

Colloquy Essay

MASSACHUSETTS V. EPA: BREAKING NEW GROUND ON ISSUES OTHER THAN GLOBAL WARMING[†]

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After the Supreme Court handed down its split 5-4 decision in *Massachusetts v. EPA*,¹ various media outlets trumpeted the significance of the case. As one example, the *Chicago Tribune* proclaimed: “EPA must regulate greenhouse gases.”² The problem, of course, is that the Court said no such thing. To be sure, the Court determined that greenhouses gases were “air pollutants” within the meaning of the Clean Air Act (CAA).³ But the Court’s opinion did not order the EPA to regulate with respect to climate change. Rather, the ruling remands the case to allow the agency to reconsider its denial of a petition to regulate the emissions of four pollutants associated with climate change from mobile sources under section 202 of the CAA.⁴ The ruling, in other words, leaves the EPA free to decide not to regulate, so long as it provides adequate justification for its decision.⁵ This means that what the media has touted as the “global warming” case may not

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¹ 127 S. Ct. 1438 (2007).

² Michael Hawthorne, *EPA Must Regulate Greenhouse Gases*, CHI. TRIB., Apr. 3, 2007, at 3.

³ *Massachusetts*, 127 S. Ct. at 1460.

⁴ 42 U.S.C. § 7521(a)(1) (2000).

⁵ Over a year has passed since the Court’s decision and the EPA has yet to regulate or to provide a reasoned justification for deciding not to regulate. The EPA did attempt to respond to the Court’s decision by drafting proposed regulations but the proposals reportedly “fell into a black hole” after they were sent by the EPA to the White House. Editorial, *More Flimflam on Warming*, N.Y. TIMES, Mar. 29, 2008, at A16. Because of this delay, on April 2, 2008, the *Massachusetts* petitioners filed a petition for a writ of mandamus in the D.C. Circuit to compel the EPA to comply with the Supreme Court’s decision in *Massachusetts*. See generally *Petition for Writ of Mandamus to Compel Compliance with Mandate, Massachusetts v. EPA*, No. 03-1261 (D.C. Cir. Apr. 2, 2008), available at http://www.sierraclub.org/environmentallaw/lawsuits/docs/Mandamus_Petition.pdf.

actually lead to the regulation of global warming at all under the current CAA.⁶

So wherein lies the true significance of the case? We believe that the long-term significance of the case is likely to be the opinion's impact on two doctrinal areas of the law: (1) the standing of states; and (2) the standard of review applied to denials of petitions for rulemaking. First, although we have some questions about the Court's reasoning, we are encouraged to see the beginning of a framework for evaluating state standing based on the interest of the state in the litigation. Second, with respect to judicial review of agency inaction in the rulemaking context, the Court's decision breaks new ground not only by confirming the reviewability of an agency's denial of a rulemaking petition but also by closely scrutinizing the reasons that the EPA offered for its decision to decline to regulate.

I. STATES' SPECIAL STANDING

A. *The Court's Analysis*

The Court's approach to standing—although foreshadowed during oral argument—was somewhat unusual.⁷ Although there were several petitioners—twelve states,⁸ several environmental and citizen groups, the District of Columbia, American Samoa Government, New York City, and the mayor and city council of Baltimore—the Court's standing analysis focused on the petitioning states, specifically one state: Massachusetts.⁹ What is interesting about the Court's approach is that it blended the conventional *Lujan* analysis—requiring injury-in-fact, causation, and redressability—found in Judge Tatel's dissent in the lower court¹⁰ with an argument made by, among others, the amici states of Arizona, Iowa, Maryland, Minnesota,

⁶ Whether the decision will prompt regulation of greenhouse gas emissions under a different regulatory regime is another question. Given the heightened national attention on this issue, the EPA's view that regulating greenhouse gases under the current CAA would be awkward, and the industry's interest in specific climate change legislation, it is no surprise that Congress seems inspired to do something about climate change. Accordingly, we think that in the not-too-distant future Congress will enact a new, comprehensive climate change statute that will likely have as its central feature a cap-and-trade program.

