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A GREENHOUSE GAS CHAIN REACTION: THE D.C. CIRCUIT
WARMS UP THE EPA'S REGULATORY AUTHORITY
IN *COALITION FOR RESPONSIBLE
REGULATION V. EPA*

I. INTRODUCTION

Climate change is one of the greatest challenges of our time. As leaders of the world's major economies, both developed and developing, we intend to respond vigorously to this challenge, being convinced that climate change poses a clear danger requiring an extraordinary global response . . . [and] that moving to a low-carbon economy is an opportunity to promote continued economic growth and sustainable development¹

At the First Leaders Meeting of the Major Economies Forum on Energy and Climate in 2009, the world's economic leaders formally declared the global significance of climate change and the importance of developing low-carbon growth plans.² This declaration affirmed the principles enumerated in the United Nations Framework Convention on Climate Change (UNFCCC), an international treaty aiming to limit average global temperature increases resulting from human activity.³ The treaty and other initiatives re-

1. *Declaration of the Leaders the Major Economies Forum on Energy and Climate*, MAJOR ECONOMIES FORUM ON ENERGY AND CLIMATE (July 9, 2009), <http://www.major-economiesforum.org/past-meetings/the-first-leaders-meeting.html> (recognizing global importance of climate change dangers and pledging to undertake mitigation and adaptation policies). The Declaration was issued at the first leaders meeting of the Major Economies Forum on Energy and Climate in L'Aquila, Italy. *Id.* Leaders from the world's foremost economic nations convened at this meeting and joined the Declaration, including heads of state from "Australia, Brazil, Canada, China, the European Union, France, Germany, India, Indonesia, Italy, Japan, Korea, Mexico, Russia, South Africa, the United Kingdom, and the United States." *See id.*

2. *Id.* (discussing climate change challenge and detailing responsibilities and general measures to be undertaken).

3. *Background on the UNFCCC: The international response to climate change*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/items/6031.php (last visited May 7, 2013) (providing background information on UNFCCC international treaty and establishing timeline of international climate change response); *see also First Steps to a Safer Future: Introducing The United Nations Framework Convention on Climate Change*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/convention/items/6036.php (last visited May 7, 2013) (summarizing UNFCCC initiative). The UNFCCC was drafted in 1992 and went into effect in 1994, with 195 countries ratifying the treaty as of 2012. *Id.* The treaty aims to

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flect a growing international commitment to respond to climate change and other global warming issues, issues that may be “[among] the most controversial scientific and political issues of our time.”⁴ The UNFCCC and similar initiatives seek to address global warming by stabilizing emissions of harmful greenhouse gas pollutants, such as carbon dioxide, that contribute to climate change.⁵

The United States government is familiar with the issue of harmful air pollution, and Congress addressed these concerns by passing the Clean Air Act (CAA) in 1963.⁶ Congress amended the CAA several times to mandate the Environmental Protection Agency (EPA) to enact regulatory controls for mobile and stationary sources and to include specific provisions regarding issues such as acid rain and ozone depletion.⁷

In 2007, the United States Supreme Court addressed the issue of whether the CAA allowed for regulation of greenhouse gases in *Massachusetts v. EPA*.⁸ In *Massachusetts*, the Court concluded that greenhouse gases “unambiguous[ly]” may be regulated as an air pollutant under the CAA.⁹ The Court held that the EPA has a “statutory obligation” to regulate harmful greenhouse gases found to be

prevent “dangerous” human interference with the climate system by implementing cooperative efforts and progressively enacting binding emissions reducing targets.
Id.

4. Jay M. Zittler, *Liability of Corporations for Climate Change and Weather Conditions*, 46 A.L.R. 6th 345 Art. I § 2 (2009) (citing Morgan McCue Sport, *An Inconvenient Suit: California v. General Motors Corporation and a Look at Whether Global Warming Constitutes an Actionable Public Nuisance or a Nonjusticiable Political Question*, 38 CUMB. L. REV. 583 (2007)) (discussing importance of climate change and weather condition issues); see also David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business as Usual?*, 64 FLA. L. REV. 15, 17 (2012) (identifying maxim of climate change as central policy issue).

5. See Markell & Ruhl, *supra* note 4 (describing legal solutions explored to address global warming); *First Steps to a Safer Future: Introducing The United Nations Framework Convention on Climate Change*, *supra* note 3 (explaining Convention’s creation and ultimate goal of mitigating human contributions to climate change).

6. See Clean Air Act, 42 U.S.C. §§ 7401-7671(q) (stating CAA statutory provisions).

7. See *id.* at § 7401 (noting Congress’ findings and purpose); *Overview – The Clean Air Act Amendments of 1990*, EPA, http://epa.gov/oar/caa/caaa_overview.html (last updated Dec. 19, 2008) (providing brief overview of 1990 CAA amendments).

8. *Massachusetts v. EPA*, 549 U.S. 497, 528-35 (2007) (analyzing whether greenhouse gases are subject to EPA regulation under CAA). For a discussion of the Supreme Court’s decision in *Massachusetts*, see *infra* notes 75-80 and accompanying text.

9. *Massachusetts*, 549 U.S. at 529 (holding greenhouse gases are subject to EPA regulation under CAA if found to be pollutants reasonably anticipated to endanger public health or welfare).

air pollutants under the statute, concluding that the EPA “can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”¹⁰ The *Massachusetts* holding opened the door for the EPA to determine that greenhouse gases are air pollutants that endanger human health, and it was not long before a federal court had the opportunity to affirm the Agency’s conclusion.¹¹

In *Coalition for Responsible Regulation, Inc. v. EPA* (*Coalition*),¹² the Obama Administration and the EPA won a major victory when the United States Court of Appeals for the District of Columbia unanimously upheld EPA rules regulating greenhouse gas emissions pursuant to the CAA.¹³ In *Coalition*, the court denied state and industry group petitions challenging EPA rules regulating motor vehicle and stationary source greenhouse gas emissions.¹⁴ The court found the EPA’s regulations consistent with the CAA and the Supreme Court’s guidance in *Massachusetts*, thus paving the way for government regulation of greenhouse gases.¹⁵ Furthermore, the appellate court held that the states, industry groups, and other opponents lacked standing to challenge the EPA’s Timing and Tailoring Rules which delineate the greenhouse gas rules’ phase-in because the petitioners were not regulated by these two rules specifically, but rather by “automatic operation of the statute.”¹⁶ Various

10. *Id.* at 533-34 (detailing EPA’s regulatory duty under CAA); *see also* *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012) (*Coalition*) (summarizing Court’s holding in *Massachusetts*).

11. *See Coalition*, 684 F.3d at 113 (affirming EPA’s regulatory actions following *Massachusetts*).

12. *Id.* at 148-49 (upholding EPA greenhouse gas regulations).

13. *See* Ann Carlson, *DC Circuit’s Unanimous Decision to Uphold Greenhouse Gas Rules Across the Board Major Victory for EPA*, LEGAL PLANET (June 26, 2012), <http://legalplanet.wordpress.com/2012/06/26/dc-circuits-unanimous-decision-to-uphold-greenhouse-gas-rules-across-the-board-major-victory-for-epa/> (discussing *Coalition* holding’s effects); *see also* *U.S. Court Upholds EPA’s Greenhouse Gas Rules, Coalition for Responsible Regulation v. EPA*, 32 No. 25 WESTLAW J. ENVTL. 1, 1 (July 3, 2012) [hereinafter *Court Upholds EPA’s Gas Rules*] (characterizing *Coalition* holding as Obama administration victory).

14. *Coalition*, 684 F.3d at 114-15 (upholding EPA’s greenhouse gas rules and chronicling rules’ promulgation). The motor vehicle and stationary source rules took effect on January 2, 2011. *Id.* at 115.

15. *See id.* at 117 (upholding of EPA greenhouse gas regulations).

16. *Id.* at 113-14, 146 (holding petitioners did not have standing to challenge Timing and Tailoring Rules); *see also* Tom Schoenberg, *EPA Greenhouse-Gas Rules Upheld by U.S. Appeals Court*, BLOOMBERG (June 26, 2012, 6:23 PM), <http://www.bloomberg.com/news/2012-06-26/epa-greenhouse-gas-rules-upheld-by-u-s-appeals-court.html> (discussing *Coalition* holding). Under the D.C. Circuit’s ruling,

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opponents and critics classified the regulations at issue as the EPA's broadest regulatory scheme to date.¹⁷

This Note examines the D.C. Circuit's decision in *Coalition*.¹⁸ This case appeared to be an easy decision for the D.C. Circuit because the Supreme Court's decision in *Massachusetts* barred most of the challenges to the EPA's greenhouse gas rules.¹⁹ Thus, the court effectively upheld the rules as a chain reaction triggered by the Supreme Court's prior ruling, and it avoided consideration of the most vulnerable issue by dismissing the Tailoring Rule challenges for lack of standing.²⁰ Section II of this Note recaps the facts pertinent to the court's decision in *Coalition*.²¹ Section III provides background information regarding greenhouse gases, the CAA, the Supreme Court's decision in *Massachusetts*, and the EPA's ensuing greenhouse gas regulations.²² Section IV presents the reasoning the D.C. Circuit employed in *Coalition*.²³ Section V evaluates the court's rationale in reaching its decision.²⁴ Finally, Section VI discusses the potential impact of *Coalition* on EPA authority and the future of greenhouse gas regulation in the United States.²⁵

"opponents don't have the legal right to challenge rules determining when states and industries must comply with regulations curtailing emissions . . ." *Id.*

17. See Michael S. Greve, *Reckless Endangerment: Global Warming in the Courts*, ONLINE LIBRARY OF LAW AND LIBERTY (Oct. 23, 2012), <http://libertylawsite.org/2012/10/23/reckless-endangerment-global-warming-in-the-courts/> (noting EPA's greenhouse gas regulations is its largest regulatory scheme ever); see also Chamber of Commerce of the United States of America's Combined Pet. for Panel Reh'g or for Reh'g En Banc at 5-6 Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (D.C. Cir. filed Aug. 10, 2012) (No. 09-1322), available at http://www.epa.gov/climatechange/Downloads/endangerment/GHG_Litigation_-_Chambers_rehearing_petition.pdf (documenting petitioners' reasons for requesting rehearing). Petitioners classify the EPA's greenhouse gas regulations at issue as "the most sweeping regulatory program in EPA's history." *Id.* at 6.

18. For an analysis of the U.S. Court of Appeals for the D.C. Circuit's decision in *Coalition*, see *infra* notes 26-187 and accompanying text.

19. For a critical analysis of the D.C. Circuit's opinion, see *infra* notes 149-187 and accompanying text.

20. For a critical analysis of the D.C. Circuit's opinion, see *infra* notes 149-187 and accompanying text.

21. For a discussion of the facts underlying *Coalition*, see *infra* notes 26-62 and accompanying text.

22. For a discussion of greenhouse gas developments and their relation to climate change, as well as legislative, Supreme Court, and EPA efforts to regulate greenhouse gases, see *infra* notes 63-95 and accompanying text.

23. For a discussion of the court's reasoning in *Coalition*, see *infra* notes 96-148 and accompanying text.

24. For a critical analysis of the D.C. Circuit's opinion in *Coalition*, see *infra* notes 149-187 and accompanying text.

25. For an evaluation of the potential impact of the court's holding in *Coalition*, see *infra* notes 188-220 and accompanying text.

II. FACTS

In *Coalition*, several states and industry groups petitioned for review of the EPA's rules regulating greenhouse gas emissions under the CAA.²⁶ These groups argued the EPA's rules misinterpreted the CAA and were otherwise arbitrary and capricious.²⁷ Following the Supreme Court's decision in *Massachusetts*, the EPA made four important regulatory decisions pursuant to its perceived authority under the CAA.²⁸

First, the EPA followed the Court's directive in *Massachusetts* and issued an Endangerment Finding, which concluded, "greenhouse gases in the atmosphere may reasonably be anticipated both to endanger public health and to endanger public welfare."²⁹ The Finding went on to note that greenhouse gas emissions from motor vehicles "contribute to the total greenhouse gas air pollution, and thus to the climate change problem, which is reasonably anticipated to endanger public health and welfare."³⁰ The Endangerment Finding defined this climate changing air pollutant as an "aggregate group of the same six long-lived and directly-emitted greenhouse gases."³¹

Second, as a result of these findings, the EPA promulgated the Tailpipe Rule based on the CAA's requirement that the EPA establish motor vehicle emission standards for "any air pollutant . . . which may reasonably be anticipated to endanger public health or

26. *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 113 (D.C. Cir. 2012) (explaining case background).

27. *Id.* at 113, 116 (noting petitioners' arguments).

