue to grow by failing to address claims for regulation by avoiding the merits presented. Such action will only postpone the necessary steps to alleviate any potential damage that is predicted to affect the environment.

Under the current method of evaluating standing in environmental cases, plaintiffs would have to prove that a particular event was a product of global warming.<sup>135</sup> Such a standard applies even if a court is willing to accept scientific data presented by them.<sup>136</sup> While many federal courts continue to stand by this method of establishing standing, others are beginning to grant standing to plaintiffs on “global warming grounds”.<sup>137</sup> For instance, in *Friends of the Earth v.*

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<sup>132</sup> Farber, *supra* note 128, at 1129.

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

<sup>134</sup> *Id.*

<sup>135</sup> Choo, *supra* note 12, at 34.

<sup>136</sup> *Id.*

<sup>137</sup> Mayer, *supra* note 60, at 445 (citing *City of Los Angeles v. Nat’l Highway Traffic Safety Admin.*, 912 F.2d 778, 483 (D.C. Cir. 1990)).

*Watson*<sup>138</sup>, a federal judge granting standing for plaintiffs challenging the actions of two federal agencies that contribute to climate change by providing loan guarantees and insurance to overseas projects that result in increased GHG emissions.<sup>139</sup> Judge White reasoned that to require the plaintiffs to investigate and prove the particular effects of an agency action would force them to perform the same environmental analysis they sought the action to conduct.<sup>140</sup>

Within the past several years, natural disasters inflicted catastrophic damage upon many regions throughout the Earth. The most notable examples of such events include the tsunami that occurred around the Southeast Asia and the tragedy of Hurricane Katrina. Some claim that as the level of greenhouse gas in the atmosphere continues to increase, the disparity between standards for showing causation will likely decrease.<sup>141</sup> However, this will only occur once the courts decide to consider new standards that address the more recent controversies surrounding global warming.

The standards that many courts apply to address Article III standing do not properly explore the issues that surround many global warming disputes. Since many appellate courts are not willing to reevaluate the precedent established in *Lujan* and the subsequent decisions within their circuits, a new approach should be implemented to determining whether a plaintiff suffers a concrete injury as a result of an agency's refusal to regulate environmental hazards. Such a standard should permit courts to grant more weight to scientific evidence that supports a plaintiff's position that government regulation would bolster the efforts to prevent severe damage from the environment. Although scientific evidence would not be enough to allow a plaintiff to

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<sup>138</sup> No. C 02-4106 JSW, 2005 WL 2035596 (N.D. Cal. Aug. 23, 2005).

<sup>139</sup> *Id.* The plaintiffs initiated this action pursuant to the National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. §§ 4321-4335.

<sup>140</sup> *Id.* at \*2.

<sup>141</sup> Mayer, *supra* note 60, at 446-47.

prevail on the merits, it can be sufficient to establish a prima facie claim that can be adequately resolved through an action by the court presiding over the issue. It is imperative that courts use a broad analysis in evaluating the scope of a “concrete injury” so as to include evidence of potential damage that would arise as a result of failure to utilize statutes implemented to prevent environmental disasters. This becomes necessary when considering the complex nature of determining potential consequences in regulating global warming.

## *B. Interpreting the Clean Air Act provisions*

### *1. Examining Congress’ Intent*

The CAA clearly states that the EPA Administrator “shall by regulation prescribe...standards” to govern the emissions of air pollutants from motor vehicles.<sup>142</sup> Such language sufficiently establishes Congress’ intent for the EPA to enforce the powers granted within section 202(a)(1). In making policy decisions regarding GHG emissions, the Administrator must determine whether U.S. motor vehicles “cause, or contribute to, air pollution”.<sup>143</sup> Furthermore, while Congress provided discretion in evaluating whether global warming “may reasonably be anticipated to endanger” welfare, this does not pertain to setting policies outside of the scope of the CAA.<sup>144</sup>

The EPA concedes that motor vehicles emit GHGs in significant quantities.<sup>145</sup> Such information furthers Judge Tatel’s statement that the Administrator’s refusal to regulate GHG emissions is in violation of the CAA.<sup>146</sup> The petitioners’ scientific evidence reasonably concludes that U.S. motor vehicles pose a significant threat to global warming. Moreover, the

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<sup>142</sup> 42 U.S.C. § 7521(a)(1).

<sup>143</sup> *Id.*

<sup>144</sup> *See Ethyl Corp. v. Environmental Protection Agency*, 541 F.2d 1, 29 (D.C. Cir. 1976).

<sup>145</sup> CLIMATE REPORT, *supra* note 38, at 40.

<sup>146</sup> *Massachusetts*, 415 F.3d at 81.

EPA approved the NAS report's independent assessment of relevant scientific research on potential hazards from the effects of climate change.<sup>147</sup> At this moment, the EPA's discretionary authority under the CAA would end and the Administrator would be required to regulate GHG emissions from new motor vehicles.

Judge Tatel argues that the EPA is free to petition Congress to amend the CAA to provide them with discretionary authority to regulate GHG emissions after making an endangerment finding.<sup>148</sup> While such an action is permissible, the EPA must obey the provisions of the CAA as they currently stand.<sup>149</sup> The refusal to regulate GHG emissions on the basis of policy reasons beyond the statutory standard of section 202(a)(1) only stretches the EPA's lawful discretion. Furthermore, such actions avoid Congress' "express directive" as provided under the CAA.<sup>150</sup> Accordingly, the EPA failed to properly interpret section 202(a)(1) with respect to regulating GHG emissions from new motor vehicles.