⁷ Justice Kennedy foreshadowed the Court's ultimate approach by asking about one of the key cases noted in the opinion, *Georgia v. Tennessee Copper Co.*, 206 U.S. 230 (1907), at oral argument. See Transcript of Oral Argument at 15, *Massachusetts*, 127 S. Ct. 1438 (2007) (No. 05-1120).

⁸ The twelve states were Massachusetts, California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington. *Massachusetts*, 127 S. Ct. at 1446 n.2.

⁹ Because the same relief was sought by all petitioners, only one petitioner had to demonstrate standing in order to bring this suit. See *Rumsfeld v. Forum for Acad. and Institutional Rights, Inc.*, 547 U.S. 47, 53 n.2 (2006).

¹⁰ *Massachusetts v. EPA*, 415 F.3d 50, 64–67 (D.C. Cir. 2005) (Tatel, J., dissenting).

and Wisconsin that the Court should base the standing analysis on the state's sovereign interest at stake in the litigation.¹¹

In particular, the Court first noted the importance of “the special position and interest of Massachusetts,”¹² and analogized Massachusetts's interest to the “quasi-sovereign” interest of the state in *Georgia v. Tennessee Cooper Co.*¹³ It then analyzed the alleged injury to Massachusetts's coastal lands under the *Lujan* test.¹⁴ This loss, as Chief Justice Roberts noted in dissent, was predicted by models to be twenty to seventy centimeters of coastal land by 2100, at best.¹⁵

The dissent detailed several objections to the Court's standing analysis but its central point was that the ultimate result of the case was to “[r]elax[] Article III standing requirements” generally for states.¹⁶ If this is true—and it seems at least some relaxation is the result given the rather small and remote injury here—we wonder why the Court was willing to take this step.

B. *An Explanation?*

In an effort to explain the Court's decision, we look to a case cited in the *Massachusetts* decision, *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*.¹⁷ *Snapp* involved whether Puerto Rico could sue several Virginia apple growers on behalf of its citizens because, it was alleged, Puerto Rican migrant workers were being discriminated against in favor of foreign workers in violation of federal law. In the course of deciding that Puerto Rico could bring the suit, the Court divided potential interests of a sovereign into three categories: (1) proprietary interests; (2) quasi-sovereign interests; and (3) sovereign interests.¹⁸ We believe these three categories are helpful as a descriptive matter but, more importantly, as a framework for evaluating state standing.

I. Proprietary Interests.—In the first category are proprietary interests such as ownership of land or participation in a business venture. Because a state asserting a proprietary interest is asserting the same kind of

¹¹ See Brief of the States of Arizona et al. as Amici Curiae in Support of Petitioners at 15–25, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120), 2006 WL 2563380. Professor Wildermuth served as counsel of record for the amici states.

¹² *Massachusetts*, 127 S. Ct. at 1454.

¹³ 206 U.S. 230 (1907).

¹⁴ We note that the factual basis for the Court's standing analysis was provided by affidavits submitted by the petitioners, and those allegations were unopposed by the respondents. A substantial question remains regarding how an appellate court reviewing an administrative action ought to handle a situation in which a respondent contests the facts asserted by a petitioner with submissions of its own. See 13A CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 3531.15, at 105 (2d ed. Supp. 2007).

¹⁵ *Massachusetts*, 127 S. Ct. at 1467 (Roberts, C.J., dissenting).

¹⁶ *Id.* at 1464.

¹⁷ 458 U.S. 592 (1982).

