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Lisa Heinzerling

Georgetown University Law Center, heinzerl@law.georgetown.edu

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ARTICLES

CLIMATE CHANGE IN THE SUPREME COURT

BY

LISA HEINZERLING*

In Massachusetts v. Environmental Protection Agency, the Supreme Court confronted the issue of climate change for the first time. The Court held that the Clean Air Act gives the Environmental Protection Agency the authority to regulate greenhouse gases and that the agency may not decline to exercise this authority based either on factors not present in the statute or on inconclusive gestures toward uncertainty in the science of climate change. I had the privilege of serving as the lead author of the winning briefs in this case. This Article provides an insider's perspective on the choices that went into bringing and briefing the case.

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I. BACKGROUND

In 1999, a group of non-governmental organizations, led by the International Center for Technology Assessment (ICTA), petitioned the Environmental Protection Agency (EPA) to regulate greenhouse gases from new motor vehicles.¹ Section 202 of the Clean Air Act provides that EPA “shall” regulate air pollutants from new motor vehicles when those

* Professor of Law, Georgetown University Law Center. This Article is an edited version of the 20th Annual Natural Resources Law Institute Distinguished Lecture, delivered on October 3, 2007 at Lewis and Clark Law School.

¹ *Massachusetts v. Environmental Protection Agency (Massachusetts v. EPA)*, 127 S. Ct. 1438, 1449 (2007).

pollutants “may be reasonably anticipated to endanger public health or welfare.”² Relying on scientific evidence of the likelihood of and probable harms from climate change, ICTA and the other petitioners argued that the EPA was required to regulate because greenhouse gases may reasonably be anticipated to endanger public health and welfare.³

Four years later, EPA finally came back with an answer.⁴ Its answer was, in short, “no.” First, the agency concluded that it did not have the authority to regulate greenhouse gases under the Clean Air Act.⁵ EPA reasoned that Congress had enacted a number of laws relating to climate change, but none of these laws had explicitly required regulation of greenhouse gases.⁶ Congress had, moreover, declined to pass bills that would have required regulation of greenhouse gases, thus showing, in EPA’s view, a lack of desire to allow such regulation.⁷ And, EPA said, greenhouse gas regulation does not fit with other statutory programs, such as the fuel economy program of the Energy Policy and Conservation Act.⁸ Therefore, EPA concluded, greenhouse gases are not “air pollutants” under the Clean Air Act because evidence from outside the statutory text indicated a Congressional desire to refrain from regulating.⁹

Second, EPA stated that even if it did have authority to regulate greenhouse gases, it would not exercise this authority.¹⁰ EPA explained, in essence, that it did not really like the statute all that much; under a heading entitled “different policy approach,”¹¹ EPA discussed its preference for voluntary measures rather than the “inefficient” and “piecemeal” approach of section 202 of the Clean Air Act.¹² The agency also expressed concern that there might not be technology reasonably available to control greenhouse gases from motor vehicles,¹³ and that “unilateral” EPA action on climate change could imperil negotiations with developing countries over greenhouse gas reductions.¹⁴ Finally, EPA provided a long list of unresolved scientific issues surrounding the problem of climate change.¹⁵

Several of the organizations that had initially asked EPA to regulate were now joined in a legal challenge to EPA’s decision by a large group of states, several cities, an American territory, and numerous environmental and public health organizations.¹⁶ They asked the D.C. Circuit to reverse

² Clean Air Act, 42 U.S.C. §§ 7401–7671q, § 7521(a)(1) (2000).

³ *Massachusetts v. EPA*, 127 S. Ct. at 1449.

⁴ Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52922 (Sept. 8, 2003).

⁵ *Id.* at 52925–29.

⁶ *Id.* at 52926, 52927–28.

⁷ *Id.* at 52927.

⁸ *Id.* at 52929.

⁹ *Id.* at 52928.

¹⁰ *Id.* at 52929–31.

¹¹ *Id.* at 52929.

¹² *Id.* at 52930, 52931.

¹³ *Id.* at 52931.

¹⁴ *Id.*

¹⁵ *Id.* at 52930–31.

¹⁶ *Massachusetts v. EPA*, 415 F.3d 50, 52 (D.C. Cir. 2005).

EPA's decision not to regulate greenhouse gases. In a splintered decision, the court sided with EPA.¹⁷ Judge Randolph concluded that EPA had the discretion to decline to regulate greenhouse gases even if it had the authority to do so;¹⁸ Judge Sentelle argued that petitioners had no standing to bring a court action based on so generalized a problem as climate change;¹⁹ and Judge Tatel sided with petitioners on every issue.²⁰ Unfortunately, Judge Tatel was alone and in dissent.²¹

In the Supreme Court, Justice Stevens wrote for a 5-4 majority.²² He concluded that petitioners had standing to sue,²³ that EPA clearly has the authority to regulate greenhouse gases as air pollutants under the Clean Air Act,²⁴ and that EPA's conclusion that it could decline to regulate even if it had the authority was arbitrary and capricious.²⁵

Writing for four Justices in dissent, Chief Justice Roberts concluded that petitioners here had no standing and broadly hinted there is no standing, ever, in climate change litigation.²⁶ Justice Scalia also filed a dissent, on behalf of the same bloc of justices.²⁷ On authority, he concluded that greenhouse gases are not "air pollutants" because they are not dirty and that the atmosphere is not "air."²⁸ On discretion, he argued that EPA was within its rights to decide that it was not yet time to decide whether to regulate greenhouse gases.²⁹

The Court's decision in *Massachusetts v. EPA* has already begun to have large-scale ramifications. A district court has upheld Vermont's law adopting California's program regulating greenhouse gas emissions from cars partly on the strength of the Supreme Court's decision;³⁰ the environmental commissioner in Kansas has denied a permit for a coal-fired power plant, citing *Massachusetts v. EPA*,³¹ and the legal reasoning behind EPA's decision not to control greenhouse gas emissions in setting New Source Performance Standards for power plants has been upheld by the Court's decision.³²

¹⁷ *Id.* at 58–59, 61.

¹⁸ *Id.* at 56–59.

¹⁹ *Id.* at 59–60.