28. *See id.* at 114-16 (describing EPA regulations after *Massachusetts*). The D.C. Circuit noted, "*Massachusetts v. EPA* spurred a cascading series of greenhouse gas-related rules and regulations." *Id.* at 114. For a brief discussion of the Supreme Court's holding in *Massachusetts*, see *infra* notes 75-80 and accompanying text.

29. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Env'tl. Prot. Agency Dec. 15, 2009) (to be codified at 40 C.F.R. pt. 1) [hereinafter Endangerment Finding] (presenting EPA's findings that greenhouse gas emissions threatened public health and safety). The EPA found that emissions of six well-mixed greenhouse gases in the atmosphere threaten the public health and welfare. *Id.*; see also *Coalition*, 684 F.3d at 114-15 (discussing EPA's Endangerment Finding). According to the D.C. Circuit, the EPA's Endangerment Finding was based on "a considerable body of scientific evidence." *Coalition*, 684 F.3d at 115.

30. *See* Endangerment Finding, 74 Fed. Reg. at 66,499 (concluding greenhouse gas emissions from motor vehicles endanger public health and welfare).

31. *Id.* at 66,536-37 (defining components of greenhouse gas). The six gases included in EPA's definition were carbon dioxide, methane, nitrous oxide, hydrofluorocarbons, perfluorocarbons, and sulfur hexafluoride. *Id.*

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welfare.”³² The Tailpipe Rule went into effect on January 2, 2011, designating greenhouse gas emission standards for cars and light-duty trucks.³³ The EPA’s regulation of motor vehicle greenhouse gas emissions “automatically triggered regulation of stationary greenhouse gas emitters under two separate sections of [the CAA].”³⁴ This trigger effect emanated from the EPA’s interpretation that the CAA’s Prevention of Significant Deterioration of Air Quality (PSD) program and Title V provision require permits for any air pollutant regulated under another provision of the CAA.³⁵ According to the EPA’s interpretation, regulating greenhouse gases under the mobile source program automatically mandated regulation of greenhouse gases under the PSD and Title V stationary programs.³⁶ The EPA therefore set out to regulate stationary source emissions as the next phase of its greenhouse gas ruling progression.³⁷

Third, the EPA advanced the Timing Rule, which specified that the PSD and Title V permit requirements are triggered on the effective date of the relevant regulation.³⁸ The Tailpipe Rule’s effective date, January 2, 2011, thus became the date on which the

32. 42 U.S.C. § 7521(a)(1) (2006); *see also Coalition*, 684 F.3d at 115 (detailing EPA’s greenhouse gas regulation process).

33. Light Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards; Final Rule, 75 Fed. Reg. 25,324, 25,324 (Env’tl. Prot. Agency May 7, 2010) (to be codified at 40 C.F.R. pt. 85, 86, 600) [hereinafter Tailpipe Rule] (indicating effective date of Tailpipe Rule regulating motor vehicle greenhouse gas emissions). The Tailpipe Rule standards were issued in conjunction with the National Highway Traffic Safety Administration’s fuel economy standards. *Id.* at 25,326.

34. *Coalition*, 684 F.3d at 115 (explaining Tailpipe Rule triggered stationary source regulations).

35. *Id.* (discussing EPA’s longstanding interpretation of CAA regulatory requirements). As stated by the court, the PSD program “requires state-issued construction permits for certain types of stationary sources – for example, iron and steel mill plants – if they have the potential to emit over 100 tons per year (tpy) of ‘any air pollutant.’” *Id.* (citing 42 U.S.C. §§ 7475, 7479(1) (2007)). Other stationary source emitters “are subject to PSD permitting if they have the potential to emit over 250 tpy of ‘any air pollutant.’” *Id.* (citing 42 U.S.C. § 7479(1) (2007)). Title V of the CAA requires operating permits for stationary sources emitting at least 100 tpy of “any air pollutant.” *Id.* (citing 42 U.S.C. § 7602(j) (2007)). The EPA interprets “any air pollutant” to mean any air pollutants regulated under the CAA. *Id.* at 115.

36. *Id.* (explaining EPA’s interpretation of CAA requirements).

37. *See id.* (detailing EPA’s regulatory process).

38. *See Reconsideration of Interpretation of Regulations That Determine Pollutants Covered by Clean Air Act Permitting Programs*, 75 Fed. Reg. 17,004, 17,004 (Env’tl. Prot. Agency Apr. 2, 2010) (to be codified at 40 C.F.R. pt. 50, 51, 70, 71) [hereinafter Timing Rule] (stating Timing Rule); *see also Coalition*, 684 F.3d at 115 (explaining EPA’s Timing Rule).

PSD and Title V permit provisions became applicable to stationary emitters of greenhouse gases.³⁹

Finally, the EPA created the Tailoring Rule, a phase-in program reflecting the Agency's recognition of the practical implications of regulating stationary source greenhouse gas emissions.⁴⁰ As millions of sources would exceed the CAA's 100/250 tons per year (tpy) threshold and thus, per the Timing Rule, require permits immediately upon the Tailpipe Rule's effective date, industry and state permitting authorities would have to confront large and immediate administrative cost increases to handle the new permits.⁴¹ The EPA admitted these severe impacts would produce "absurd results," and found that under the absurd results doctrine, Congress could not have intended for the PSD and Title V threshold levels and timing requirements to apply literally on the effective date of the Tailpipe Rule.⁴² The EPA thus enacted the Tailoring Rule as a

39. *Coalition*, 684 F.3d at 115 (explaining Timing Rule).

40. See Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514, 31,514 (Env'tl. Prot. Agency June 3, 2010) (to be codified at 40 C.F.R. pt. 51, 52, 70, 71) [hereinafter Tailoring Rule] (stating Tailoring Rule); see also *Coalition*, 684 F.3d at 115 (describing EPA's promulgation of Tailoring Rule).

41. *Coalition*, 684 F.3d at 115-116 (explaining Tailoring Rule). For a discussion of the statutory thresholds, see *supra* note 35 and accompanying text.

42. See Tailoring Rule, 75 Fed. Reg. at 31,514 (tailoring to whom stationary source greenhouse gas emission regulations apply). In the Tailoring Rule, the EPA explained that, due to the Tailpipe Rule, beginning on January 2, 2011, the PSD and Title V licensing requirements would apply to all stationary source emitters of more than 100 or 250 tpy of greenhouse gases. *Id.* at 31,517. This would mark the first imposition of control requirements on carbon dioxide and other greenhouse gases, which would lead to heavy burdens on small stationary sources and state or local permitting authorities. *Id.* The EPA determined that these results were "so severe that they bring the judicial doctrines of 'absurd results,' 'administrative necessity,' and 'one-step-at-a-time' into the Chevron two-step analytical framework for statutes administered by agencies." *Id.* The Agency explained that, when invoking the absurd results doctrine, it did not have to consider the literal meaning of the statutory language when determining congressional intent under the first step of the *Chevron* framework because "the literal meaning of statutory requirements should not be considered to indicate congressional intent if that literal meaning would produce a result that is senseless or that is otherwise inconsistent with — and especially one that undermines — underlying congressional purpose." *Id.* The court further explained:

In these cases, if congressional intent for how the requirements apply to the question at hand is clear, the agency should implement the statutory requirements not in accordance with their literal meaning, but rather in a manner that most closely effectuates congressional intent. If congressional intent is not clear, then an agency may select an interpretation that is reasonable under the statute.

Tailoring Rule, 75 Fed. Reg. at 31,517. The EPA considered cost and permitting burdens, emissions data, and extensive public comments and determined "the costs to sources and administrative burdens to permitting authorities that would result from application of the PSD and title V programs for GHG emissions at the

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deviation from the CAA's 100/250 tpy threshold to "reliev[e] overwhelming permitting burdens that would, in the absence of this rule, fall on permitting authorities and sources."⁴³ Instead of being subject to the CAA's designated emission thresholds, stationary sources emitting greenhouse gases would initially be subject to PSD and Title V permit requirements only if the sources exceeded 75,000 or 100,000 tpy of carbon dioxide equivalents and emitted over 100/250 tpy of actual pollutants.⁴⁴

Thirty-five petitioners filed more than eighty separate claims against the EPA's greenhouse gas regulations, and the D.C. Circuit's opinion consolidated the challenges for each rule, including

statutory levels as of January 2, 2011 should be considered 'absurd results.'" *Id.* Applying the absurd results doctrine, the EPA decided that Congress "could not have intended that the PSD or Title V applicability provisions — in particular, the threshold levels and timing requirements — apply literally to GHG sources as of that date." *Id.* The EPA therefore concluded that the Tailoring Rule was necessary. *Id.*; see also *Am. Water Works Ass'n v. EPA*, 40 F.3d 1266, 1271 (D.C. Cir. 1994) (explaining absurd results doctrine). In *Am. Water Works Ass'n*, the D.C. Circuit stated that under the absurd results doctrine, "where a literal reading of a statutory term would lead to absurd results, the term simply 'has no plain meaning . . . and is the proper subject of construction by EPA and the courts.'" *Am. Water Works*, 40 F.3d at 1271 (quoting *Chem. Mfg. Ass'n v. Natural Res. Def. Council, Inc.*, 470 U.S. 116, 126 (1995)); see also *Envtl. Def. Fund, Inc. v. EPA*, 636 F.2d 1267, 1283 (D.C. Cir. 1980) (stating administrative necessity doctrine rule). Under the administrative necessity doctrine, "an agency may depart from the requirements of a regulatory statute . . . to cope with the administrative impossibility of applying the commands of the substantive statute." *Id.* Regarding the one-step-at-a-time doctrine, the Supreme Court stated, "[a]gencies, like legislatures, do not generally resolve massive problems in one fell [regulatory] swoop." *Massachusetts v. EPA*, 549 U.S. 497, 524 (2007) (applying the one-step-at-a-time doctrine).

43. *Coalition*, 684 F.3d at 116 (quoting Tailoring Rule, 75 Fed. Reg. at 31,516) (discussing EPA's decision to institute Tailoring Rule).

44. *Id.* (detailing Tailoring Rule's emission thresholds). In addition to the absurd results doctrine, the EPA relied on the "administrative necessity" and "one-step-at-a-time" doctrines as applied to the *Chevron* framework for determining congressional intent of statutes applied by agencies. Tailoring Rule, 75 Fed. Reg. at 31,517 (indicating doctrines used by EPA in decision-making process). As the EPA stated in the Tailoring Rule, the administrative necessity doctrine allows agencies construing the first step of the *Chevron* framework to presume that Congress intended "that its statutory directives to agencies be administrable, and not to have intended to have written statutory requirements that are impossible to administer." *Id.* Thus, the EPA claimed the doctrine allowed it to depart from statutory requirements as far as necessary to allow the statute to be administrable. *Id.* Further, the EPA's Tailoring Rule explained that the one-step-at-a-time doctrine applied, allowing the agency to presume that Congress "intended to allow the agency to administer the statutory requirements on a step-by-step basis, as appropriate, when the agency remains on track to implement the requirements as a whole." *Id.* The EPA explained its conclusion that the absurd results, administrative necessity, and one-step-at-a-time doctrines supported the Tailoring Rule separately and collectively, as they "are intertwined and support [the EPA's] action in a comprehensive manner." *Id.* For further discussion of the absurd results doctrine, see *supra* note 42 and accompanying text.

the Endangerment Finding, the Tailpipe Rule, the Timing Rule, and the Tailoring Rule.⁴⁵ In the aggregate, the various claims raised six challenges to the Endangerment Finding.⁴⁶ First, the petitioners argued the EPA incorrectly interpreted CAA Section 202(a)(1) to restrict endangerment findings to science-based judgments and therefore the EPA's improper exclusion of policy considerations rendered its finding arbitrary and capricious.⁴⁷ The petitioners maintained that relevant policy considerations included "the benefits of activities that require greenhouse gas emissions, the effectiveness of emissions regulation triggered by the Endangerment Finding, and the potential for societal adaptation to or mitigation of climate change."⁴⁸

Second, the petitioners questioned the scientific evidence relied upon in the Endangerment Finding by challenging both the type of evidence used and the significant scientific uncertainty of the finding.⁴⁹ The petitioners claimed the EPA relied too heavily on peer-reviewed assessments of climate change research rather than forming its own conclusion.⁵⁰ Third, state petitioners such as Texas argued the Endangerment Finding was also arbitrary and capricious because the EPA did not "'define,' 'measure' or 'quantify'" the climate change effects of greenhouse gas emissions.⁵¹ The petitioners contended the failure to specify the threshold at which climate change levels endanger public health and welfare made the Endangerment Finding a mere "'subjective conviction.'"⁵²

45. Gregory E. Wannier, *EPA's Impending Greenhouse Gas Regulations: Digging through the Morass of Litigation*, COLUMBIA LAW SCHOOL CENTER FOR CLIMATE CHANGE, 6 (Nov. 10, 2010), https://www.law.columbia.edu/null/download?exclusive=filemgr.download&file_id=542157 (describing challenges to EPA's regulation of greenhouse gases and breaking down rules and arguments involved); see also *Coalition*, 684 F.3d at 116 (describing petitioners' claims).