¹⁸ *Id.* at 601–02.

interest that a private party would, we see no reason in these cases to treat a state as “special.” Accordingly, it appears to us that when a state brings suit on this basis, the standing analysis should proceed as it would if the plaintiff were a private party, i.e., by evaluating the state’s contentions under *Lujan*.¹⁹

2. *Quasi-Sovereign Interests*.—In the second category are suits based on quasi-sovereign interests. The Court has never precisely defined these interests, but has instructed that they generally “consist of a set of interests that the State has in the well-being of its populace.”²⁰ For example, these interests include a state’s interest in the health and well-being of its citizens in a public nuisance suit for transboundary pollution,²¹ or its interest in seeing that its residents are not excluded from the benefits that flow from participation in the federal system.²²

The roots of a state’s interest to bring suits based on its quasi-sovereign interests—that is, to bring suit to protect its residents—are found in “[t]he royal prerogative, [which] included the right or responsibility to take care of persons who ‘are legally unable, on account of mental incapacity.’”²³ The modern version of the royal prerogative is commonly known as *parens patriae* standing, but the ability of a sovereign to bring suit as *parens patriae* no longer requires that the persons represented by the state be unable to represent themselves. Instead, in order for a state to have *parens patriae* standing today, “the State must assert an injury to . . . a ‘quasi-sovereign’ interest,” that is, an interest related to the well-being of its residents.²⁴

As Professor Thomas Merrill has explained, suits based on quasi-sovereign interests, such as public nuisance suits, “should be exempt from the standing limitations that apply to citizen suits when public officers sue in the courts of their own sovereign.”²⁵ This is so because these suits are the

¹⁹ Cf. Ann Woolhandler & Michael G. Collins, *State Standing*, 81 VA. L. REV. 387, 506 (1995) (suggesting that it would be appropriate to analyze state standing based on traditional common law interests in property and liberty under a modified *Lujan* test); cf. also *Snapp*, 458 U.S. at 611 (Brennan, J., concurring) (“At the very least, the prerogative of a State to bring suits in federal court should be commensurate with the ability of private organizations. A private organization may bring suit to vindicate its own concrete interest in performing those activities for which it was formed.”).

²⁰ *Snapp*, 458 U.S. at 602.

²¹ See Thomas W. Merrill, *Global Warming as a Public Nuisance*, 30 COLUM. J. ENVTL. L. 293, 303 n.44 (2005) (listing the following transboundary cases that fit this mold: “*North Dakota v. Minnesota*, 263 U.S. 365 (1923) (flooding); *New York v. New Jersey*, 256 U.S. 296 (1921) (water pollution); *Georgia v. Tenn.[.] Copper Co.*, 206 U.S. 230 (1907) (air pollution in Georgia caused by discharge of noxious gases from the defendant’s plant in Tennessee); *Kansas v. Colorado*, 185 U.S. 125 (1902) (diversion of water); *Missouri v. Illinois*, 180 U.S. 208 (1901) (sought to enjoin defendants from discharging sewage in such a way as to pollute the Mississippi river in Missouri)”).

²² *Snapp*, 458 U.S. at 607–08.

²³ *Id.* at 600 (quoting J. CHITTY, PREROGATIVES OF THE CROWN 155 (1820)).

²⁴ *Id.* at 601.

²⁵ Merrill, *supra* note 21, at 304.

civil analog to criminal prosecutions, and courts have never required the sovereign to satisfy *Lujan*-type requirements in those kinds of cases.²⁶ In contrast, when a state brings suit based on a quasi-sovereign interest in the courts of *another* sovereign—like Connecticut has done by filing a public nuisance action against several power companies in *federal* court for climate change injuries²⁷—it is unclear whether the state should be required to satisfy the *Lujan* requirements. We see two possibilities here.

First, one might conclude that a state need not satisfy the standing requirements when asserting a quasi-sovereign interest no matter where the state files suit. This is supported by several federal cases like *Georgia v. Tennessee Copper Co.*²⁸ that, although lacking any explicit consideration of the issue, never hinted at a problem with states bringing these kinds of suits. Before drawing too many conclusions based on the lack of discussion in these cases, however, it should be noted that these cases predate *Lujan*, many by more than fifty years.