²⁰ *Id.* at 61–82.

²¹ *Id.* at 53.

²² *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007).

²³ *Id.* at 1452–58.

²⁴ *Id.* at 1459–62.

²⁵ *Id.* at 1462–63.

²⁶ *Id.* at 1463–71.

²⁷ *Id.* at 1471.

²⁸ *Id.* at 1475–78.

²⁹ *Id.* at 1471–75.

³⁰ *See, e.g., Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie*, No. 2:05-cv-302, 2007 U.S. Dist. LEXIS 67617, at *123–41 (D.Vt. Sept. 12, 2007).

³¹ *KDHE Denies Sunflower Electric Air Quality Permit*, KAN. DEP'T OF HEALTH & ENV'T, Oct. 18, 2007, available at http://www.kdheks.gov/news/web_archives/2007/10182007a.htm.

³² Order for Standards for Performance for Electric Utility Steam Generating Units, 71 Fed. Reg. 98666, 98698 (Feb. 27, 2006) (to be codified at 40 C.F.R. 60) (declining to regulate greenhouse gases from power plants because "EPA has concluded that it does not presently have the authority to set NSPS to regulate CO₂ or other greenhouse gases that contribute to

How did we get here? The remainder of this Article discusses, from a lawyer's perspective, the strategic and tactical decisions behind the *Massachusetts v. EPA* litigation.

II. INSIDE *MASSACHUSETTS V. EPA*

In this discussion, I walk through the choices that the lawyers for petitioners made, ranging from the decision to petition EPA to regulate greenhouse gases from new motor vehicles to decisions about the precise wording of the briefs in the Supreme Court. In some instances, it is clear that the choices we made at least did not hurt our case, since we ultimately won. It is more difficult to say, of course, that the outcome would have been different if we had made different choices. Nevertheless, future litigants may find it helpful to understand the sheer breadth and subtle content of choices that shape litigation of this kind.

Beginnings. Here we must go back to the late 1990s. At that time, scientists were sounding ever scarier alarms about the reality and consequences of climate change.³³ Yet, on the international front, the Senate had formally expressed its opposition to ratifying the Kyoto Protocol in its existing form.³⁴ Thus nongovernmental organizations and governments other than the federal government (such as states and local governments) were casting about for legal theories under which domestic regulation of greenhouse gases could be jump-started. Everyone had a different theory. One idea was to begin by building cases under the National Environmental Policy Act, convincing agencies (through court order if necessary) to consider the climate-change consequences of their major activities.³⁵ Another idea was to start by persuading California to use its special authority under the Clean Air Act to set standards for new motor vehicles.³⁶ Yet another idea (my own, supported by no one but myself) was to petition EPA to regulate greenhouse gases as "hazardous air pollutants" under section 112 of the Clean Air Act.³⁷ The advantage of this approach was that section 112 had a clear petitioning procedure and set out deadlines within which the agency was required to answer petitions.³⁸ The disadvantage was that section 112 seemed an awkward source for greenhouse gas regulation because it had historically been applied to pollutants that are directly hazardous to human health, such as carcinogens and neurotoxins.³⁹ A

global climate change").

³³ See, e.g., *Massachusetts v. EPA*, 127 S. Ct. at 1448–49 (citing INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, CLIMATE CHANGE 1995, THE SCIENCE OF CLIMATE CHANGE 4 (1996)).

³⁴ Control of Emissions From New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,927 (Sept. 8, 2003).

³⁵ For an outgrowth of this strategy, see *Friends of the Earth v. Mosbacher*, 488 F. Supp. 2d 889 (N.D. Cal. 2007).

³⁶ 42 U.S.C. § 7543(b)(1) (2005).

³⁷ 42 U.S.C. § 7412(b)(3)(A) (2005).

³⁸ *Id.*

³⁹ See, e.g., *Natural Res. Def. Council v. EPA*, 824 F.2d 1146 (D.C. Cir. 1987) (reviewing section 112 standard for vinyl chloride, a carcinogen).

different approach, adopted by Massachusetts, was to sue the EPA to require it to set National Ambient Air Quality Standards for greenhouse gases⁴⁰ (Massachusetts eventually withdrew this lawsuit).⁴¹ Another possible approach was to petition EPA to regulate greenhouse gas emissions from new motor vehicles.

The last approach was, of course, the one taken by ICTA and the other groups that filed the original petition with EPA that ultimately led to the decision in *Massachusetts v. EPA*. It is worth noting that these original petitioners included many small and, I must say, rather obscure nongovernmental organizations, but few large ones; Greenpeace and Friends of the Earth were the two best-known environmental organizations in the original group.⁴² The largest and most established environmental organizations did not join the initial petition. Nevertheless, Joe Mendelson, a senior staff attorney at ICTA, forged ahead and filed the petition that changed the legal landscape for climate change in the United States.⁴³

Petitioning the Court. Challenging EPA's decision in the D.C. Circuit was not a big gamble. On the merits, petitioners were unlikely to end up with a result worse than the one they already had: that is, that the Clean Air Act provided no authority to regulate greenhouse gases and that even if it did, EPA would not be required to meaningfully investigate the relationship between climate change and public health and welfare. On the issue of standing—a sticking point in many environmental cases these days—even a loss in the D.C. Circuit would not have national consequences.

Once the D.C. Circuit had issued its decision against petitioners, however, it became a substantial question whether to let the case end at that point. For one thing, the case was in an unfavorable posture for Court review. The fractured decision of the D.C. Circuit left no clear ruling to appeal. Of particular importance, the D.C. Circuit had issued no decision on the marquee issue in the case, that is, whether the Clean Air Act gives EPA the power to regulate greenhouse gases.⁴⁴ Thus, the case did not appear to be a promising candidate for certiorari. Even more significantly, taking the case up to the Supreme Court raised the stakes considerably. An adverse ruling on the merits would ratify EPA's stance against greenhouse gas regulation and perhaps tie the hands of future administrations that might wish to use Clean Air Act provisions to set limits on greenhouse gas emissions. An adverse ruling on standing—a possibility made more likely by

⁴⁰ Richard Blumenthal & Kimberly Massicotte, *Seven States Notify EPA of Their Intent to Sue Over Global Warming*, SUSTAINABLE DEV., ECOSYSTEMS & CLIMATE CHANGE COMMITTEE NEWSLETTER (A.B.A., SEC. OF ENV'T, ENERGY & RESOURCES), June 2003, available at <http://www.abanet.org/enviro/committees/climatechange/newsletter/june03/globalwarming>.