46. See *Coalition*, 684 F.3d at 117 (documenting petitioners' challenges to EPA's Endangerment Finding).

47. *Id.* (examining petitioners' challenges to EPA's basis for Endangerment Finding conclusions).

48. *Id.* (addressing petitioners' challenge that certain information should have been considered in EPA's Endangerment Finding).

49. *Id.* at 117, 119 (identifying petitioners' second challenge to EPA's Endangerment Finding claiming inadequacy of scientific evidence).

50. *Id.* at 119 (examining petitioners' challenges to EPA's Endangerment Finding). The EPA evaluated climate change assessments issued by the Intergovernmental Panel on Climate Change, the U.S. Global Climate Research Program, and the National Research Council. *Id.*

51. *Coalition*, 684 F.3d at 117, 122 (examining petitioners' third challenge, that EPA's Endangerment Finding was arbitrary and capricious).

52. *Id.* at 122 (identifying specific claims made by state petitioners protesting EPA's Endangerment Finding).

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Fourth, the petitioners challenged the EPA's definition of the greenhouse gas air pollutant as an aggregate of six gases.⁵³ The petitioners asserted that because two gases included in the EPA's aggregate definition of "greenhouse gas" are not generally emitted by motor vehicles, including the gasses rendered the definition arbitrary and capricious.⁵⁴ Fifth, petitioners argued the EPA's failure to submit the Endangerment Finding to its Science Advisory Board for review violated the EPA's statutory mandate under the CAA.⁵⁵ Finally, the state petitioners argued the EPA erred in rejecting petitions requesting reconsideration of the Endangerment Finding because those petitions established that the Finding was not based on the best scientific evidence available.⁵⁶

In addition to the six challenges against the EPA's Endangerment Finding, the petitioners also disputed several aspects of the EPA's three subsequent greenhouse gas rules.⁵⁷ The petitioners argued the Tailpipe Rule was based on an improper interpretation of the CAA and was arbitrary and capricious for failing to consider the implications and costs of the Rule's triggering of stationary source regulations.⁵⁸ The claims further alleged that the Timing Rule and Tailoring Rule were also based on improper interpretations of the CAA and that these rules explicitly violated the statutory language by manipulating the emission threshold levels subject to regulation.⁵⁹

The various states and industry groups asserted these challenges in their petitions, arguing the EPA's rules were arbitrary and

53. *Id.* at 117, 123 (identifying petitioners' fourth challenge to EPA's Endangerment Finding). For discussion of the EPA's definition of air pollutants subject to regulation, see *supra* note 31 and accompanying text.

54. *Coalition*, 684 F.3d at 123 (explaining petitioners' fourth challenge, that including perfluorocarbons (PFCs) and sulfur hexafluoride (SF) in Endangerment Finding's definition of greenhouse gas made Endangerment Finding arbitrary and capricious).

55. *Id.* at 124 (describing petitioners' fifth challenge to EPA's Endangerment Finding). This mandate requires the EPA to "'make available' to the [Science Advisory Board] 'any proposed criteria document, standard, limitation, or regulation under the Clean Air Act' at the time it provides the same 'to any other Federal agency for formal review and comment.'" *Id.* (citing 42 U.S.C. § 4365(c)(1)).

56. *Coalition*, 684 F.3d at 117, 124 (examining petitioners' final challenge to EPA's Endangerment Finding, which criticized EPA's denial of all petitions for reconsideration).

57. *Id.* at 126-48 (analyzing petitioners' challenges to EPA's greenhouse gas regulations).

58. *Id.* at 126 (stating state and industry petitioners' claims regarding EPA's Tailpipe Rule). The petitioners did not take issue with the substance of the Tailpipe Rule. *Id.*

59. *Id.* at 129-48 (analyzing petitioners' challenges to EPA's interpretation of CAA provisions applicable to Tailoring and Timing Rules).

capricious and were rooted in incorrect constructions of the CAA.⁶⁰ The Court of Appeals for the District of Columbia upheld the EPA's regulations by finding: (1) the Endangerment Finding and the Tailpipe Rule were neither arbitrary nor capricious; (2) the petitioners lacked standing to challenge the Timing and Tailoring Rules; (3) the remaining petitions should be denied; and (4) the EPA's interpretation of the CAA provisions at issue was "unambiguously correct."⁶¹ This decision strongly validated the EPA's authority to regulate greenhouse gas emissions under the CAA.⁶²

III. BACKGROUND

A. Greenhouse Gas Effects on Climate Change

Concern for greenhouse gas emissions gained momentum in 2007 when the Intergovernmental Panel on Climate Change released a report showing that human activities dramatically contribute to climate change and that existing efforts to reach safe greenhouse gas levels were insufficient.⁶³ The report explained that greenhouse gases concentrated in the Earth's atmosphere are "directly linked to the average global temperature on Earth; the concentration has been rising steadily . . . since the time of the Industrial Revolution; and the most abundant greenhouse gas, carbon dioxide, is the product of burning fossil fuels."⁶⁴ Without action, the Earth's average surface temperature is expected to rise between 1.8 and 4 degrees Celsius by 2100, compared to a rise of only 0.74 degrees since the late 1800s.⁶⁵ Although this projected increase may seem insignificant, small changes in temperature "can translate to large and potentially dangerous shifts in climate and weather."⁶⁶

60. *Id.* at 113 (stating petitioners' cause of action).

61. *Coalition*, 684 F.3d at 113-14 (noting court's holdings).

62. *See id.* at 114 (upholding EPA's greenhouse gas regulations).

63. *See Feeling the Heat: Climate Science and the Basis of the Convention*, UNITED NATIONS FRAMEWORK CONVENTION ON CLIMATE CHANGE, http://unfccc.int/essential_background/the_science/items/6064.php (last visited May 7, 2013) [hereinafter *Feeling the Heat*] (providing climate change background, history, and data).

64. *Id.* (detailing links between greenhouse gases and climate change).

65. *Id.* (providing average temperature data and demonstrating sharp increase in global warming). The Earth's temperature is expected to rise between 3.24 and 7.2 degrees Fahrenheit by 2100, compared to a mere 1.332 degree rise since the late 1800s. *Id.*

66. *Climate Change: Basic Information*, EPA, http://www.epa.gov/climate_change/basics/ (last updated June 14, 2012) [hereinafter *Climate Change Basics*] (providing background regarding climate change issues).

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Many scientists believe that continued climate change will produce “a host of deleterious consequences, including drought, increasingly severe weather events, and rising sea levels.”⁶⁷ Experts project worldwide climate change effects will include decreased agricultural yields, the spread of certain diseases to new areas of the world, water stress, more extreme and intense weather-related disasters, and the extinction of many plant and animal species.⁶⁸ Climate change poses grave consequences and is largely attributable to human activities; thus, combating climate change has become a major focal point of emerging environmental policy.⁶⁹

B. The CAA and *Massachusetts*

Enacted in 1963, the CAA “defines EPA’s responsibilities for protecting and improving the nation’s air quality and the stratospheric ozone layer.”⁷⁰ Section 202(a)(1) of the CAA requires the EPA to promptly regulate any air pollutant that may affect the stratosphere in such a way that “may reasonably be anticipated to endanger public health or welfare.”⁷¹ Further, the CAA requires the EPA to regulate mobile and stationary source emissions for regulated pollutants.⁷² The CAA explicitly sets thresholds for stationary source emissions of regulated pollutants for different types of facilities by requiring the issuance of permits under the PSD and Title V programs for sources that emit over 100 tpy and 250 tpy respectively.⁷³ The EPA, however, did not issue any regulations or findings concerning greenhouse gases until the Supreme Court addressed this inaction in *Massachusetts*.⁷⁴

In *Massachusetts*, the Supreme Court acknowledged the possible significance of greenhouse gas emissions, noting the gases are “‘like the ceiling of a greenhouse, trapping solar energy and retard-

67. *Coalition*, 684 F.3d at 114 (examining scientific predictions regarding climate change).

68. See *Feeling the Heat*, *supra* note 63 (noting expert projections regarding fall-out from climate change).

69. See *Climate Change Basics*, *supra* note 66 (summarizing climate change issue and encouraging action).

70. *Clean Air Act*, EPA, <http://www.epa.gov/air/caa/> (last updated Feb. 17, 2012) (providing brief overview of CAA).

71. 42 U.S.C. § 7521(a)(1) (2007) (defining EPA’s authority to regulate air pollutants under CAA).

72. 42 U.S.C. §§ 7521(a)(1), 7475(a), 7479(1) (2007) (establishing CAA provisions with respect to mobile and stationary sources).

73. *Id.* (establishing thresholds for CAA stationary source regulations).

74. See *Massachusetts v. EPA*, 549 U.S. 497, 505 (1997) (examining EPA’s inaction with respect to greenhouse gas findings and regulations).

ing the escape of reflected heat.’”⁷⁵ Several states, including Massachusetts, challenged the EPA’s failure to regulate greenhouse gas emissions under the CAA, alleging the EPA violated the CAA’s terms by deciding not to regulate emissions of greenhouse gases such as carbon dioxide.⁷⁶ The Supreme Court agreed, indicating the CAA required the EPA to regulate “any air pollutant,” and because greenhouse gases fit within this definition, the CAA obligated the EPA to regulate greenhouse gas emissions from new motor vehicles.⁷⁷

The Supreme Court further held the EPA could not evade its statutory obligations under the CAA based on policy reasons or regulatory concerns.⁷⁸ The EPA must instead provide a reasoned explanation for its assessment of whether greenhouse gases contribute to climate change, and the EPA “must ground its reasons for action or inaction in the statute.”⁷⁹ The Court thus directed the EPA to investigate whether greenhouse gases were air pollutants that must be regulated under the CAA, as the EPA can avoid a duty to regulate “*only if* it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.”⁸⁰ As a result of the holding in *Massachusetts*, the EPA promulgated four greenhouse gas rules which were each challenged in *Coalition*: the Endangerment Finding, the Tailpipe Rule, the Tailoring Rule, and the Timing Rule.⁸¹

75. *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114 (D.C. Cir. 2012) (quoting *Massachusetts*, 549 U.S. at 505) (explaining how greenhouse gases cause global warming).

76. *Massachusetts*, 549 U.S. at 505 (explaining *Massachusetts*’ plaintiffs’ claim against EPA). Plaintiffs in *Massachusetts* included twelve states led by Massachusetts, four cities, and thirteen public groups, and the EPA was supported by ten intervening states and six trade associations. *Id.* The plaintiffs alleged the EPA “abdicated its responsibility under the Clean Air Act to regulate the emissions of four greenhouse gases, including carbon dioxide.” *Id.*

77. *Id.* at 529-30 (analyzing EPA authority under CAA).

78. *Id.* at 535 (discussing EPA’s statutory obligations under CAA to regulate air pollutants).

79. *Id.* (concluding EPA’s unexplained refusal to identify whether greenhouse gas emissions contribute to climate change was not in accordance with CAA).

80. *Id.* at 533 (emphasis in original) (finding EPA cannot ignore CAA’s statutory text and must, per CAA Section 202(a)(1), make reasoned judgments as to whether greenhouse gases endanger public health or welfare).

81. *See Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 114-16 (D.C. Cir. 2012) (noting EPA’s rules and petitioners’ challenges). For a discussion of EPA’s four promulgated rules at issue in *Coalition*, see *supra* notes 28-44 and accompanying text.

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C. EPA Authority and Judicial Review

Several important precedents clarify the scope of the EPA's regulatory authority.⁸² Courts have the authority to overturn EPA actions under the CAA if the actions are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."⁸³ Determining whether an action is in accordance with the law often requires statutory interpretation under the two-step process the Supreme Court crafted in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc. (Chevron)*.⁸⁴ Under the two-part *Chevron* test, a court reviewing an agency's statutory construction must first ask if Congress directly spoke on the issue and whether Congress' intent on the matter is clear; if so, the court and the agency must carry out that intent.⁸⁵ If the statute is unclear or silent as to congressional intent, the court must progress to the test's second step and determine "whether the agency's answer is based on a permissible construction of the statute."⁸⁶

Giving significant deference to the EPA's authority, a court "will presume the validity of agency action as long as a rational basis for it is presented."⁸⁷ This policy allows "an 'extreme degree of deference to the agency when it is evaluating scientific data within its technical expertise.'"⁸⁸ Under *Ethyl Corp. v. EPA*,⁸⁹ EPA rulings can withstand some degree of uncertainty if the EPA bases them on the expert Administrator's rationally justified conclusions.⁹⁰ The EPA is not required to put forth rigorous proof or definitive conclusions

82. For a discussion of precedent regarding EPA authority, see *infra* notes 83-95 and accompanying text.

83. *Med. Waste Inst. & Energy Recovery Council v. EPA*, 645 F.3d 420, 424 (D.C. Cir. 2011) (quoting 42 U.S.C. § 7607(d)(9)(A)) (noting on what basis courts may overturn EPA action); see also *Coalition*, 684 F.3d at 116 (highlighting relevance of precedent to case at hand).