Second, another option would be to conclude—as Professor Merrill has recommended—that a state suing in federal court to vindicate a quasi-sovereign interest “should be subject to the same Article III and prudential standing limitations that apply to suits by aggrieved citizens.”²⁹ These Article III requirements could be satisfied “either by showing that the State itself has suffered some injury in fact from the challenged action, or by suing in a representational capacity and showing that the State’s citizens have suffered some injury in fact from the challenged action.”³⁰ This solution is more in keeping with modern standing analysis than the alternative approach is. Moreover, given the alleged injuries, their alleged causes, and the relief sought in prior cases in which a state asserted a quasi-sovereign interest, either the state or its residents likely would have satisfied the *Lujan* requirements.³¹

One final issue remains: does a state have standing as *parens patriae* to bring an action against the federal government? Because a state’s quasi-sovereign interests are based on protecting “the well-being of its popu-

²⁶ *Id.* at 300–01.

²⁷ See *Connecticut v. Am. Elec. Power*, 406 F. Supp. 2d 265 (S.D.N.Y. 2005) (dismissing suit because court concluded case raised nonjusticiable political questions beyond limits of court’s jurisdiction), *appeal pending*, No. 05-5104 (2d Cir. argued June 7, 2006).

²⁸ Merrill, *supra* note 21, at 305 n.56 (citing same list of cases as discussed *supra* note 21); see also *Snapp*, 458 U.S. 592.

²⁹ Merrill, *supra* note 21, at 305.

³⁰ *Id.*

³¹ *Id.* at 306. One wonders, however, what incentive a state might have to assert a quasi-sovereign interest when it will nevertheless be required to satisfy the *Lujan* requirements. Cf. Woolhandler & Collins, *supra* note 19, at 511–12 (“[S]tates that now litigate on the basis of *parens patriae* often have an independent basis for standing Where a state has an independent legally protected interest, there is arguably no harm in allowing a state to sue additionally as *parens patriae*. Such standing is analogous to that of private parties who have individually suffered harms suing as representatives of a class.”). We return to this issue below.

lace,³² it seems to follow that a state would not be permitted to bring suit as *parens patriae* against the federal government because the federal government is not only charged with the same obligation to protect those residents, but it typically stands in a superior position to that of the states to do so.³³ The Court seemed to lean in this direction in cases prior to *Massachusetts*, noting, for example in *Massachusetts v. Mellon*, that when it comes to protecting citizens' rights, "it is the United States, and not the State, which represents them as *parens patriae*."³⁴

3. *Sovereign Interests*.—In the third and final category are a state's sovereign interests, which include "the power to create and enforce a legal code, both civil and criminal" and the power to demand "recognition from other sovereigns."³⁵ The best example of this is a criminal prosecution, as Professor Merrill has explained:

A U.S. Attorney authorized by law to bring a federal criminal prosecution has never been, nor should be, required to demonstrate that the United States has suffered injury in fact, or that the crime caused this injury, or that a conviction will redress such an injury, or that the crime is not a generalized grievance.³⁶

It is clear based on this longstanding practice that when a state asserts a sovereign interest, at least in its *own* courts, it need not satisfy the *Lujan* requirements.

When a state does *not* sue the federal government in its own courts, however, questions arise surrounding whether a *Mellon*-type bar should prevent the suit, and if not, whether the state must satisfy the *Lujan* requirements. We think there should be no *Mellon*-type bar when a state—instead of relying upon *parens patriae* standing to assert a quasi-sovereign interest—asserts its *own* sovereign interest or its *own* proprietary interest in a suit against the federal government.³⁷ This is because a state suing the federal government based on a sovereign interest is asserting its own interest, not a derivative, quasi-sovereign interest based on preventing harm to its citizens.

We also think that when a state sues the federal government because federal law or administrative action regulates the state administrative machinery directly or otherwise undermines the state's independence in the federal system—such as, for example, by potentially preempting state law—the state may bring suit without reference to the *Lujan* analysis.³⁸ In

³² *Snapp*, 458 U.S. at 602.