⁴¹ A.B.A., SEC. OF ENV'T, ENERGY & RESOURCES, GLOBAL CLIMATE CHANGE AND U.S. LAW 144–45 (Michael B. Gerrard ed., 2007).

⁴² *Massachusetts v. EPA*, 127 S.Ct. 1438, 1449 n.15 (2007).

⁴³ See INT'L CTR. FOR TECH. ASSESSMENT, PETITION FOR RULEMAKING AND COLLATERAL RELIEF SEEKING THE REGULATION OF GREENHOUSE GAS EMISSIONS FROM NEW MOTOR VEHICLES UNDER SECTION 202 OF THE CLEAN AIR ACT (Oct. 20, 1999), available at <http://www.icta.org/doc/ghgpet2.pdf>.

⁴⁴ *Massachusetts v. EPA*, 415 F.3d 50, 56 (D.C. Cir. 2005).

the recent appointment of John Roberts as Chief Justice, as Roberts had made clear that he would be no friend to environmentalists on the issue of standing⁴⁵—likely would have negative reverberations for litigation on climate change and perhaps other environmental issues around the country.

Nevertheless, petitioners went for it and asked the Court to review the D.C. Circuit's decision.⁴⁶ In the petition for certiorari, we made several noteworthy tactical decisions. First, we led with the question addressed by Judge Randolph: whether EPA had erred in concluding that it could decline to regulate greenhouse gases, even if it had the authority to regulate them, based on reasons such as scientific uncertainty and foreign policy concerns.⁴⁷ We thought that Judge Randolph's statement that EPA had discretion as great as that of Congress when it decided whether to enact legislation in the first instance⁴⁸ might catch the eye of the Justices, even if they were otherwise uninterested in the general issue of climate change. Second, we opened with the legal errors committed by the D.C. Circuit and EPA, and closed with the importance of the issue of climate change. Here, too, our hope was that even the Justices who might not be inclined to worry about climate change might worry about significant legal errors. Ultimately, of course, the Court indicated that it had indeed taken up the case because of the importance of the issue of climate change,⁴⁹ and the Justices in dissent let it be known that their viewpoints rested in significant part on the environmental backdrop of the case.⁵⁰ Thus, while we succeeded in persuading the Court to take up the case, we failed miserably in our effort to disguise this breakthrough case about climate change as an ordinary administrative and statutory matter. No one, apparently, was fooled.

Playing nicely with others. The twenty-nine petitioners in the Supreme Court included twelve states, three cities, an American territory, and thirteen environmental and public health organizations.⁵¹ The number of lawyers was, of course, larger than that. In the D.C. Circuit, petitioners had made the smart and admirable decision to work together on a single presentation to the court, and they continued that practice in the Supreme Court. Thus, this large group of diverse entities, represented by skillful lawyers with strong opinions, came together and filed one petition for certiorari, one opening brief, and one reply brief.⁵² This way of proceeding meant that we had fewer pages to work with than we would have if we had filed separate briefs. We had fifty pages for our single opening brief, compared to the 250 pages

⁴⁵ John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219, 1231 (1993).

⁴⁶ Petition for Writ of Certiorari, *Massachusetts v. EPA*, 415 F.3d 50 (C.A.D.C. 2005) (Nos. 03-1361 to 03-1368).

⁴⁷ *Massachusetts v. EPA*, 415 F.3d at 56–58.

⁴⁸ *Id.* at 58.

⁴⁹ *Massachusetts v. EPA*, 127 S. Ct. 1438, 1447 (2007).

⁵⁰ *Id.* at 1468–71 (Roberts., C.J., dissenting).

⁵¹ *Id.* at 1446.

⁵² See Petition for Writ of Certiorari, *supra* note 46; Brief for the Petitioners, *Massachusetts v. EPA*, 415 F.3d 50 (C.A.D.C. 2005) (Nos. 03-1361 to 03-1368); Reply Brief for the Petitioners, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2006) (No. 05-1120).

available to the five different groups of respondents.⁵³ In addition to the United States, the respondents were several states led by Michigan, the Utility Air Regulatory Group, the CO₂ Litigation Group, and the automobile manufacturers.⁵⁴ Each of these groups filed a separate brief.⁵⁵ The advantage of our unified approach was that we presented the Court with one, consistent legal theory. Respondents did not. For example, some respondents argued that EPA's decision not to regulate greenhouse gases was "effectively nonreviewable";⁵⁶ others argued that it was reviewable, but under a narrow standard.⁵⁷ One could say, I suppose, that respondents' approach presented a kind of smorgasbord to the Court, from which the Court could choose the items it most preferred. My sense, however, is that petitioners had the better idea: one work product, one theory.

Petitioners' amici also offered a cohesive presentation. Three points are of note here. First, several amici—including a group of distinguished climate scientists, a group of local governments and local government organizations, and an Alaskan organization—participated, with petitioners' encouragement, at the cert stage as well as at the merits stage.⁵⁸ Amicus support at the cert stage has been shown to be an important factor in obtaining review.⁵⁹ Second, at the merits stage, individual groups largely suppressed the natural desire to file a separate brief, and instead gathered together on joint briefs presenting, again, a unified argument. Perhaps most dramatically, seventy-five different wildlife organizations got together and filed just one brief.⁶⁰ Third, the amici were a very diverse lot. They ranged from climate scientists to states and local governments to religious organizations to the skiing industry and major energy firms.⁶¹ Together, they provided what amicus briefs, at their best, do: a portrait for the Court of the problem at hand and of the consequences of a failure to address that problem.

Framing the case. In discussing the petition for certiorari, I alluded briefly to decisions we faced about how to frame the case for the Court. Here I elaborate on those decisions, with reference to the briefs on the merits.