84. *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (setting forth legal test for determining whether to defer to agency's statutory interpretation). *Chevron* defined a court's duty regarding statutory interpretation vis-à-vis administrative agency action. See *id.*

85. *Id.* (discussing *Chevron* test's first prong).

86. *Id.* at 843 (allowing courts to uphold agency interpretations of statutes where statute is silent regarding congressional intent and agency's interpretation permissibly construes statute).

87. *Coalition*, 684 F.3d at 120 (quoting *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 519 (D.C. Cir. 2009)) (explaining application of *Chevron* test).

88. *Am. Farm Bureau Fed'n*, 559 F.3d at 519 (quoting *City of Waukesha v. EPA*, 320 F.3d 228, 248 (D.C. Cir. 2003)) (deferring to agency decisions).

89. *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (discussing EPA rulings).

90. *Id.* at 28 (explaining that, in some instances, *Chevron* allows permissible degrees of uncertainty in EPA statutory interpretations).

for endangerment findings aimed at preventing public health detriments so long as the finding is rational.⁹¹

Further, in any case or controversy, judicial jurisdiction requires plaintiffs to have standing under Article III of the United States Constitution.⁹² Under *Lujan v. Defenders of Wildlife*,⁹³ plaintiffs lack standing and are prevented from bringing suit if the plaintiffs fail to demonstrate they have suffered an actual or imminent, concrete and particularized harm caused by the alleged misconduct, and that such harm would likely be redressed by a decision in their favor.⁹⁴ Similarly, a party must demonstrate a specific, immediate injury to establish that a claim is ripe for review, which can prevent parties from challenging EPA actions that may cause future injury but have not yet caused the parties immediate injury.⁹⁵

91. *Id.* (discussing EPA ruling proof requirements). As the D.C. Circuit discussed in *Coalition*:

If a statute is “precautionary in nature” and “designed to protect the public health,” and the relevant evidence is “difficult to come by, uncertain, or conflicting because it is on the frontiers of scientific knowledge,” EPA need not provide “rigorous step-by-step proof of cause and effect” to support an endangerment finding. As we have stated before, “Awaiting certainty will often allow for only reactive, not preventive, regulation.”

Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 121 (D.C. Cir. 2012) (citing *Ethyl Corp.*, 541 F.2d at 25, 28).

92. See generally *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (articulating standing requirements).

93. 504 U.S. 555 (1992).

94. *Lujan*, 504 U.S. at 560-561 (enumerating standing requirements). In *Lujan*, the Court explained the standing requirements: to establish standing, a petitioner must have suffered an “injury in fact” that is 1) “concrete and particularized . . . [and] ‘actual or imminent, not conjectural or hypothetical,’” 2) was caused by the conduct complained of, and 3) is “‘likely,’ as opposed to merely ‘speculative’ . . . [to] be ‘redressed by a favorable decision.’” *Id.* (internal citations omitted). In *Lujan*, the Court stated standing “is an essential and unchanging part of the case-or-controversy requirement.” *Id.* at 560; see also *Coalition*, 684 F.3d at 146 (explaining *Lujan* holding). Additionally, in *Massachusetts*, the Court explained that states are “entitled to special solicitude in our standing analysis.” *Massachusetts v. EPA*, 549 U.S. 497, 520 (2007).

95. See *Coalition*, 684 F.3d at 131 (citing *Balt. Gas & Elec. Co. v. ICC*, 672 F.2d 146, 149 (D.C. Cir. 1982)) (explaining what makes claims constitutionally ripe). “Ripeness, while often spoken of as a justiciability doctrine distinct from standing, in fact shares the constitutional requirement of standing that an injury in fact be certainly impending.” *Nat’l Treasury Emp. Union v. United States*, 101 F.3d 1423, 1427 (D.C. Cir. 1996) (relating judicial doctrines of standing and ripeness); see also *Coalition*, 684 F.3d at 130-31 (explaining ripeness). The D.C. Circuit emphasized ripeness exists “where a challenge ‘involve[s], at least in part, the existence of a live Case or Controversy.’” *Coalition*, 684 F.3d at 130-31 (citing *Duke Power Co. v. Carolina Envtl. Study Grp.*, 438 U.S. 59, 81, 98 (1978)). Thus, standing emphasizes redressability, while ripeness focuses on the injury. See *id.*

IV. NARRATIVE ANALYSIS

The principal issue before the D.C. Circuit in *Coalition* was whether the EPA's rules were rational and rooted in appropriate interpretations of the CAA.⁹⁶ The D.C. Circuit analyzed petitioners' claims by considering challenges to each of the four rules in turn.⁹⁷ First, the court considered the EPA's Endangerment Finding and each of petitioners' challenges thereto and concluded that the record supported the Finding, which was consistent with the CAA and *Massachusetts*.⁹⁸ Second, the court analyzed the Tailpipe Rule and found the EPA's promulgation of the rule was neither arbitrary nor capricious.⁹⁹ Third, the court considered whether the petitioners' challenge to the EPA's interpretation of pertinent CAA air pollutant provisions, including the PSD statute and Title V, was timely and ripe for review.¹⁰⁰ The D.C. Circuit found the petitioners' challenges to the stationary source regulations were timely and ripe based on the promulgation of the Tailpipe Rule and filing of petitions within sixty days; accordingly, the court proceeded to evaluate the merits of these claims and found that the EPA appropriately interpreted the CAA as requiring PSD and Title V permitting for major greenhouse gas emission sources.¹⁰¹ Fourth, the court evaluated the petitioners' challenges to the Timing and Tailoring Rules and held that the parties lacked standing.¹⁰²

A. EPA Authority & Legal Duty: Upholding the Endangerment Finding and the Tailpipe Rule

The D.C. Circuit began its analysis with a thorough consideration of the Endangerment Finding, which initiated the EPA's greenhouse gas regulation efforts following the Supreme Court's ruling in *Massachusetts*.¹⁰³ The Supreme Court's *Massachusetts* hold-

96. See *Coalition*, 684 F.3d at 113 (stating petitioners' challenges to EPA's greenhouse gas regulations).

97. See generally *Coalition*, 684 F.3d 102 (analyzing EPA's findings and rules and considering petitioners' challenges thereto).

98. *Id.* at 116-26 (scrutinizing EPA's Endangerment Finding).

99. *Id.* at 126-29 (analyzing EPA's Tailpipe Rule).

100. *Id.* at 129-32 (considering whether petitioners' challenges to EPA's stationary source regulations were timely and ripe).

101. *Id.* at 132-44 (upholding EPA's CAA interpretation).

102. See *Coalition*, 684 F.3d at 144-48 (considering and dismissing petitioners' claims for lack of standing).

103. See *id.* at 116-26 (analyzing state and industry petitioners' challenges to EPA's Endangerment Finding). For a discussion of the Supreme Court's decision in *Massachusetts*, see *supra* notes 75-80 and accompanying text.

ing governed most of the D.C. Circuit's analysis.¹⁰⁴ In responding to each of the petitioners' six contentions, the court placed particular emphasis on the Supreme Court's guidance regarding the EPA's duty under the CAA to regulate greenhouse gas emissions and other pollutants adjudged to cause pollution "which may reasonably be anticipated to endanger public health or welfare."¹⁰⁵

First, the court concluded the Endangerment Finding complied with the CAA, rejecting the petitioners' argument that the EPA improperly ignored policy considerations in promulgating the Endangerment Finding.¹⁰⁶ Although the petitioners claimed that a purely scientific finding devoid of attention to policy and regulatory implications was improper, the D.C. Circuit held that Supreme Court precedent and the statutory language required only scientific judgments.¹⁰⁷ According to the D.C. Circuit, CAA Section 202(a)(1) "requires EPA to answer only two questions: whether particular 'air pollution' - here, greenhouse gases - 'may reasonably be anticipated to endanger public health or welfare,' and whether motor-vehicle emissions 'cause, or contribute to' that endangerment."¹⁰⁸ Relying on *Massachusetts*, the court stated that "[t]hese questions require a 'scientific judgment' about the potential risks greenhouse gas emissions pose to public health or welfare—not policy discussions."¹⁰⁹ Moreover, in *Massachusetts*, the Supreme Court "rebuffed an attempt by [the] EPA itself to inject considerations of policy into its decision."¹¹⁰ The D.C. Circuit further indi-

104. See *Coalition*, 684 F.3d at 116-26 (applying Supreme Court guidance from *Massachusetts*).

105. See *id.* at 117 (quoting 42 U.S.C. § 7521(a)(1)); see also *Massachusetts v. EPA*, 549 U.S. 497 (2007) (deciding EPA's greenhouse gas regulatory authority and duty).

106. *Coalition*, 684 F.3d at 116-19 (rejecting petitioners' first challenge to EPA's Endangerment Finding).

107. *Id.* at 117-19 (finding policy concerns irrelevant to scientific considerations underlying EPA's Endangerment Finding).

108. *Id.* at 117 (stating CAA requirements for Endangerment Findings).

109. *Id.* at 117-18 (citing *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007)). The D.C. Circuit also pointed to the EPA's observation in the Endangerment Finding that adding policy analyses to the Finding would "muddle the rather straightforward scientific judgment about whether there may be endangerment by throwing the potential impact of responding to the danger into the initial question." *Id.* at 118 (quoting Endangerment Finding, 74 Fed. Reg. at 66,515).

110. *Id.* at 118 (discussing Supreme Court's prohibition on including policy considerations in Endangerment Finding determinations). In *Massachusetts*, the Court rejected the EPA's "laundry list of reasons not to regulate" greenhouse gases. *Massachusetts*, 549 U.S. at 533. The Supreme Court found "these policy judgments . . . have nothing to do with whether greenhouse gas emissions contribute to climate change." *Id.* at 533-34; see also *Coalition*, 684 F.3d at 118 (explaining Supreme Court's holdings with respect to irrelevance of policy considerations).

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cated the Supreme Court gave the EPA authority to regulate greenhouse gases and “[t]he plain language of [Section] 202(a)(1) of [the Clean Air] Act does not leave room for EPA to consider as part of the endangerment inquiry the stationary-source regulation triggered by an endangerment finding, even if the degree of regulation triggered might at a later stage be characterized as ‘absurd.’”¹¹¹ Thus, the Endangerment Finding’s lack of policy consideration complied with the CAA.¹¹²

Second, the D.C. Circuit found the petitioners’ objections to the adequacy of the Endangerment Finding’s scientific record were without merit.¹¹³ The court held the EPA properly considered whether the scientific evidence “warranted an endangerment finding for greenhouse gases as it was required to do under the Supreme Court’s mandate in *Massachusetts v. EPA*.”¹¹⁴ Furthermore, the D.C. Circuit held the EPA’s conclusion was appropriately precautionary, made in a rational manner, and based on substantial evidence in accordance with the CAA and Supreme Court guidance.¹¹⁵ Rather than limiting the EPA to remedial action, the

111. *Coalition*, 684 F.3d at 119 (rejecting relevance of policy considerations in EPA’s promulgation of endangerment findings). The petitioners’ pointed to the Tailoring Rule as evidence that the EPA believed the impending emission standards and permitting requirements would cause an absurd result; however, the court found this irrelevant to the Endangerment Finding. *Id.* The court did admit the Tailoring Rule “may indicate that the CAA is a regulatory scheme less-than-perfectly-tailored to dealing with greenhouse gases.” *Id.*

112. *See id.* at 118-19 (finding EPA’s scientific justifications in Endangerment Finding complied with CAA). The D.C. Circuit stated:

The Supreme Court made clear in *Massachusetts v. EPA* that it was not addressing the question “whether policy concerns can inform EPA’s actions in the event that it makes such a finding,” but that policy concerns were not part of the calculus for the determination of the endangerment finding in the first instance.

Id. (quoting *Massachusetts*, 549 U.S. at 534-35).

113. *Id.* at 119-22 (considering petitioners’ challenges to type of evidence underlying and alleged “significant scientific uncertainty” in EPA’s Endangerment Finding). The D.C. Circuit found that the EPA had properly utilized scientific reports and evidence in making its decision and did not substitute the reports for the agency’s own judgment. *Id.* at 120.