³³ *See id.* at 610 n.10.

³⁴ 262 U.S. 447, 486 (1923).

³⁵ *Snapp*, 458 U.S. at 601.

³⁶ Merrill, *supra* note 21, at 300–01.

³⁷ *See Woolhandler & Collins, supra* note 19, at 510.

³⁸ *Cf. id.* at 510 (noting that "[a]llowing state standing when the federal government acts on state governmental machinery similarly expresses the norms that governments should act independently and

our system of dual sovereignty, the federal government has certain enumerated powers, one of which is the “undoubted power”³⁹ under the Supremacy Clause⁴⁰ to trump state law in certain instances. Under the Tenth Amendment,⁴¹ however, “states retain all governmental power except that power otherwise explicitly reserved to the federal government by the Constitution,”⁴² and “the structure of the constitutional system assumes that each of the states will maintain a sovereign status independent of the national government.”⁴³ That is, although federal law may preempt state law, the state nevertheless has a sovereign interest in preserving its own law, even if ultimately unsuccessful.⁴⁴ Given this relationship and the importance of the state’s interest in protecting its laws, it should be sufficient for Article III purposes that a state brings suit on this basis.

C. *Applying Snapp to Massachusetts*

Applying this framework to *Massachusetts*, the first issue is to properly identify Massachusetts’s interest at stake in the case. The Court labeled the relevant interest as quasi-sovereign. Although the Chief Justice faulted the majority for failing to identify a proper quasi-sovereign interest,⁴⁵ Massachusetts’s quasi-sovereign interest could be “in the health and well-being . . . of its residents in general”⁴⁶ based on Massachusetts’s desire to protect them from the harms of global warming.⁴⁷ Alternatively, given the Court’s observation that the federal government has an obligation to protect Massachusetts under the CAA,⁴⁸ the state’s interest could be in protecting its resi-

that the states may have certain constitutionally based rights to complain in federal court”); *id.* at 511 & n.492 (commenting that “courts have historically allowed states standing as ‘aggrieved parties’ that can contest federal administrative action under a variety of statutes”).

³⁹ *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 887 (2000) (Stevens, J., dissenting).

⁴⁰ U.S. CONST. art. VI, cl. 2 (“This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).

⁴¹ *Id.* amend. X (“The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.”).

⁴² Betsy J. Grey, *Make Congress Speak Clearly: Federal Preemption of State Tort Remedies*, 77 B.U. L. REV. 559, 568 (1997).

⁴³ *Id.*

⁴⁴ *See Alaska v. U.S. Dep’t of Transp.*, 868 F.2d 441, 443 (D.C. Cir. 1989) (concluding states had standing because the agency “claim[ed] that its rules preempt state consumer protection statutes”); *Florida v. Weinberger*, 492 F.2d 488, 492 (11th Cir. 1974) (finding state could bring suit because “[t]here is nothing abstract about this disagreement, and the Secretary has set a collision course with Florida law in a formal and final regulation which is backed by grave sanctions and which demands, if valid, immediate compliance”).

⁴⁵ *Massachusetts v. EPA*, 127 S. Ct. 1438, 1466 (2007) (Roberts, C.J., dissenting).

⁴⁶ *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel Barez*, 458 U.S. 592, 607 (1982).

⁴⁷ *See Massachusetts*, 127 S. Ct. at 1454 (quoting *Snapp*’s health and welfare discussion).

⁴⁸ *Id.*

dents by “securing observance of the terms under which it participates in the federal system.”⁴⁹

The next question is the proper standing analysis. As noted above, one might suggest that once Massachusetts asserted a quasi-sovereign interest, it did not need to demonstrate that it satisfied the *Lujan* requirements. The fact that the Court turned to the *Lujan* analysis after its discussion of the interest at stake, however, seems to foreclose that option. Accordingly, the better reading of the opinion is that it adopted Professor Merrill’s suggestion that a state suing on the basis of a quasi-sovereign interest in federal court must demonstrate standing based either on its own injury or one to its residents.⁵⁰ Here, the Court looked to Massachusetts’s interest in its coastal lands for the *Lujan* analysis.