One possibility was to frame the case in terms of the international agreements on climate change and, in particular, the agreement signed by the United States, the United Nations Framework Convention on Climate

⁵³ SUP. CT. R. 33.1(g)(v).

⁵⁴ *Massachusetts v. EPA*, 127 S. Ct. at 1446 n.5, 6.

⁵⁵ *Id.*

⁵⁶ Brief for Respondents Alliance of Automobile Manufacturers et al. at 43, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120).

⁵⁷ Brief for the Federal Respondent at 39, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120).

⁵⁸ See Docket, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120) (listing amici filings), available at <http://www.supremecourtus.gov/docket/05-1120.htm>.

⁵⁹ Gregory A. Caldeira & John R. Wright, *Organized Interest and Agenda-Setting in the U.S. Supreme Court*, 82 AM. POL. SCI. REV. 1109, 1109 (1988).

⁶⁰ Brief of Amici Curiae Wildlife Conservation Interests in Support of Petitioners at 1, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007) (No. 05-1120).

⁶¹ See Docket, *supra* note 58.

Change (UNFCCC).⁶² This convention commits the United States to take action to avoid “dangerous anthropogenic interference with the climate system.”⁶³ One might argue that EPA’s failure to address greenhouse gases under the Clean Air Act places the U.S. on a collision course with its commitments under the UNFCCC. We chose not to place the case in its international context in this way. With some Justices hostile to the invocation of international law in adjudicating domestic disputes,⁶⁴ it seemed unwise to risk turning them off by relying on international agreements that were not at the core of our legal arguments.

Another possibility was to situate the legal issues explicitly within the context of the problem of climate change, and to use the urgency and importance of this issue to set the tone for our legal arguments. One might, for example, argue that the consequences of climate change for public health and welfare are likely to be so dire that any doubt about the Clean Air Act’s applicability to climate change should be resolved in favor of action rather than inaction. Again, we did not frame the issues in this way. Indeed, as I have suggested, we instead framed the case as an ordinary administrative and statutory case that happened to arise in an extraordinary context. We hoped that Justices who might for whatever reason question the significance of the problem of climate change would be persuaded to look beyond that pre-existing mindset and consider the legal issues without prejudice. In the case of the four dissenting Justices, our hope proved forlorn. Indeed, Chief Justice Roberts went so far as to express skepticism about our unrebutted affidavits on the consequences of climate change for Massachusetts and on the effect of U.S. regulation on climate change mitigation.⁶⁵ So much for our attempt to lift the case out of its political context.

A final decision about framing had to do with the kind of relief we requested. We did not ask the Court to hold that EPA must find that climate change is endangering public health and welfare (it seems to me that the United States Supreme Court is the last institution in America that should be deciding this issue), and we did not ask the Court to hold that EPA must regulate greenhouse gases. Instead, we asked the Court to hold only that EPA had legally erred in declining to regulate greenhouse gases, and to remand the case to the agency for a decision based on the correct legal standard.⁶⁶ While the case was pending, many commentators and news outlets got this point wrong. Even *The New York Times* seemed under the impression that the case might call upon the Court to pronounce upon the science of climate change.⁶⁷ That was not our position. Our position was more modest: we simply wanted EPA to follow the correct legal standard in

⁶² United Nations Framework Convention on Climate Change, May 9, 1992, 31 I.L.M. 849, available at <http://unfccc.int/resource/docs/convkp/conveng.pdf>.

⁶³ *Id.* art. 2.

⁶⁴ See, e.g., *Roper v. Simmons*, 543 U.S. 551, 624 (2005) (Scalia, J., dissenting).

⁶⁵ *Massachusetts v. EPA*, 127 S. Ct. at 1467, 1470 (Roberts, C.J., dissenting).

⁶⁶ Brief for the Petitioners, *supra* note 52, at 3.

⁶⁷ Editorial, *Global Warming and the Courts*, N.Y. TIMES, July 8, 2006.

coming to a decision on the now-almost-a-decade-old ICTA petition asking EPA to regulate greenhouse gases from new motor vehicles.

Arguing the merits. In arguing the questions regarding EPA's authority and discretion under the Clean Air Act, we made a tactical decision to rely almost exclusively on the text of the statute. Our thinking was as follows: First, most simply, the text of the statute clearly pointed in our direction. Section 202 directs EPA to regulate "air pollutants" from new motor vehicles when they cause or contribute to air pollution that may reasonably be anticipated to endanger public health or welfare.⁶⁸ The Clean Air Act defines "air pollutants" to mean "any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air."⁶⁹ All of the greenhouse gases petitioners had asked EPA to regulate—carbon dioxide, methane, nitrous oxides, and hydrofluorocarbons—are physical and chemical substances or matter which are emitted into or otherwise enter the ambient air.⁷⁰ Moreover, we argued, the use of the word "including" meant that the category of "air pollution agents" was, if anything, broader than the large category of substances or matter emitted into the ambient air.⁷¹ (A digression here: one evening after I had spent the day working on the brief, my then-ten-year-old daughter asked me what exactly I had done all day. I told her I had spent the day explaining the meaning of "including." She asked how could it be that "these people"—the Justices—"who were, like, 60 or 70 years old," did not know what "including" meant. I asked her if she knew, asking her if one said "A includes B," which was bigger, A or B? She quickly answered "A." I said she got it right, but that EPA had gotten this point wrong. She was incredulous. She was even more incredulous when, later, she learned that Justice Scalia had gotten it wrong, too.⁷²).

Our arguments from the statutory text were more extensive than I have explained here,⁷³ but our basic conviction, and argument to the Court, was that the statutory text compelled a conclusion that EPA had the authority to regulate greenhouse gases and that its reasons for saying it could decline to regulate even if it had the authority to do so flouted the statutory language. Another reason for our decision to rely almost entirely on the text of the statute was that this is the kind of argument that has found favor with even the Justices who might not be inclined to rule in our favor. Specifically, I was utterly convinced that we simply *had* Justice Scalia on at least the authority question. Justice Scalia, of course, is perhaps the Court's most adamant

⁶⁸ 42 U.S.C. § 7521(a)(1) (2000).

⁶⁹ 42 U.S.C. § 7602(g) (2000).