114. *Id.* at 120 (rejecting petitioners’ argument). The court found the EPA “simply did here what it and other decision-makers often must do to make a science-based judgment: it sought out and reviewed existing scientific evidence to determine whether a particular finding was warranted.” *Id.* “This is how science works. EPA is not required to re-prove the existence of the atom every time it approaches a scientific question.” *Id.*

115. *Id.* at 122 (dismissing petitioners’ allegations that EPA’s finding was not adequately supported by scientific evidence). Under the “presumed validity of rational basis rule” in *American Farm Bureau Fed’n v. EPA* and the “allowance of some degree of uncertainty without step-by-step proof” rule in *Ethyl Corp. v. EPA*, the EPA’s evidence and reasoning sufficed in *Coalition*. *Id.* at 120-21. For a discussion

court interpreted CAA Section 202(a) to require EPA regulation where the Agency determines that the air pollutant “may reasonably be anticipated to endanger public health or welfare.”¹¹⁶ Despite some degree of uncertainty, the D.C. Circuit found that, as *Massachusetts* confirmed, the EPA must regulate greenhouse gases where it has a reasonable belief greenhouse gases may cause public endangerment, thereby foreclosing any challenges alleging the EPA lacks sufficient scientific evidence to regulate greenhouse gases.¹¹⁷ The court quickly progressed through an analysis of the petitioners’ four remaining challenges to the Endangerment Finding and dismissed each contention, concluding the Endangerment Finding was consistent with the EPA’s evidence, *Massachusetts*, and the CAA’s language and structure.¹¹⁸

Next, the D.C. Circuit considered the petitioners’ assertion that the EPA improperly interpreted the CAA in promulgating the Tailpipe Rule and failed to consider the rule’s cost implications, ultimately holding the EPA’s rule was neither arbitrary nor capri-

of the agency interpretation rules in *American Farm Bureau and Ethyl Corp.*, see *supra* notes 88-91 and accompanying text.

116. See *Coalition*, 684 F.3d at 121-22 (quoting 42 U.S.C. § 7521(a)(1) (2006)) (describing EPA regulatory authority under CAA).

117. See *id.* (upholding EPA’s Endangerment Finding despite scientific uncertainty). As recalled by the D.C. Circuit:

[R]equiring EPA to wait until it can conclusively demonstrate that a particular effect is adverse to health before it acts is inconsistent with both the [CAA]’s precautionary and preventive orientation and the nature of the Administrator’s statutory responsibilities. Congress provided that the Administrator is to use his judgment in setting air quality standards precisely to permit him to act in the face of uncertainty.

Id. at 122 (citing *Lead Indus. Ass’n, Inc. v. EPA*, 647 F.2d 1130, 1155 (D.C. Cir. 1980)). Further, the court noted the Supreme Court’s ruling in *Massachusetts* “confirmed that EPA may make an endangerment finding despite lingering scientific uncertainty.” *Id.* Thus, to avoid regulating greenhouse gas emissions, the EPA “would need to show ‘scientific uncertainty . . . so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming.’” *Id.* (citing *Massachusetts*, 549 U.S. at 534).

118. See *id.* at 117, 122-126 (upholding EPA’s Endangerment Finding). First, the D.C. Circuit dismissed petitioners’ quantification challenge because, under *Ethyl*, the EPA’s failure to put forth a specific number indicating dangerousness was due to the uncertain nature of science and the EPA’s precautionary approach. *Id.* at 123. Second, the court dismissed petitioners’ argument against the alleged arbitrariness of including perfluorocarbons and sulfur hexafluoride in its greenhouse gas composition because the petitioners lacked standing. *Id.* at 123-24. Third, petitioners’ claim against the EPA’s failure to submit findings to the Science Advisory Board was rejected because there was no clear duty to do so and petitioners did not show that this issue was centrally relevant to the rule. *Id.* at 125. Finally, the D.C. Circuit rejected petitioners’ argument that EPA erred in denying petitions for reconsideration because petitioners failed to show that alleged errors in the Finding substantially supported overruling of the Endangerment Finding. *Id.*

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cious and precedent compelled such a rule.¹¹⁹ The D.C. Circuit explained that, under *Massachusetts*, once the EPA found greenhouse gases endangered public health thus necessitating an Endangerment Finding, the CAA required the EPA to regulate greenhouse gases under the mobile source program pursuant to Section 202(a)(1) and, ultimately, under the PSD and Title V stationary source programs as well.¹²⁰ The D.C. Circuit therefore upheld both the Endangerment Finding and the Tailpipe Rule as compulsory under the authority and duty designated to the EPA by the CAA and *Massachusetts*.¹²¹

B. EPA's CAA Interpretation and Regulation of Stationary Sources

Next, the D.C. Circuit found the petitioners' challenges to the EPA's interpretation of the CAA permitting requirements were timely and ripe.¹²² The petitioners' success with this argument,

119. *Id.* at 126-29 (sustaining EPA's Tailpipe Rule). The D.C. Circuit held the plain text of the CAA and precedent foreclosed petitioners' challenge. *Id.* at 126.

120. *Id.* (explaining *Massachusetts* and CAA required promulgating Tailpipe Rule following EPA's finding that greenhouse gases endanger public welfare). CAA Section 202(a)(1) states:

The Administrator shall by regulation prescribe . . . standards applicable to the emission of any air pollutant from any class or classes of new motor vehicles or new motor vehicle engines, which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.

42 U.S.C. § 7521(a)(1) (2006). The D.C. Circuit found the Supreme Court's guidance in *Massachusetts* compelled interpreting this section as requiring EPA regulation of motor vehicle emissions following an Endangerment Finding, repeating that "[i]f EPA makes a finding of endangerment, the Clean Air Act requires the [a]gency to regulate emissions of the deleterious pollutant from new motor vehicles." *Coalition*, 684 F.3d at 126. Thus, the D.C. Circuit explained that after the EPA made the Endangerment Finding under CAA Section 202(a), the agency "lacked discretion to defer promulgation of the Tailpipe Rule on the basis of its trigger of stationary-source permitting requirements under the PSD program and Title V." *Id.* For a discussion of the D.C. Circuit's analysis regarding the EPA's stationary source regulations and triggers, see *infra* notes 122-132 and accompanying text.

121. *Coalition*, 684 F.3d at 116-29 (upholding two of EPA's greenhouse gas regulations).

122. *Id.* at 132 (finding petitioners may challenge EPA's interpretation of CAA PSD provisions); see also 42 U.S.C. §§ 7475(a), 7479(1) (2006) (prescribing statutory permitting triggers under PSD provision). Although the EPA asserted petitioners' challenge was untimely due to its longstanding interpretation of PSD permit triggers conveyed in numerous rules, the court found the EPA failed to demonstrate the challenge was untimeliness. *Coalition*, 684 F.3d at 129. The Tailpipe Rule ripened the claims of two petitioners, the National Association of Home Builders and the National Oilseed Processors Association; therefore, their challenges to the EPA's interpretation of the CAA's PSD permitting triggers were timely and ripe. *Id.* at 130, 132.

however, was short-lived; the court held the EPA appropriately interpreted the CAA as mandating PSD stationary source permitting for any regulated air pollutant emission above statutory thresholds, including greenhouse gases.¹²³ The D.C. Circuit rejected all three of the petitioners' interpretations after finding none of the proffered interpretations "cast doubt on the unambiguous nature of the statute."¹²⁴

The court first focused on what sources were subject to PSD regulation as major emitting facilities, which the court perceived as the focus of the petitioners' claim regarding stationary source regulation.¹²⁵ The court emphasized the CAA's language, stating that a "major emitting facility" under the PSD program is "a stationary source 'which emit[s], or [has] the potential to emit' either 100 tons per year (tpy) or 250 tpy of 'any air pollutant.'"¹²⁶ Beginning in 1978, the EPA interpreted the "any air pollutant" definitional component as "any air pollutant regulated under the CAA."¹²⁷ Under this interpretation, the court reasoned that once the Tailpipe Rule regulated greenhouse gases, the PSD provision automatically applied to stationary sources emitting greenhouse gases above the 100/250 tpy thresholds.¹²⁸ The EPA's interpretation left no room for petitioners' contention that "any air pollutant" could be inter-

123. See *Coalition*, 684 F.3d at 132-44 (evaluating merits of petitioners' stationary source regulation claims and holding EPA correctly interpreted CAA with respect to stationary source regulations).

124. *Id.* at 136 (rejecting industry petitioners' alternative interpretations of CAA PSD permitting triggers). First, the court rejected petitioners' argument that the PSD program only regulates emissions that pollute locally because this was an unreasonable reading of the CAA. *Id.* at 136-38. Second, the D.C. Circuit rejected an argument that the PSD program contained a "pollutant-specific situs requirement" because petitioners failed to show the phrase "any air pollutant" should be interpreted narrowly to allow such an interpretation. *Id.* at 138-43. Third, the court quickly dismissed petitioners' argument that the EPA failed to follow the new pollutant process in Section 166 because these steps apply only to new national ambient air quality standard (NAAQS) pollutants and thus are inapplicable, as the EPA "never classified greenhouse gases as a NAAQS criteria pollutant." *Id.* at 143. The court also noted petitioners' only asserted challenges regarding the PSD program and forfeited any challenges to the EPA's Title V interpretation. *Id.*

125. *Id.* at 133 (evaluating EPA's interpretation of CAA PSD stationary source provisions).

126. *Id.* at 133 (citing 42 U.S.C. § 7479(1) (2006)) (emphasis in original) (defining "major emitting facility").

127. See *id.* at 133 (quoting 1977 Clean Air Act Amendments to Prevent Significant Deterioration, 43 Fed. Reg. 26,388, 26,388, 26,403 (June 19, 1978) (codified at 40 C.F.R. pt. 52)) (explaining EPA's definition of "any air pollutant" under CAA).

128. *Coalition*, 684 F.3d at 133 (explaining effects of EPA's CAA interpretation). Note the EPA promulgated the Tailoring Rule to mitigate this automatic application of the permitting requirements. *Id.*

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preted in a much more circumscribed way, such that the EPA “could have — and should have — avoided extending the PSD permitting program to major greenhouse gas emitters.”¹²⁹

Upon further analysis of congressional intent and Supreme Court precedent, the D.C. Circuit agreed with the EPA “that its longstanding interpretation of the PSD permitting trigger is statutorily compelled.”¹³⁰ The court emphasized the significance not only of the statutory language and Congress’s Declaration of Purpose, but also the Supreme Court’s recognition in *Massachusetts* that the term “any air pollutant” is “expansive” and “unambiguous” enough to include greenhouse gases.¹³¹ Consequently, the D.C. Circuit stated it had “little trouble concluding that ‘any air pollutant’ in the definition of ‘major emitting facility’ unambiguously means ‘any air pollutant regulated under the CAA.’”¹³²

A. Dodging the Bullet: Lack of Standing to Challenge Timing and Tailoring Rules

Turning to the petitioners’ final argument, the D.C. Circuit examined the Tailoring and Timing Rule challenges and concluded that the petitioners lacked the requisite Article III standing to challenge either rule, thereby avoiding consideration of the petitioners’ strongest claims.¹³³ The court found that the petitioners advanced no real arguments against the Timing Rule because the rule merely delayed application of the PSD and Title V licensing provisions.¹³⁴ Further, the D.C. Circuit articulated confusion regarding the peti-

129. *Id.* at 134 (explaining industry petitioners’ challenge to EPA’s broad interpretation of “any air pollutant”).

130. *Id.* at 134-36 (analyzing CAA under *Chevron* and determining Congress’ intent).

131. *Id.* at 136 (citing *Massachusetts v. EPA*, 549 U.S. 497, 529 (2007)) (noting support for EPA’s CAA interpretation).

132. *Id.* (holding “any air pollutant” unambiguously means any air pollutant regulated under CAA).

133. *See Coalition*, 684 F.3d at 144-48 (examining petitioners’ challenges to Tailoring and Timing Rules). As the D.C. Circuit explained, the petitioners used strong words in their Tailoring Rule challenges, which “colorfully argue that EPA’s attempts to alleviate those burdens ‘establish only that EPA is acting as a benevolent dictator rather than a tyrant.’” *Id.* at 145 (citing Brief of State Petitioners and Supporting Intervenor at 26 *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102 (2012) (No. 10-1073), available at https://www.oag.state.tx.us/newspubs/releases/2011/062111timing_tailoring_brief.pdf).