The Court’s *Lujan* analysis, however, is much less restrictive than past applications of the test in that Massachusetts’s harm was relatively small and fairly remote. This relaxation was not part of Professor Merrill’s analysis, and it is not immediately obvious to us why the Court would adopt a “*Lujan*-lite” here (and possibly, as the Chief Justice suggested, in every case in which a state is the plaintiff), other than a desire to generally loosen the standing requirements. The more lenient *Lujan*-lite analysis that courts apparently are now to apply when states assert a quasi-sovereign interest may well give states a strategic incentive to assert quasi-sovereign interests, even though the analysis will still turn on their proprietary interests. We, however, do not view this move as a significant rewriting of the law since the Court’s embrace of a *Lujan*-lite standard seems to only affect the “mood” courts are to follow when applying the preexisting *Lujan* test.

In contrast, we are far more puzzled by the Court’s apparent lifting of the bar to a state suing the federal government on the basis of a quasi-sovereign interest using *parens patriae* standing. This is the most difficult aspect of the standing analysis to understand. Instead of explaining its result by, for example, reasoning that sovereigns need to be able to protect their residents from the federal government in the complicated modern federal administrative system, the Court insists that the difference in this case is that a state may not sue the federal government based on its interest in protecting its citizens but it may sue the federal government “when it assert[s] its [own] rights under federal law.”⁵¹ That sounds like the assertion of a *sovereign* interest, i.e., where the federal legislation directly operates on a state and the state asserts its own legally protected interest in response. As we noted above, there is no bar to suing the federal government when a state asserts a sovereign interest. But the Court specifically identified Massachusetts’s relevant interest as a quasi-sovereign interest, *not* a sovereign interest.

⁴⁹ *Snapp*, 458 U.S. at 607–08.

⁵⁰ Merrill, *supra* note 21, at 305.

⁵¹ *Massachusetts*, 127 S. Ct. at 1455 n.17.

This confusion may well be the result of unfortunate language in *Snapp*. The Court in *Snapp* defined quasi-sovereign interests broadly as “interests that the State has in the well-being of its populace.”⁵² But later the Court tells us that quasi-sovereign interests can include interests that apparently bear no relation to a state’s residents: “[A] State has a quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”⁵³

On closer examination, however, it is clear that the Court’s cases on quasi-sovereign interests always refer to an interest related to a state’s residents rather than simply the state’s own interest. The cases listed in support of the Court’s statements regarding this interest, in fact, all reference impacts on the residents of the state involved.⁵⁴ Moreover, the Court itself restates this interest, more correctly we believe, as “assuring that the benefits of the federal system are not denied to its general population.”⁵⁵ In short, while the Court was not as careful as it could have been in *Snapp*, it is clear that quasi-sovereign interests must always relate back to a state’s residents.

This, in turn, leads to the bigger question whether any of the state petitioners asserted a sovereign—as opposed to a quasi-sovereign—interest in *Massachusetts*. A possible sovereign interest could be the interest of California and other states in preserving their state laws from being trumped by federal agency action.

The CAA reflects a special respect for state sovereignty by allowing states to adopt their own air pollution standards in certain circumstances. Section 209(b)(1) allows California⁵⁶ to set its own motor vehicle emissions standards if those standards meet certain requirements, such as being consistent with section 202. Other states are permitted under section 177 to “piggyback” on California’s action so long as they adopt emissions standards identical to those implemented by California.⁵⁷ Since California adopted emissions limits on greenhouse gases released from new motor vehicles sold in California beginning with the 2009 model year,⁵⁸ eleven states have adopted emissions standards identical to California’s,⁵⁹ and six more

⁵² *Snapp*, 458 U.S. at 602.