⁷⁰ *Id.*

⁷¹ Brief for the Petitioners, *supra* note 52, at 13–14.

⁷² *Massachusetts v. EPA*, 127 S. Ct. 1438, 1475–76 (2007).

⁷³ For a detailed discussion of our arguments, see Lisa Heinzerling, *Climate Change and the Clean Air Act*, 42 U.S.F. L. REV. 1 (2007).

textualist.⁷⁴ And here was an argument based solely on the text of the statute. Turns out I was wrong about Justice Scalia.

To my mind, the trickiest part of briefing the merits of this case was in explaining to the Court why EPA had erred in saying that it had discretion to decline to regulate even if it had authority to regulate. Courts typically give agencies a good deal of leeway when they decline to take action.⁷⁵ The way we approached the question was to look at each reason EPA gave for asserting that it had discretion, and to explain why each of them was unlawful. Three of the reasons were unlawful for the same reason. EPA's evident distaste for the mandatory controls imposed by section 202, its reference to foreign policy concerns, and its worries about the availability of technology all failed, legally speaking, because they were simply not factors Congress had made relevant to the decision whether to regulate under section 202.⁷⁶ Only endangerment was relevant.⁷⁷ In this way, we swept away three out of four of the reasons EPA had given.

The fourth was trickier to handle. EPA had said that the science was so uncertain that the agency was justified in withholding regulation.⁷⁸ With a statutory trigger like “may reasonably be anticipated to endanger public health or welfare,” scientific uncertainty obviously is a relevant concern.⁷⁹ Thus our argument on this point had to be different from the argument regarding the other reasons cited by EPA. We could not say that scientific uncertainty was totally out of the statutory bounds. Instead, we said that, although this factor was relevant, EPA had mishandled it. Section 202 not only allows, but requires, regulatory action even in the face of scientific uncertainty.⁸⁰ Thus, simply referring to scientific uncertainty, without saying how that uncertainty relates to the statutory standard of reasonable anticipation of endangerment, is insufficient.⁸¹ The Court accepted this argument.⁸² Here, too, though, Justice Scalia and three of his colleagues were unmoved by our appeals to the text of the statute.⁸³

In making a quite strict textualist argument like this one, one important issue that arises is whether one is prepared to accept the natural implications of the broad argument. If one cannot take the argument to its logical conclusion, one might be faced with charges of inconsistency or opportunism. Two implications, in particular, were important to think through in this case. First, were we really prepared to say that any substance or matter emitted into the ambient air was an “air pollutant”? This would

⁷⁴ John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 226 (2000) (adding Justice Thomas as equally committed to textualism).

⁷⁵ See, e.g., *Nat'l Mining Ass'n v. U.S. Dep't of the Interior*, 70 F.3d 1345, 1352 (D.C. Cir. 1995).

⁷⁶ Brief for the Petitioners, *supra* note 52, at 39–40.

⁷⁷ *Id.* at 39.

⁷⁸ Brief for the Federal Respondent, *supra* note 57, at 35.

⁷⁹ Brief for the Petitioners, *supra* note 52, at 41.

⁸⁰ *Id.* at 41–42.

⁸¹ *Id.* at 42.

⁸² *Massachusetts v. EPA*, 127 S. Ct. 1438, 1463 (2007).

⁸³ *Id.* at 1474.

mean that water vapor, for example, was an “air pollutant.” We decided that we were prepared to accept this implication. Before it would be regulated, water vapor would have to be shown to endanger public health or welfare and it would have to be emitted by a regulated source.⁸⁴ With those qualifications in mind, the idea that water vapor could be regulated under the statute did not seem implausible. Second, we had to decide what to say about the implications of our argument for the National Ambient Air Quality Standards (NAAQS), which are health- and welfare-based standards applicable to air quality throughout the country.⁸⁵ If we were right, and if EPA ultimately made a finding of endangerment regarding greenhouse gases, was EPA then required to set a NAAQS for greenhouse gases? The awkwardness of this possibility came from the fact that no state could come into compliance with a NAAQS for, say, carbon dioxide, without not only compliant behavior on the part of other states but also without mitigating actions on the part of other nations. And we could not say that no one would consider petitioning EPA to set a NAAQS for greenhouse gases because Massachusetts had, in fact, done just that.⁸⁶ Instead, we first reminded the Court that the NAAQS program was not at issue here; only the cars program of section 202 was.⁸⁷ And, second, we pointed the Court to a bit of language in the statute that might allow EPA more room to decline to set a NAAQS than we thought it had to decline to set a standard for cars.⁸⁸ In the end, the Supreme Court did not even mention the NAAQS.

Juggling other cases. Other tactical choices in the case had to do with the fact that there were cases all over the country relating to climate change, many of them brought by the same parties who were petitioners in this case. This case was made more complicated by our desire to protect the litigating positions in those cases without jeopardizing our position in this case. For example, at the same time *Massachusetts v. EPA* was pending, the Supreme Court was considering *Environmental Defense v. Duke Energy Corp. (Duke Power)*.⁸⁹ One part of that very complicated case involved the question of whether the same term used in different parts of a statute must be given the same meaning throughout the statute.⁹⁰ The answer Environmental Defense (also one of our petitioners) gave in *Duke Power* was “no”; an “increase in emissions” could mean an hourly increase in one part of the Clean Air Act and an annual increase in another.⁹¹ In *Massachusetts v. EPA*, on the other

⁸⁴ These prerequisites to regulation are pervasive in the Clean Air Act. See, e.g., 42 U.S.C. § 7411(b)(1)(A) (2001) (new source performance standards are applicable to categories of stationary sources that may reasonably be anticipated to endanger public health or welfare).

⁸⁵ *Alaska Dep’t Env’tl. Conservation v. EPA*, 540 U.S. 461, 469–70 (2004).

⁸⁶ *Massachusetts v. EPA*, 127 S. Ct. at 1449–51.

⁸⁷ Brief for the Petitioners, *supra* note 52, at 8–9.

⁸⁸ 42 U.S.C. § 7408(a)(1) (2000) (requiring Administrator to list, as criteria pollutants subject to the NAAQS program, pollutants “for which he plans to issue air quality criteria under this section”).