134. *Id.* at 144 (finding petitioners’ challenges to Timing Rule were unfounded and confusing). The court pointed out that petitioners’ contention that the Timing Rule was an attempt “to extend the PSD and Title V permitting requirements to greenhouse-gas emissions” was incorrect, as these provisions automatically applied as a result of the CAA rather than as an effect of the Timing Rule. *Id.*

tioners' desire to vacate this rule, as the court did not recognize any clear benefit to petitioners of vacating the timing provision.¹³⁵

Turning its attention to the Tailoring Rule, the court examined the potential costs and logistical implications of immediate application of the PSD and Title V permitting requirement thresholds.¹³⁶ The court explained the EPA's justifications for phasing in the permitting requirements under the Tailoring Rule based on the administrative law doctrines of absurd results, administrative necessity, and one-step-at-a-time.¹³⁷ Rather than addressing the merits of the petitioners' challenges to the EPA's promulgation of the Tailoring Rule under these doctrines, the D.C. Circuit instead determined petitioners lacked standing to challenge the rule at all.¹³⁸

In concluding that the petitioners lacked standing to challenge the rules, the court found that the petitioners failed to establish the requisite injury and likelihood of redress.¹³⁹ Because the D.C. Circuit previously concluded the CAA itself mandated permit applications, it found that the CAA's PSD and Title V provisions – not the Timing and Tailoring Rules – were the source of the permitting requirements causing petitioners' alleged injuries.¹⁴⁰ The petitioners therefore lacked standing to challenge the Timing and Tailoring

135. *Id.* (scrutinizing petitioners' challenges to Timing Rule). The court explained it was "unclear what practical effect vacature of the Timing Rule would have." *Id.*

136. *See id.* (exploring EPA's cost and permitting data as stated in Tailoring Rule). In the Tailoring Rule, the EPA estimated that immediate application of the permitting provisions would cause PSD permit applications to rise from 280 per year to over 81,000 per year and Title V permits to rise from 14,700 per year to 6.1 million per year. *Id.* (citing Tailoring Rule, 75 Fed. Reg. 31,514, 31,554, 31,562 (Env't. Prot. Agency June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71)). Similarly, the EPA surmised that immediate application of the PSD statute would cost applying commercial and residential sources almost \$60,000 on average. *Id.* (citing Tailoring Rule, 75 Fed. Reg. at 31,556). Title V application would cost small commercial and residential sources \$23,175 on average. *Id.* (citing Tailoring Rule, 75 Fed. Reg. at 31,562). State and local permitting authorities would also face tremendous costs; the EPA estimated current permitting costs of \$62 million per year would spike to over \$21 billion annually. *Id.* (citing Tailoring Rule, 75 Fed. Reg. at 31,563).

137. *Id.* at 145 (exploring EPA's Tailoring Rule justifications). For further discussion of the absurd results, administrative necessity, and one-step-at-a-time doctrines, see *supra* note 42 and accompanying text.

138. *See Coalition*, 684 F.3d at 146 (analyzing jurisdictional element of standing). For discussion of standing elements established by the Supreme Court in *Lujan*, see *supra* note 94 and accompanying text.

139. *Coalition*, 684 F.3d at 148 (finding petitioners lacked standing to challenge EPA's Timing and Tailoring Rules).

140. *Id.* at 146 (evaluating petitioners' alleged injury with respect to greenhouse gas regulation). According to the D.C. Circuit, petitioners were required to comply with PSD and Title V permit requirements not under the Timing or Tailoring Rules, but because of "automatic operation of the [CAA]." *Id.*

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Rules because the rules were not the cause of the petitioners' injuries.¹⁴¹ Moreover, the court reasoned that the Timing and Tailoring Rules operated to effectively mitigate the petitioners' alleged injuries.¹⁴²

The D.C. Circuit rejected the state petitioners' two alternative theories advanced to support standing.¹⁴³ Although the petitioners claimed to prefer immediate application of the 100/250 tpy permitting thresholds for greenhouse gases under the theory that such application would force congressional relief legislation, the court determined that the prospect of congressional redress was merely speculative and thus that petitioners failed to show a favorable decision was likely to redress their injury.¹⁴⁴ Further, the court found the petitioners' second theory, that petitioners could establish standing through the EPA's failure to regulate sooner, was without merit.¹⁴⁵ Most significantly, the D.C. Circuit held that the state petitioners failed "to cite any record evidence to suggest that they are

141. *Id.* at 147 (finding petitioners failed to satisfy constitutional standing elements by failing to demonstrate their injuries were caused by Timing and Tailoring Rules).

142. *Id.* at 146 (explaining that, absent Timing and Tailoring Rules, petitioners would still have been subject to CAA permit requirements on effective date of Tailpipe Rule, and even more sources would have been subject to regulatory burdens). The court surmised, "vacature of the Tailoring Rule would significantly exacerbate Petitioners' injuries." *Id.*

143. *Id.* at 146-147 (holding petitioners' lacked standing under *Lujan*).

144. *Coalition*, 684 F.3d at 147 (citing *Lujan* standing requirement that plaintiffs must demonstrate likelihood that injury will be redressed by sought judicial remedy). The court stated that petitioners were merely hypothesizing congressional action and seriously doubted "whether, for standing purposes, it [was] ever 'likely' that Congress [would] enact legislation at all." *Id.* Also, petitioners' idea that potential "corrective legislation" would exempt greenhouse gases from PSD and Title V requirements was flawed because such an exemption was only one form that possible legislation could take. *Id.* Thus, the court found "State Petitioners' faith that Congress will alleviate their injury is inherently speculative." *Id.*

145. *Id.* (dismissing petitioners' standing claims). The petitioners' second theory, which relied on establishing standing under the reasoning advanced by Massachusetts in *Massachusetts v. EPA*, was summarized by the D.C. Circuit as a contention that petitioners' "want more regulation, not less, and that they wanted regulation sooner rather than later." *Id.* The court found petitioners' contention amounted to asserting a new injury and new standing theory in a reply brief, which was not permitted under the law. *Id.* at 147-48. The D.C. Circuit's analysis of petitioners' two alternative standing theories reflects the court's reasoning that these theories were last ditch efforts on the part of petitioners who were "abruptly donning what they themselves call 'an environmentalist hat.'" *Id.* at 148 (citing Reply Brief of State Petitioners and Supporting Intervenor at 4 Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102 (2012) (No. 10-1073), available at <http://www.edf.org/sites/default/files/10-1073-2011-11-16-State-Reply-brief.pdf>). The court recognized that petitioners were completely changing positions; having first challenged the EPA's Endangerment Finding, petitioners were now "assert[ing] that global warming causes them concrete and particularized harm." *Id.* "Essentially, State Petitioners' reply brief contends that, contrary to the position taken in

adversely affected by global climate change.”¹⁴⁶ The court concluded that all petitioners failed to establish a particularized injury in fact because the petitioners failed to present specific and factual submissions, which were crucial to establishing standing under *Massachusetts*.¹⁴⁷ The D.C. Circuit therefore dismissed the petitioners’ Timing and Tailoring Rule challenges due to lack of standing under Article III.¹⁴⁸

V. CRITICAL ANALYSIS

The unanimous decision in *Coalition* strongly reinforced the EPA’s greenhouse gas rules and the Agency’s authority to issue precautionary greenhouse gas regulations under the CAA.¹⁴⁹ The D.C. Circuit made it clear that it had a straightforward path in this case because the Supreme Court’s decision in *Massachusetts* barred most challenges to the EPA’s greenhouse gas rules.¹⁵⁰ The court essentially upheld the rules as a chain reaction triggered by the Supreme Court’s ruling in *Massachusetts* and avoided considering the most vulnerable issue by dismissing the Tailoring Rule challenges for lack of standing.¹⁵¹ By keeping policy considerations out of the Endangerment Finding and Tailpipe Rule, but allowing them in the

the opening brief, they want more regulation, not less, and that they wanted regulation sooner rather than later.” *Coalition*, 684 F.3d at 147.

146. *Id.* at 148 (dismissing state petitioners’ claim for lack of standing). Holding state petitioners did not show an injury was significant because the court used lack of injury to differentiate *Coalition* from *Massachusetts*, in which the Commonwealth of Massachusetts showed current and continuing injury according to the court. *See id.*

147. *Id.* (explaining court’s standing rationale). The D.C. Circuit found petitioners’ failure to cite to substantial evidence of injury from global climate change was:

in stark contrast to the evidence put forward in *Massachusetts v. EPA*, where the Commonwealth submitted unchallenged affidavits and declarations showing that 1) rising sea tides due to global warming had “already begun to swallow Massachusetts’ coastal land,” and 2) “[t]he severity of that injury will only increase over the course of the next century.”

Id. (citing *Massachusetts v. EPA*, 549 U.S. 497, 522-23 (2007)). These submissions were “key to the standing analysis in *Massachusetts*.” *Id.*

148. *Id.* (dismissing Timing and Tailoring Rule challenges for lack of standing).

149. *See Coalition*, 684 F.3d at 148-49 (upholding EPA’s regulatory provisions).

150. *See* Seth Jaffe, *Easy Cases Make No Law (We Hope): The D.C. Circuit Upholds EPA’s Greenhouse Gas Regulations*, LAW AND THE ENVIRONMENT (June 27, 2012), <http://www.lawandenvironment.com/2012/06/easy-cases-make-no-law-we-hope-the-d-c-circuit-upholds-epas-greenhouse-gas-regulations/> (explaining court’s holding and noting *Coalition* was not particularly difficult to decide). *Coalition* supports the supposition that “important cases, or those with big stakes, are not necessarily difficult cases.” *Id.*

151. For an analysis of the D.C. Circuit’s decision, see *infra* notes 153-187.

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Timing and Tailoring Rules, the D.C. Circuit acknowledged the outrageous regulatory and cost burdens associated with the EPA's regulations while emphasizing the importance of the Agency's role in taking precautionary action against greenhouse gas emissions that contribute to climate change.¹⁵²

A. A Regulatory Chain Reaction: Endangerment Finding and Tailpipe Rule Mandated by CAA and Massachusetts

The Supreme Court's holding in *Massachusetts* and the CAA's language strictly confined the D.C. Circuit's analysis in *Coalition*.¹⁵³ The Supreme Court ruling laid the groundwork for a chain reaction of greenhouse gas regulations based upon the EPA's duty on remand to determine whether greenhouse gases contribute to climate change.¹⁵⁴ The Supreme Court's instructions, in fact, compelled the Endangerment Finding, thereby creating a responsibility to promulgate the Tailpipe Rule under the CAA.¹⁵⁵

The D.C. Circuit's analyses of these two regulations reads more like an educational briefing than an inquiry into undecided issues.¹⁵⁶ Notably, during oral arguments, Chief Judge Sentelle asserted, "[s]ometimes in reading the petitioners' briefs, I got the impression that *Massachusetts* had not been decided."¹⁵⁷ The D.C. Circuit's interpretation of the CAA was consistent with the Act's leg-

152. See *Coalition*, 684 F.3d at 121-22 (noting CAA language requires precautionary measures from EPA).

153. See Jaffe, *supra* note 150 (discussing *Coalition* decision). Additionally, "as the Court noted repeatedly, most of the petitioners' arguments were foreclosed by *Massachusetts v. EPA*." *Id.* Further, the Supreme Court's decision "gave EPA almost no wiggle room in which it could avoid an endangerment finding." *Id.*

154. Chamber of Commerce of the United States of America's Combined Petition for Panel Rehearing or for Rehearing En Banc, *supra* note 17, at 5 (discussing petitioners' arguments supporting petition for rehearing). As petitioners describe, the EPA's greenhouse gas rules, including the Endangerment Finding, Tailpipe Rule, Tailoring Rule, and Timing Rule, evolved after *Massachusetts* as a "domino-like series of rules." *Id.* For a discussion of the rules triggered by the Supreme Court's ruling and by each rule in turn, see *supra* notes 28-44 and accompanying text.

155. See *Coalition*, 684 F.3d at 116-129 (discussing and upholding Endangerment Finding and Tailpipe Rule).

156. See Jaffe, *supra* note 150 (opining on D.C. Circuit's attitude in decision). "Indeed, the tone of the opinion has the feel of a teacher lecturing a student where the teacher has a sense that the student is being willfully obtuse." *Id.* For a narrative analysis of the D.C. Circuit's decision regarding the Endangerment Finding and the Tailpipe Rule, see *supra* notes 104-121 and accompanying text.