## 2. *The D.C. Circuit's Mischaracterization of the Clean Air Act*

Because agencies are held accountable to the public through the Executive Branch, helping an agency reach its preferred outcome in a way that bypasses political repercussions insulates the Executive and diminishes public accountability.<sup>151</sup> Judge Randolph never explicitly stated that he interpreted the EPA's petition denial as a finding of no endangerment.<sup>152</sup> Instead, he refers to its decision by using terms such as "refusal to regulate", "decision to forego

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<sup>147</sup> Control of Emissions, *supra* note 1, at 52,930.

<sup>148</sup> *Massachusetts*, 415 F.3d at 81.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Recent Case, *Massachusetts v. Environmental Protection Agency*, 415 F.3d 50 (D.C. Cir. 2005), 119 HARV. L. REV. 2620, 2627 (2006).

<sup>152</sup> *Massachusetts*, 415 F.3d at 57.

rulemaking”, and “regulatory forbearance”.<sup>153</sup> These statements would presume that the EPA conducted a thorough study on the effects of U.S. motor vehicles with respect to climate change when, in fact, such actions did not occur.

If the EPA determined that GHGs met the statutory standard of section 202(a)(1), one would presume that Judge Randolph to require the EPA to regulate them.<sup>154</sup> But because he proceeded to find for the EPA, his approach was to treat the agency as making the requisite finding of no endangerment.<sup>155</sup> To reach this conclusion would be to mischaracterize the CAA with respect to its mandatory authority delegated under section 202(a)(1). Furthermore, this reasoning would allow agencies to escape public accountability in their decision to enforce policies established by the political branches.

Judge Randolph’s opinion assumes to establish a finding that the EPA did not present before the court. This ruling serves to extend the Administrator’s discretion provided by Congress. Furthermore, Judge Randolph’s decision considers policies unrelated to the statutory standard applicable under the CAA.<sup>156</sup> Moreover, it grants the EPA the authority to circumvent the mandates of the CAA any time it thinks the statute’s approach unwise.<sup>157</sup> Such judicial interpretation could severely restrict the ability of Congress to effectively establish laws for the Executive Branch to enforce.

The D.C. Circuit’s opinion stands to weaken the CAA and its ability to effectively protect the public welfare from environmental hazards. The decision presented an opportunity to hold the EPA accountable to the public by making a threshold judgment on the impact of GHG

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<sup>153</sup> *Id.* at 57-58.

<sup>154</sup> Recent Case, *supra* note 151, at 2626.

<sup>155</sup> *Massachusetts*, 415 F.3d at 57.

<sup>156</sup> Recent Case, *supra* note 151, at 2627.

<sup>157</sup> *Id.*

emissions from new motor vehicles. Instead, it established a policy for the EPA to avoid the CAA's mandatory regulation duties while preserving its discretionary authority. If federal courts continue with this approach, several policies established by Congress will be deemed inefficient in their respective implementation.

### *C. The Likely Outcome of Massachusetts v. EPA*

There are some signs that the White House and Capitol Hill may be starting to give more attention to the implications of climate change.<sup>158</sup> For instance, the Senate adopted a nonbinding resolution calling for a national mandatory program to “slow, stop and reverse” emissions of GHGs.<sup>159</sup> Furthermore, the Bush administration is pushing for more voluntary energy conservation and reliance on alternative fuels.<sup>160</sup> Such actions will likely prompt the Court to move in the direction of GHG regulation under the CAA.

Since its decision in *Lujan*, the Court established a broader test in determining whether a plaintiff possesses proper standing under Article III.<sup>161</sup> In *Akins*, Justice Breyer implied that Congress may grant standing to all citizens concretely harmed by a particular injury even if every other citizen is similarly adversely affected.<sup>162</sup> Such reasoning shifted the Court's Article III jurisprudence away from Justice Scalia's philosophy as stated in *Lujan*. Moreover, federal courts seem to be moving towards a trend of establishing standing with respect to the CAA and other statutes in similar environmental cases.<sup>163</sup> Given these recent developments, the Court should find that the petitioners claim meets the three requirements regarding Article III standing.

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<sup>158</sup> Choo, *supra* note 12, at 35.

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

<sup>161</sup> *Federal Election Commissions v. Akins*, 524 U.S. 11 (1998).

<sup>162</sup> *Id.* at 24-25.

<sup>163</sup> *See generally* *Covington v. Jefferson County*, 358 F.3d 626 (9th Cir. 2004).

Due to the significance placed upon policies addressing global warming, those supporting wide agency discretion contend that reliance on scientific data is insufficient to impact the EPA's policy surrounding regulating GHG emissions. However, if the Court conducts the proper test, the EPA should be required to enforce GHG policies as mandated under the CAA. Recent scientific discoveries support the impact that GHG regulations have towards assisting state governments in enforcing their respective policies within their territories. Moreover, there is nothing in the CAA that permits the EPA to exercise discretion once evidence of an endangerment finding is presented. Such evidence and growing public concern with respect to environmental hazards shows that agency discretion should not be used to limit the ability to enforce statutes as Congress intended.

## VI. CONCLUSION

The history of climate change policy evidences the contention that global warming cases present different controversies that do not appear in most Article III cases. Because of this, the Supreme Court should examine global warming cases by applying a broader test to determine if the petitioners lack standing under Article III. In the case of *Massachusetts v. Environmental Protection Agency*, the Court should not overlook such factors when confronting climate change policy.

States and their citizens depend on the Executive Branch to carry out the policies established by Congress for the benefit of the public. Yet, to permit federal agencies to exercise discretion in areas where Congress did not provide such action only hinders the ability to enforce federal statutes. The Supreme Court can prevent such actions by upholding the mandatory authority granted to the EPA under section 202(a)(1) of the CAA. Such a move will serve to

establish a new direction in the development of global warming policy for the benefit of the public.