⁸⁹ 127 S. Ct. 1423 (2007).

⁹⁰ *Id.* at 1432–34.

⁹¹ Brief for the Petitioners, *supra* note 52, at 45–46, *Env’tl. Def. v. Duke Energy Corp.*, 127 S. Ct. 1423 (2006) (No. 05-848).

hand, there was some potential ground to be gained from arguing that the same terms must be deemed to have the same meaning in different parts of the statute.⁹² But nothing would be lost by putting the point less dramatically. In this way, we could preserve an argument important to *Duke Power* without sacrificing any argument of importance to *Massachusetts v. EPA*.

Another example of pending litigation that we had very much in mind in briefing *Massachusetts v. EPA* was the litigation over California's program for regulating greenhouse gas emissions from cars.⁹³ The Clean Air Act gives California alone the power to set its own emission standards for automobiles,⁹⁴ yet it also gives other states the authority to adopt California's standards as their own.⁹⁵ In 2004, California promulgated rules limiting greenhouse gas emissions from motor vehicles.⁹⁶ By the time the Court granted review in *Massachusetts v. EPA*, ten other states had adopted California's standards,⁹⁷ and automobile manufacturers had filed lawsuits challenging the standards in California, Vermont, and Rhode Island.⁹⁸ California and several of the states that had adopted California's standards were petitioners in *Massachusetts v. EPA*.⁹⁹ Thus, at the same time they were hoping for victory in that case, they also had a close eye on the litigation over state standards pending in the district courts. One of the arguments common to both *Massachusetts v. EPA* and the litigation over state standards was based on the Energy Policy and Conservation Act (EPCA), which sets federal fuel economy standards for cars.¹⁰⁰ In *Massachusetts v. EPA*, EPA and other respondents argued that the Clean Air Act could not be interpreted to give EPA authority to regulate carbon dioxide because reducing carbon dioxide from motor vehicles would largely mean increasing vehicles' fuel economy—thus displacing, EPA and the other respondents thought, the scheme created by EPCA.¹⁰¹ In the litigation over state standards, the auto manufacturers have argued that state standards are preempted by EPCA, both expressly and because of the inherent conflict between state emission controls for greenhouse gases and federal fuel economy standards.¹⁰² In developing our arguments in *Massachusetts v. EPA*, we were cognizant of the fact that the outcome in that case would likely have large implications for the litigation over California's standards. Indeed, while *Massachusetts v. EPA* was under review, the district judge hearing the California case stayed that litigation based expressly on the

⁹² Brief for the Petitioners, *supra* note 52, at 33–35.

⁹³ *See, e.g.*, Cent. Valley Chrysler-Jeep v. Witherspoon, 456 F. Supp. 2d 1160 (E.D. Cal. 2006).

⁹⁴ 42 U.S.C. § 7543 (2000).

⁹⁵ 42 U.S.C. § 7507 (2000).

⁹⁶ CAL. CODE REGS. tit. 13, §§ 1961, 1961.1 (2006).

⁹⁷ Brief for the Petitioners, *supra* note 52, at 6.

⁹⁸ *Id.*

⁹⁹ *Massachusetts v. EPA*, 127 S. Ct. 1438, 1446 (2007).

¹⁰⁰ 49 U.S.C. §§ 32,901–32,919 (2000).

¹⁰¹ Brief for the Federal Respondent, *supra* note 57, at 24–25.

¹⁰² Green Mountain Chrysler Plymouth Dodge Jeep v. Crombie, 508 F. Supp. 2d 295, 302 (D. Vt. 2007).

pendency of *Massachusetts v. EPA*.¹⁰³ In *Massachusetts v. EPA*, we tried to show that the Clean Air Act and EPCA could live comfortably together, that they were written with attention to each other, and that there was no inherent conflict between the two laws.¹⁰⁴ These arguments were perfectly consistent with arguments important to the litigation over state standards, but the stakes in making them were made that much higher by the overlap between the two pieces of litigation. The outcome in this regard was even better than we might have hoped: a brief, dismissive paragraph from the Supreme Court saying that the two statutes fit fine together and that the existence of EPCA gave EPA no excuse to “shirk its environmental responsibilities.”¹⁰⁵ *Massachusetts v. EPA* figured prominently in the Vermont district court’s recent decision upholding Vermont’s standards for greenhouse gases from automobiles.¹⁰⁶

Standing for something. We knew standing was going to be an issue from the beginning. In its opposition to the petition for certiorari, the federal government actually added standing as a third question of the case.¹⁰⁷ Notably, the Court declined to add the question of standing to the questions to be addressed. Yet, during Chief Justice Roberts’ brief tenure, the Court has already proved itself quite willing to add questions—including questions regarding standing—to the questions presented by the parties.¹⁰⁸ And four Justices ended up dissenting on the issue, finding no standing in this case.¹⁰⁹ It continues to baffle me why the four Justices who dissented on standing—and whose views appeared adamant enough that one might reasonably speculate that they thought standing was a live issue in the case from the beginning—did not care to add standing to the questions presented and thus to receive orderly briefing on the issue.¹¹⁰ Of course, standing is an issue that can be raised at any time,¹¹¹ but this does not mean it is an issue that does not deserve the kind of process afforded to other legal issues before the Court.

Given that we knew that the federal government and other respondents would raise the issue of standing but that we were also in a posture where standing was not formally one of the questions presented in the case, we faced the decision of whether to address this issue in our opening brief. The advantages of doing so were that we had more pages to work with in the opening brief and that by addressing the issue up front we could be the first to frame it for the Court. The disadvantages were that we might appear, unnecessarily, defensive if we addressed an issue on which we had not lost below and that we would not have the benefit of respondents’ briefing on the

¹⁰³ Cent. Valley Chrysler-Jeep v. Witherspoon, No. CV F 04-6663 AWI LJO, 2007 WL 135688 (E.D. Cal. Jan. 16, 2007).

¹⁰⁴ Brief for the Petitioners, *supra* note 52, at 30.

¹⁰⁵ *Massachusetts v. EPA*, 127 S. Ct. 1438, 1462 (2007).

¹⁰⁶ *Green Mountain*, 508 F. Supp. 2d at 307–10.