157. Jaffe, *supra* note 150 (quoting statement made by Judge Sentelle during oral arguments for *Coalition*).

islative history and rules of statutory construction, and the court's holding was in accordance with *Massachusetts*.¹⁵⁸

The court's resolution of petitioners' various challenges to the Endangerment Finding was well-reasoned and strongly supported by the record.¹⁵⁹ The Endangerment Finding contained logical judgments based on credible scientific evidence indicating that greenhouse gas emissions contribute to climate change and endanger public welfare.¹⁶⁰ Although the evidence led to less than absolute certainty, the D.C. Circuit properly recognized that, under *Massachusetts*, uncertainty is inherent in the nature of an Endangerment Finding because it is a precautionary action recognizing potential sources of danger to the public.¹⁶¹

Further, the court properly relied on *Massachusetts* and Section 202(a) of the CAA in rejecting the petitioners' argument that the CAA required the EPA to consider policy and regulatory consequences.¹⁶² Although the petitioners' contention as to the relevancy of policy was practical, the Supreme Court held the EPA may not consider policy when issuing endangerment findings.¹⁶³ The D.C. Circuit recognized the Supreme Court rejected considering policy issues when determining endangerment findings in *Massachusetts*, and therefore they could not be considered when determining the endangerment finding in *Coalition*.¹⁶⁴

In addition to appropriately interpreting the CAA with respect to the Endangerment Finding and the Tailpipe Rule, the D.C. Circuit accurately construed the CAA as requiring stationary source regulation following enactment of mobile source regulation in the

158. *See id.* (discussing D.C. Circuit's holding). As a result of *Massachusetts*, "[t]he bottom line [was] that EPA not only had *authority* to issue the regulations; it had a legal *duty* to do so." *Id.* (emphasis in original). As the D.C. Circuit indicated many times throughout *Coalition*, the CAA's plain language specifies the EPA must regulate "any air pollutant." *Id.*

159. *See Coalition*, 684 F.3d at 116-26 (analyzing petitioners' challenges to Endangerment Finding).

160. *See id.* at 119-22 (discussing scientific evidence EPA relied on).

161. *See id.* at 121-22 (discussing uncertainty in EPA's evidence). The court emphasized the precautionary nature of the EPA's Endangerment Findings. *Id.* at 121. For a discussion of the inherent uncertainty in scientific findings, see *supra* notes 115-117 and accompanying text.

162. *See Coalition*, 684 F.3d at 117-19 (discussing petitioners' policy considerations argument).

163. *See id.* at 119 (finding CAA and Supreme Court precedent require EPA to make findings devoid of policy implications).

164. *See id.* at 118 (following Supreme Court's *Massachusetts* decision regarding excluding policy considerations and endangerment findings).

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Tailpipe Rule.¹⁶⁵ Once the court properly upheld the Endangerment Finding under *Massachusetts* and the CAA, the finding necessitated upholding the Tailpipe Rule because the mobile source program mandates regulation of any air pollutant for which the EPA issues an Endangerment Finding.¹⁶⁶ Upholding the Tailpipe Rule in turn triggered the PSD and Title V provisions because the PSD and Title V programs mandate regulation of any air pollutant regulated under any other part of the CAA, including the mobile source program.¹⁶⁷ Last in the cascade of guidelines, regulation of greenhouse gases under the PSD and Title V programs ultimately led the EPA to issue the Tailoring and Timing Rules in response to regulatory and policy considerations.¹⁶⁸

B. No Standing? Avoiding the Most Vulnerable Issue

In considering the petitioners' Tailoring Rule challenges, the court abruptly changed its tone from reviewing the EPA's justification doctrines to quickly dismissing the petitioners' standing under Article III.¹⁶⁹ By strictly applying the Supreme Court's *Lujan* standing analysis, the D.C. Circuit avoided considering objections to the Tailoring Rule, which was arguably the petitioners' strongest claim.¹⁷⁰ Although the court's strict standing analysis under *Lujan* was logical and well-reasoned, the court's ability to duck the merits of petitioners' strongest challenge based on Supreme Court standing requirements warrants close attention.¹⁷¹

165. See *id.* at 126-29 (upholding EPA's Tailpipe Rule). "The plain language — a phrase used repeatedly in [the *Coalition*] decision — of the CAA requires EPA to regulate 'any air pollutant.' End of story." Jaffe, *supra* note 150 (examining *Coalition* decision).

166. For a discussion of the Endangerment Finding's trigger effect leading to the Tailpipe Rule, see *supra* note 32 and accompanying text.

167. For a discussion of the Tailpipe Rule's trigger effect leading to PSD and Title V permitting regulations, see *supra* notes 34-37 and accompanying text.

168. For a discussion of the Timing and Tailoring Rules' place in EPA's greenhouse gas regulation, see *supra* notes 38-44 and accompanying text.

169. See *Coalition*, 684 F.3d at 146 (analyzing standing). For a discussion of the EPA's absurd results, administrative necessity, and one-step-at-a-time doctrines, see *supra* note 42 and accompanying text.

170. See Wannier, *supra* note 45 (asserting Tailoring Rule challenge was petitioners' strongest claim). Petitioners' other claims were weakened by their reliance, to some extent, on scientific skepticism with regard to climate change or on ambiguities. *Id.* "This makes the 'Tailoring' Rule claim, that it disregards explicit statutory regulation guidelines (in order to accomplish the 'broader intent' of the statute), the strongest challenge to EPA's actions." *Id.* For a discussion of the court's standing analysis under *Lujan*, see *supra* notes 139-148 and accompanying text.

171. See Jonathan H. Adler, *En Banc Petitions in D.C. Circuit Greenhouse Gas Litigation*, THE VOLOKH CONSPIRACY (Aug. 28, 2012), <http://www.volokh.com/2012/>

Indeed, the EPA's promulgation of the Tailoring Rule was the most vulnerable issue in *Coalition*.¹⁷² The EPA admittedly promulgated the Tailoring Rule in response to practical concerns regarding the regulatory difficulties and costs associated with subjecting a vast number of stationary sources to permitting regulations because of the Tailpipe Rule triggering the CAA's regulatory cascade.¹⁷³ The policy behind this decision was realistic; however, the rule directly violated the explicit text of the CAA as it increased the permitting threshold of carbon emissions from 100/250 tpy to 75,000/100,000 tpy.¹⁷⁴ Although the EPA viewed the Tailoring Rule as a mandatory step in the chain reaction of regulations, the decision represents an abuse of agency discretion, which remained unchallenged due to the court's decision to dismiss for lack of standing.¹⁷⁵ Moreover, the EPA's promulgation of the Tailoring Rule signifies a unilateral amendment of the CAA by an administrative agency, which is contrary to the established legislative process.¹⁷⁶ The D.C. Circuit's decision gives the EPA unfettered discretion to choose when to consider policy in shaping regulations, as the court held the EPA could not consider policy in the Endangerment Finding and resulting trigger regulations under the CAA and *Massachusetts*, yet allowed the Tailoring Rule's phase-in approach to stand.¹⁷⁷

08/28/en-banc-petitions-in-d-c-circuit-greenhouse-gas-litigation/ (discussing standing issue). The D.C. Circuit's *Coalition* decision could significantly impact EPA's regulatory authority. *Id.* The potential for impacts "doesn't mean the decision is wrong — the rule against taxpayer standing insulates many allegedly illegal government actions from judicial review — but it should raise some questions." *Id.*

172. See Wannier, *supra* note 45 (designating petitioners' Tailoring Rule challenge as their strongest claim); see also Kirsten Engel, *EPA's Standing Argument: A Sleeping Giant in the Tailoring Rule Litigation?*, CENTER FOR PROGRESSIVE REFORM (Feb. 21, 2012), <http://www.progressivereform.org/CPRBlog.cfm?idBlog=A0D46B85-0F01-D793-A9EB02579067D3A1> (calling petitioners' challenge to Tailoring Rule "robust," and discussing standing defense).

173. Tailoring Rule, 75 Fed. Reg. 31,514, 31,514 (Env'tl. Prot. Agency June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) (explaining reasoning for Tailoring Rule promulgation).

174. See 42 U.S.C. §§ 7602(j), 7479(1) (2006) (setting regulatory thresholds for potential emissions).

175. See *Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 148 (D.C. Cir. 2012) (dismissing petitioners' Tailoring Rule and Timing Rule challenges for lack of standing).

176. See Chamber of Commerce of the United States of America's Combined Petition for Panel Rehearing or for Rehearing En Banc, *supra* note 17 at 4 (alleging EPA's Timing and Tailoring Rule enactments were complete rewrites of PSD and Title V numerical thresholds).

177. Compare *Coalition*, 684 F.3d at 117-19 (rejecting petitioners' contentions that policy should be considered in Endangerment Finding promulgation), with Tailoring Rule, 75 Fed. Reg. at 31,514 (discussing policy and regulatory justifications for Tailoring Rule promulgation).

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By dissecting the standing elements under *Lujan*, the D.C. Circuit's standing analysis and ensuing dismissal of the Tailoring Rule challenge are arguably on thin ice.¹⁷⁸ In finding that the Tailoring Rule was not the source of the petitioners' harm under the second *Lujan* prong, the court disguised the harm to petitioners caused by the EPA's interconnected regulations.¹⁷⁹ Even though the court described the Tailoring Rule as a form of relief, the greenhouse gas regulations can be seen as an orchestrated set of regulations, of which the Tailoring Rule is an integral part.¹⁸⁰ Under this view, as parties regulated under the Tailoring Rule, the petitioners were best suited to challenge the arbitrariness of the EPA's rule contradicting the CAA's explicit permitting thresholds.¹⁸¹

In addition, the D.C. Circuit's finding that the petitioners failed to satisfy the redressability requirement under the third *Lujan* prong placed strong emphasis on the petitioners' desire to ultimately have Congress intervene.¹⁸² The court found the possibility of congressional relief too speculative; however, the idea was that without the Tailoring Rule, national compliance with the stationary source regulations would be absurd - as the EPA admitted - and

178. See Seth Jaffe, *Shocking News: The D.C. Circuit Court of Appeals Is Not Going to Overturn Massachusetts v. EPA*, LAW AND THE ENVIRONMENT (Feb. 29, 2012), <http://www.lawandenvironment.com/2012/02/shocking-news-the-d-c-circuit-court-of-appeals-is-not-going-to-overturn-massachusetts-v-epa/> (speculating on Tailoring Rule challenge before issuance of D.C. Circuit's *Coalition* opinion). The author noted that this issue "seems on thin ice." *Id.*

179. See *Coalition*, 684 F.3d at 146-48 (concluding Tailoring Rule did not harm petitioners under *Lujan* analysis and may actually mitigate their purported injuries). It is important to consider, however, that narrowly evaluating petitioners' injury with respect to the Tailoring Rule isolated the rule from the "series of four closely interconnected rulemakings that the Agency carefully split up and thereby crafted to evade judicial review of the most critical step in its cascading regulation — the point at which EPA decided to rewrite (and thus violate) the Clean Air Act." See Chamber of Commerce of the United States of America's Combined Petition for Panel Rehearing or for Rehearing En Banc, *supra* note 17.

180. See Greve, *supra* note 17 (noting EPA's tactic of breaking regulations into separate rules). According to Greve, "[t]he EPA proceeded by breaking the formerly integrated GHG rulemaking into several separate rules, issued within a six-month span but carefully calculated to evade judicial review of the enterprise as a whole" *Id.*

181. See *id.* (claiming Tailoring Rule made more than mere adjustments to CAA statutory thresholds). Greve noted that "[t]he EPA did not 'adjust' a statutory threshold; it re-wrote a numerical statutory standard." *Id.*

182. See *Coalition*, 684 F.3d at 147 (asserting petitioners did not meet redressability requirement under *Lujan*). The D.C. Circuit focused on petitioners' hypothesis that Congress would legislate in absence of the Tailoring Rule and playfully quoted Schoolhouse Rock to support skepticism that Congress would legislate on the matter. *Id.*

would require reexamination of the regulations and the CAA.¹⁸³ Although the D.C. Circuit's standing analysis properly relied on the three-prong test dictated in *Lujan*, the court's conclusion was extremely deferential, protecting the EPA from judicial scrutiny of petitioners' challenges and expanding the scope of the EPA's regulatory power.¹⁸⁴

The D.C. Circuit's standing conclusion is subject to ongoing legal dispute as the petitioners consider seeking Supreme Court review after the D.C. Circuit denied a petition for a rehearing en banc in which the petitioners alleged the *Coalition* decision was inconsistent with precedent and is of exceptional importance to the economy.¹⁸⁵ Significantly, should the Court ultimately find petitioners have standing, the Tailoring and Timing Rule issues will be subject to judicial review, thereby exposing the EPA's weakest arguments to scrutiny.¹⁸⁶ Without review by the Supreme Court, however, the D.C. Circuit's deferential *Lujan* analysis will survive.¹⁸⁷

VI. IMPACT

The D.C. Circuit's decision to uphold the EPA's greenhouse gas regulations in *Coalition* has damaging effects on economy and industry, as businesses will be forced to undertake the costly burden of compliance with PSD and Title V permitting requirements.¹⁸⁸ From a regulatory standpoint, this holding opens the door for further EPA greenhouse gas regulation, including follow-up rules to the EPA's phase-in approach taken in the Tailoring Rule.¹⁸⁹ The D.C. Circuit's decision also broadened the EPA's regulatory authority.¹⁹⁰

183. *See id.* (stating petitioners' belief that Congress would act if Tailoring Rule did not exist).

184. For a discussion of the impact of the *Coalition* decision on the EPA's regulatory power, see *infra* notes 206-215 and accompanying text.

185. Greve, *supra* note 17 (discussing petitioners' petition for rehearing en banc and actions subsequent to D.C. Circuit's ruling in *Coalition*). For a discussion of the D.C. Circuit's December 2012 denial of petitioners' request for a rehearing en banc, see *infra* notes 218-219 and accompanying text.

186. For a discussion of the strength of petitioners' Tailoring Rule challenge, see *supra* notes 169-183 and accompanying text.

187. *See* Greve, *supra* note 17 (predicting *Coalition* decision will reach review).

188. For a discussion of the economic and industrial impacts of the D.C. Circuit's decision in *Coalition*, see *infra* notes 191-205 and accompanying text.

189. For a discussion of the impact of the *Coalition* decision on the EPA's authority to regulate greenhouse gas emissions, see *infra* notes 206-215 and accompanying text.

190. For a discussion of the impacts of the *Coalition* holding on the EPA's authority, see *infra* notes 206-215 and accompanying text.

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A. Environmental Victory Causes Damaging Effects to the Economy and Industry

The *Coalition* decision represents a significant “setback to industrial groups and a victory for the Obama Administration.”¹⁹¹ The Environmental Defense Fund acknowledged the court’s holding as a major victory, and an adviser at the Bipartisan Policy Center stated the holding signifies that “greenhouse regulation is bombproof under the law.”¹⁹² The Natural Resources Defense Council (NRDC) also released a statement calling the D.C. Circuit’s holding a “huge victory for our children’s future.”¹⁹³ This group agreed that the court’s rulings “clear the way for EPA to keep moving forward under the Clean Air Act to limit carbon pollution from motor vehicles, new power plants and other big industrial sources.”¹⁹⁴

Conversely, *Coalition* has many adverse implications on industrial groups, who face the tremendous burdens associated with compliance.¹⁹⁵ The president of the National Association of Manufacturers (NAM) classified the ruling as a setback for businesses and “one of the most costly, complex and burdensome regulations facing manufacturers.”¹⁹⁶ Further, NAM’s president asserted that the EPA’s regulations “will harm [manufacturers’] ability to hire, invest and grow.”¹⁹⁷ According to the NAM’s president, enforcing the EPA’s rules could affect as many as six million stationary sources.¹⁹⁸

The Heritage Foundation also questioned the effect of the EPA’s regulations as one Fellow stated that the rules would lead to “higher energy costs and a slower economy — all for no noticeable

191. *Court Upholds EPA’s Gas Rules*, *supra* note 13 (analyzing *Coalition* decision effects).

192. Darryl Fears, *D.C. appeals court upholds EPA regulations to fight global warming*, WASH. POST, June 26, 2012, at A02, available at http://www.washingtonpost.com/national/health-science/dc-appeals-court-upholds-epa-regulations-to-fight-global-warming/2012/06/26/gJQAcZHX5V_story.html (noting reactions to the D.C. Circuit’s ruling in *Coalition*).

193. Schoenberg, *supra* note 16 (releasing statement by David Doniger, senior NRDC attorney, articulating how *Coalition* holding benefits future generations).

194. *Id.* (quoting David Doniger’s statements asserting new opportunities for growth under CAA).

195. *See id.* (noting reactions from leaders of prominent industrial groups).

196. *Id.* (quoting Jay Timmons’ reaction to *Coalition*).

197. *Id.* (quoting Jay Timmons’ reaction to *Coalition*).

198. *Court Upholds EPA’s Gas Rules*, *supra* note 13 (exploring statements made by Jay Timmons regarding enforcement of EPA’s greenhouse gas regulations upheld under *Coalition*). Timmons’ statement also indicated that stationary sources affected could include 200,000 manufacturing facilities and 37,000 farms. *Id.*

change in the earth's temperature."¹⁹⁹ Various entities have protested the permit requirements allowed under *Coalition*, which they assert will cost companies billions of dollars and put thousands of employees' jobs at risk.²⁰⁰ These implications could devastate an economy that already exhibits many signs of recession.²⁰¹

Michigan Republican Representative Fred Upton further critiqued that "[a]fter enduring forty consecutive months of higher than eight percent unemployment, we cannot afford the EPA's continued expansion of red tape that is slowing economic growth and threatening to entangle millions of small businesses."²⁰² Upton strongly opposed the EPA's rules, which he claimed "will impose billions of dollars in compliance and delay costs and represent an unprecedented expansion of EPA authority that has the potential to affect virtually every sector of the economy and touch every household."²⁰³ Similarly, Republican Senator James Inhofe complained the EPA's regulations "will continue to punish job creators and further undermine our economy."²⁰⁴ Despite noting the serious economic impact of the EPA's rules, the Tailoring Rule simply disregarded these concerns because the PSD's purpose is to "balance environmental protection and growth."²⁰⁵

B. Regulation of Greenhouse Gases and EPA's Authority

The D.C. Circuit's decision in *Coalition* set an important precedent of allowing the EPA to regulate both automotive and stationary source emissions of greenhouse gases, giving rise to the possibility of "sweeping regulations affecting vehicles, coal-burning

199. See Fears, *supra* note 192 (noting reactions to D.C. Circuit's ruling in *Coalition*).

200. *Id.* (stating that Electric Reliability Coordinating Council permit requirements will cost power plants billions of dollars and put thousands of jobs at risk).

201. See Schoenberg, *supra* note 16 (describing Michigan Republican Fred Upton's displeasure with *Coalition* ruling).

202. *Id.* (quoting Fred Upton's statement following *Coalition* decision).

203. *Id.* (quoting Fred Upton's statement following *Coalition* decision).

204. *Court Upholds EPA's Gas Rules*, *supra* note 13 (quoting Oklahoma Senator James Inhofe). Senator Inhofe has consistently opposed the EPA's climate change regulation, claiming that "EPA's massive and complicated regulatory barrage will continue to punish job creators and further undermine our economy." *Id.*

205. See Tailoring Rule, 75 Fed. Reg. 31,514, 31,549 (Env'tl. Prot. Agency June 3, 2010) (to be codified at 40 C.F.R. pts. 51, 52, 70, 71) (discussing PSD permitting provisions). The Tailoring Rule states, "[o]ne of the purposes, in subsection (1), is specifically 'to protect public health and welfare,' and another, in subsection (3), is 'to insure that economic growth will occur in a manner consistent with the preservations of existing clean air resources.'" *Id.*

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power plants and other industrial facilities.”²⁰⁶ As stated by an NRDC representative, the D.C. Circuit’s holding “gave the EPA ‘a green light to keep moving forward’ on a second round of vehicle emissions [standards] and a proposed nationwide emission standard for new power plants.”²⁰⁷ The EPA continues to issue additional greenhouse gas regulation proposals and standards, such as motor vehicle fuel specifications.²⁰⁸ Although the rules may risk harm to the economy and jobs, the EPA is moving forward with regulation under its upheld authority to regulate greenhouse gas emissions.²⁰⁹ For instance, the EPA is expected to issue additional standards for carbon dioxide emissions to motivate new power plants to build cleaner, natural-gas burning plants.²¹⁰

The D.C. Circuit’s decision in *Coalition* also has a notable impact on the EPA’s authority as an administrative agency.²¹¹ In dismissing the petitioners’ challenges to the Tailoring and Timing Rules, the court effectively insulated the EPA from judicial review of half of its greenhouse gas rules.²¹² Although this was a valid application of the *Lujan* standing analysis, *Coalition* established that the EPA, or any agency, may be able to protect itself by issuing exception rules as part of its regulatory enactments, thereby preventing those non-exempt parties from appealing the decision’s arbitrariness because the parties would be subject to the regulation anyway.²¹³ This result is at odds with the basic idea that parties should be capable of seeking redress for injuries caused by arbitrary rules, and it represents an increase of the EPA’s authority.²¹⁴ Further, the

206. *Court Upholds EPA’s Gas Rules*, *supra* note 13, at 1 (discussing effects of *Coalition* decision).

207. Fears, *supra* note 192 (noting reactions to D.C. Circuit’s ruling in *Coalition*).

208. *What is EPA Doing about Climate Change?*, EPA, <http://www.epa.gov/climatechange/EPAactivities.html> (last updated Apr. 22, 2013) (noting EPA action addressing climate change).

209. *See id.* (discussing ongoing efforts to regulate climate change).

210. *Court Upholds EPA’s Gas Rules*, *supra* note 13 (discussing possible EPA action following *Coalition*).

211. *See Jaffe*, *supra* note 150 (stating environmental law community will “be living with this decision for a long time”).

212. *See Coal. for Responsible Regulation, Inc. v. EPA*, 684 F.3d 102, 148 (D.C. Cir. 2012) (dismissing all challenges to Tailoring and Timing Rules based on lack of jurisdiction).

213. *See Adler*, *supra* note 171 (assessing implications of D.C. Circuit’s *Coalition* decision). “Applied more broadly, this decision could have substantial implications, effectively giving agencies like the EPA carte blanche to issue rules selectively exempting politically favored constituencies from statutorily mandated rules.” *Id.*

214. *See id.* (discussing effects from lack of standing finding in *Coalition*). The D.C. Circuit’s decision forces parties to comply with the Tailoring Rule and pre-

unanimous opinion's strong language presents several key statements that can hold precedential value for EPA authority in the future.²¹⁵

The *Coalition* decision to uphold the EPA's authority to regulate greenhouse gases may be settled for now, but litigation and political agendas persist.²¹⁶ Jeffrey Holmstead, a former EPA official under George W. Bush, predicted that Congress will ultimately weigh in on the issue.²¹⁷ Further, although the D.C. Circuit rejected the *Coalition* petitioners' request for a rehearing en banc in December 2012, two fierce dissents will support a petition for certiorari should the petitioners choose to file.²¹⁸ NAM President and CEO Jay Timmons issued a statement on behalf of the coalition following the D.C. Circuit's denial, in which he applauded the two well-reasoned dissenting opinions, pledged continued effort to fight the EPA's regulations, and promised to carefully consider seeking a writ of certiorari.²¹⁹ Although a congressional bill on the

vents challenges to the Rule's legality or arbitrariness. *Id.* "Thousands of companies are forced to comply with the regulation, and none can have their day in court." *Id.* This seems at odds with *Lujan*, where "Justice Scalia explained 'there is ordinarily little question' that one who is the object of government action has standing to challenge that action." *Id.*

215. See Jaffe, *supra* note 150 (highlighting strong language in D.C. Circuit's *Coalition* decision). During the court's analysis of the adequacy of the EPA's evidence, the court emphasized "EPA is not required to re-prove the existence of the atom every time it approaches a scientific question." *Id.* Further, "EPA need not provide rigorous step-by-step proof of cause and effect." *Id.* Also, "[The CAA] requires a precautionary forward-looking scientific judgment about the risks of a particular air pollutant, consistent with the CAA's precautionary and preventative orientation." *Id.* Phrases such as these support the assertion that *Coalition* was "a decision with plenty of language destined to haunt the regulated community in future cases." *Id.*

216. For a discussion of ongoing political and legal agenda, see *infra* notes 217-218 and accompanying text.

217. Schoenberg, *supra* note 16 (reporting Holmstead's statement that Congress will act). Holmstead was not involved with any party to the case in *Coalition*. *Id.*

218. See Greve, *supra* note 17 (noting petitioners submitted petition for panel rehearing or rehearing en banc and EPA issued reply). The rehearing petition had a high probability of failure based on the rarity of a D.C. Circuit en banc hearing, especially with respect to per curiam opinions. *Id.* Despite likelihood of failure, petitioners hoped at least for "a dissent from the denial, and therewith a shot at Supreme Court review." *Id.* On December 20, 2012, the petition for rehearing was denied, but the petitioners had two strong dissenting opinions on their side from Judges Brett Kavanaugh and Janice Rogers Brown. See *Coal. for Responsible Regulation, Inc. v. EPA*, No. 10-1073 (D.C. Cir. Dec. 20, 2012), available at [http://www.cadc.uscourts.gov/internet/opinions.nsf/7F9EC0498823671D85257ADA00540B48/\\$file/09-1322-1411145.pdf](http://www.cadc.uscourts.gov/internet/opinions.nsf/7F9EC0498823671D85257ADA00540B48/$file/09-1322-1411145.pdf).

219. *Coalition for Responsible Regulation v. U.S. EPA*, ENVIRONMENTAL – APPEALS COURT (Dec. 20, 2012, 3:34 PM), <http://environmentalappealscourt.blog>

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issue failed in the past, it appears that, for the time being, the ball is back in Congress' court.²²⁰

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spot.com/2012/12/coalition-for-responsible-regulation-v.html (discussing D.C. Circuit's rejection of petitioner's request for rehearing en banc and reactions).

220. See Jaffe, *supra* note 150 (forming conclusions on regulatory state after D.C. Circuit's decision). With respect to greenhouse gas regulation, "the ball is now squarely back in Congress's court." *Id.*

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