¹⁰⁷ Brief for the Federal Respondent, *supra* note 57, at I.

¹⁰⁸ *Wilkins v. Cuno*, 545 U.S. 1165 (2005).

¹⁰⁹ *Massachusetts v. EPA*, 127 S. Ct. at 1463–74.

¹¹⁰ *Id.* at 1471.

¹¹¹ FED. R. CIV. P. 12(h)(3).

issue before deciding what arguments to make. Thus, we made only the smallest of gestures toward standing in our opening brief, noting the presence of twelve states among the petitioners and referring to amicus briefs discussing standing.¹¹² Then we waited to see what respondents would have to say. If we had not followed this course, I think we might have made some foolish mistakes.

Let me give two examples. The first involves a fellow named Frank Keim. Frank Keim was one of our forty-three affiants on standing.¹¹³ He averred that he lives in Alaska, that he hikes on glaciers, and that his enjoyment of hiking has been impaired by the effect of climate change on glaciers.¹¹⁴ (The glaciers are melting).¹¹⁵ There is nothing wrong with Mr. Keim's affidavit. In fact, of all the affidavits in the case, this one most closely tracked the teachings of the Supreme Court's decision in *Friends of the Earth v. Laidlaw*, which found standing for plaintiffs who were no longer able to enjoy recreational opportunities along a river because the river was polluted.¹¹⁶ So, technically speaking, there was nothing wrong and everything right about Frank Keim's affidavit. But if one put Frank Keim out there as one's only evidence of standing, one would just be hosed in the Supreme Court—especially in a case in which one is asking the Court to rule for the first time on an issue as important as climate change. I don't care what the law is; you lose if you do that. In the end, therefore, we mentioned Frank Keim's plight as one example of the kinds of injuries set forth in our affidavits, but we did not dwell on it. Instead, as Judge Tatel had done below,¹¹⁷ we focused on Massachusetts' injury and, in particular, on the state's loss of coastline, noting that states had been coming to the Supreme Court to complain about loss of territory since the very founding of the republic.¹¹⁸

Another mistake we might have made would have been to focus on an affidavit stating that, historically speaking, when the United States adopts technological standards for cars, the developing countries have followed suit, and that they could be expected to do so in this context as well.¹¹⁹ The significance of this affidavit was that it showed that the stakes in the case were not limited to domestic emissions of greenhouse gases, but that they extended as well to other countries' decisions on emission-reducing technologies. This would have helped us to establish causation and redressability in the standing context, by demonstrating that U.S. decisions on motor vehicle standards have large ripple effects. After seeing the federal

¹¹² Brief for the Petitioners, *supra* note 52, at 5–6 & n.5.

¹¹³ Petitioners' Standing Appendix at 188–91, *Massachusetts v. EPA*, 415 F.3d 50 (D.C. Cir. 2005) (Nos. 03–1361 to 03–1368) (Declaration of Frank Keim).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 190.

¹¹⁶ 528 U.S. 167 (2000).

¹¹⁷ *Massachusetts v. EPA*, 415 F.3d at 65–67 (Tatel, J., dissenting).

¹¹⁸ See Reply at 9, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2006) (No. 05-1120), 2006 WL 3367871.

¹¹⁹ Petitioners' Standing Appendix, *supra* note 113, at 204–21. (Declaration of Michael C. MacCracken).

government's brief, however, which ripped into the idea that standing could be based on third-party decisions, we chose not to focus on this affidavit in our presentation on standing.¹²⁰ Again, as a technical legal matter, there was nothing wrong with the affidavit. The causal chain it described was neither long nor fanciful, and the assertions in the affidavit were unrebutted.¹²¹ But asking the Court to accept the causal chain the affidavit laid out felt like it would be asking more than the Court would embrace.

We decided, instead, to focus on domestic emissions. We pointed out to the Court that twenty-three percent of U.S. carbon dioxide emissions come from motor vehicles, that six percent of the global emissions of carbon dioxide come from U.S. cars, and that all told, U.S. cars belch about half a billion metric tons of carbon dioxide into the atmosphere every year.¹²² Moreover, EPA used the same legal reasoning to reject regulation of greenhouse gas emissions from power plants as it used to reject regulation of cars. Together, cars and power plants emit sixty percent of the carbon dioxide inventory in this country.¹²³ Despite the Solicitor General's arguments to the contrary, we observed to the Court, these amounts were nothing to sneeze at.¹²⁴ Moreover, we argued, the Clean Air Act itself provides that EPA must regulate harmful air pollutants when they "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."¹²⁵ We urged the Court not to override that statutory directive in the guise of deciding the standing question or, in other words, to decide that some specific percentage contribution was required for standing purposes even though it was not required by the relevant statute.¹²⁶ It would be activist, we thought and we argued, to use the purportedly judicially modest doctrine of standing to undo a statutory directive on causation.¹²⁷

In short, our argument on standing was quite conventional. We claimed an injury, based on unrebutted factual evidence, that has supported Supreme Court jurisdiction since the days of the framers.¹²⁸ We urged the Court to find causation and redressability both in the sheer magnitude of the emissions involved and in the statutory standard at issue in the case.¹²⁹ We asked for no new law on standing, and indeed affirmatively implored the Court not to derange the law of standing in the way respondents' briefs would have done (as by, for example, requiring an unelaborated "meaningful contribution" to a problem in order to satisfy the causation requirement).¹³⁰

¹²⁰ Brief for the Federal Respondent, *supra* note 57, at 7–8, 14–19.

¹²¹ *See id.* at 14–15 (citing the MacCracken declaration without challenging its assertions).

¹²² *See Reply*, *supra* note 118, at 5, 9.

¹²³ *Id.* at 5.

¹²⁴ *Id.* at 10.

¹²⁵ 42 U.S.C. § 7521(a)(1) (2000).

¹²⁶ *Reply*, *supra* note 118, at 9.

¹²⁷ *Id.* at 5.

¹²⁸ *Id.* at 2.

¹²⁹ *Id.* at 10–12.

¹³⁰ *Id.* at 1.

The Court met us halfway. In its actual analysis of the standing question, it did not purport to break any new legal ground, and upheld our standing based on a conventional examination of injury in fact, causation, and redressability.¹³¹ But the Court prefaced its discussion of these elements of standing by noting the importance of state involvement in the case and acknowledging the “special solicitude” to be afforded to states when they come to federal court to complain about the federal government’s failure to protect them from pollution.¹³² A large question that remains after *Massachusetts v. EPA* is whether private litigants can use the decision to support standing in climate change cases.¹³³

A primary authority cited by the Court in finding “special solicitude” for states appropriate is *Georgia v. Tennessee Copper Co.*¹³⁴ As Chief Justice Roberts noted in his dissent, no brief even mentioned this case.¹³⁵ Justice Kennedy first brought it up at oral argument.¹³⁶ It remains a mystery how this decision emerged as a player in this case. One bemusing anecdote from the development of petitioners’ arguments: early on in the briefing, I had considered citing this case in support of standing for the states, only to be brushed back upon finding the Court’s decision in *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel., Barez*,¹³⁷ which appeared to me to hold that the standing of *Georgia v. Tennessee Copper*—“parens patriae” standing¹³⁸—did not apply when states sued the federal government.¹³⁹ Silly me.

Coming to terms. The last category of choices is the least substantive but may be among the most interesting. Those choices have to do with language: what terms do you use for recurring concepts, what literary allusions are within bounds, what language is acceptable. On recurring concepts, we had to decide, for example, whether to call the problem at issue “global warming” or “climate change.” There is no right answer. It seemed to me, however, that “climate change” might seem less inflammatory to Justices hostile to the very notion of human-induced warming. Similarly, rather than referring to “greenhouse gases,” we used the term “air pollutants associated with climate change,” which in addition to its slightly euphemistic quality had a kind of question-begging virtue to it. Likewise, we did not refer to “the Bush Administration” or “the Bush EPA” or anything of that sort; we simply referred to EPA. All of these choices were aimed at preventing a

¹³¹ *Massachusetts v. EPA*, 127 S. Ct. 1438, 1455–58 (2007).

¹³² *Id.* at 1454–55.

¹³³ Notably, the D.C. Circuit has preliminarily—and without analysis—answered “no.” *Public Citizen v. Nat’l Highway Traffic Safety Admin.*, 489 F.3d 1279, 1294 n.2 (D.C. Cir. 2007) (“In *Massachusetts v. EPA*, the Supreme Court held that states receive ‘special solicitude’ in standing analysis, including analysis of imminence. No state is involved in this case, however.”).

¹³⁴ 206 U.S. 230 (1907).

¹³⁵ *Massachusetts v. EPA*, 127 S. Ct. at 1466 (Roberts, J., dissenting).

¹³⁶ Transcript of Oral Argument at 15, *Massachusetts v. EPA*, 127 S. Ct. 1438 (2007), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/05-1120.pdf.

¹³⁷ 458 U.S. 592 (1982).

¹³⁸ *Id.* at 603–05.

¹³⁹ *Id.* at 610 n.16.

backlash against us from Justices who might not be disposed to accept our arguments. Four of those Justices voted against us in any event.

What literary figures could we use? We opened our analysis in the petition for certiorari with *Bartleby the Scrivener* and closed the opening brief on the merits with Cardinal Richelieu. In the petition, we likened EPA's explanation of its decision not to regulate greenhouse gases to Bartleby's famous answer: "I would prefer not to."¹⁴⁰ In the opening brief, we analogized the D.C. Circuit's open-ended approval of EPA's reasoning to Richelieu's *carte blanche*: "It is by my order and for the good of the State that the bearer of this has done what he has done."¹⁴¹ Humpty Dumpty also made an appearance, in an allusion to his assertion of arbitrary control over the words he chose to use.¹⁴² I am not suggesting that Bartleby, Richelieu, or the big egg made a difference to the outcome of the case. I would wager, however, that they made the briefs more enjoyable to read.

Last, we had to make choices about the actual words we would use to make our arguments. In the many long conference calls devoted to line-by-line discussions of the drafts of the briefs, no topic consumed more attention than word choice. No interesting word was liked by everyone; or, to put it another way, at least one person disliked—"hated," sometimes—every word with any lilt or kick or whimsy to it. "Farraginous," "mélange," "hodgepodge," and many others were criticized for being too unusual or too trite, too erudite or too colloquial. "Farraginous," in particular, came under sustained attack. The complaint was that people had had to look it up in a dictionary. My response was that if there was one word in the brief that law clerks had to look up, that wasn't necessarily a bad thing; perhaps they would think, here is a person who knows something I didn't know—what else does she know that I don't know? Here again, petitioners ultimately came together and agreed to set aside individual differences in order to preserve a brief with not only substance, but some style. The lesson may be a good one for lawyers and law students alike, who might gather from evidence around them that legal writing must be boring to be acceptable. It needn't be.

And sometimes writing assistance can come from unexpected sources. In one conference call, one person objected to a phrase I had used in describing EPA's decision. There were about fifteen lawyers on the call; no one offered a substitute word. I finally suggested "fumbled." Everyone thought that was fine. The next morning at breakfast, however, I worried aloud to my family that perhaps one could not just "fumble"; one had to fumble *something*—a ball, a case, etc. My son—then seven years old—said simply, "How about 'blundered'?" So "blundered" it was.

¹⁴⁰ Petition for Writ of Certiorari, *supra* note 46, at 12, 48; HERMAN MELVILLE, *Piazza Tales*, in *BARTLEBY* 16, 24–25 (1948).

¹⁴¹ Brief for the Petitioners, *supra* note 52, at 48; ALEXANDRE DUMAS, *THE THREE MUSKETEERS* 178 (1888).

¹⁴² Brief for the Petitioners, *supra* note 52, at 33.

III. CONCLUSION

I have tried to provide a fairly detailed picture of the lawyer's choices that defined and shaped the *Massachusetts v. EPA* litigation in the Supreme Court. Some of these choices probably made a difference to the outcome in the case; undoubtedly some did not. It is also possible that, despite our victory, in some instances even the Justices in the majority thought we had fumbled—or even blundered. But, I must say, it is much less painful to second guess one's litigating choices after a victory than after a defeat.