⁵³ *Id.* at 607.

⁵⁴ *Id.* at 608.

⁵⁵ *Id.*

⁵⁶ See generally *Motor Vehicle Mfrs. Ass’n v. N.Y. State Dep’t of Env’tl. Conservation*, 17 F.3d 521, 525–26 (2d Cir. 1994) (explaining the history of the CAA amendments and describing how California came to be the only state with the ability to regulate auto emissions).

⁵⁷ See 42 U.S.C. § 7507 (2000); see also *Motor Vehicle Mfrs. Ass’n*, 17 F.3d at 525.

⁵⁸ See CAL. CODE REGS. tit. 13, §§ 1900, 1961, 1961.1 (2005).

⁵⁹ See, e.g., CONN. AGENCIES REGS. § 22a-174-36b (2006); 06-096-127 ME. CODE R. § 127 (Weil 2006); 2007 MD. LAWS Ch. 111 (S.B. 103); 310 MASS. CODE REGS. 7.40 (2006); N.J. ADMIN. CODE § 7:27-29 (2006); N.Y. COMP. CODES R. & REGS. tit. 6, § 218-8 (2006); OR. ADMIN. R. 340-257-0100 (2006); 25 PA. CODE §§ 126.411–.412 (2006); R.I. LOW EMISSION VEHICLE PROGRAM, AIR POLLUTION

are considering adopting them.⁶⁰ Although California had applied for approval of its new standards in December 2005,⁶¹ the EPA would not consider California's request because its regulation of greenhouse gas emissions was flatly inconsistent with the EPA's reading of section 202 in the decision under review in *Massachusetts*. As a result, California and all states interested in piggybacking were prevented from creating their own law as the CAA permits.⁶²

It is clear, of course, that although the EPA has never denied a prior request from California under this section,⁶³ it might nevertheless find reason to deny this one.⁶⁴ But the point is that the EPA would not even consider California's request unless and until the EPA decision regarding section 202 was vacated. When the *Massachusetts* decision did just that, the EPA announced within two days of the decision that it would notice California's request and schedule both a public comment period and public hearing as required under section 209(b)(1).⁶⁵

This issue is so important to California that Governor Arnold Schwarzenegger threatened to sue if the EPA failed to grant its request by October 2007,⁶⁶ a move applauded even outside the state.⁶⁷ In addition, the Senate

CONTROL REG. NO. 37 (2006); VT. AIR POLLUTION CONTROL REGS., Subch. XI and App. F (2006); WASH. ADMIN. CODE 173-423-010 (2006).

⁶⁰ Erica Werner, *California Urges EPA to Approve Waiver*, ORLANDO SENTINEL, May 23, 2007, at A5.

⁶¹ Letter from Catherine Witherspoon, Executive Officer, California Air Resources Board, to Stephen L. Johnson, Administrator, EPA (Dec. 21, 2005), available at <http://www.arb.ca.gov/cc/docs/waiver.pdf>.

⁶² Cf. Samantha Young, *EPA Revives Request for Tough Emission Regs*, CINCINNATI POST, Apr. 4, 2007, at A15 (reporting that "[t]he EPA had blocked California's . . . request" but that the *Massachusetts* decision "pushed the EPA to allow California to proceed with its request").

⁶³ Editorial, *Bold Leadership on Emissions*, WASH. POST, May 22, 2007, at A14 ("Every request by California has been granted—more than 40 in three decades.").

⁶⁴ See *Examining the Case for the California Waiver: Hearing Before the S. Comm. on Environment and Public Works*, 110th Cong. (2007) (statement of Jonathan H. Adler, Professor of Law, Case Western Reserve University Law School), available at http://epw.senate.gov/public/index.cfm?FuseAction=Files.View&FileStore_id=8f14a13d-6c20-4f99-a334-b4594aa72356 (noting that the provision allowing California to request permission to set its own standards "is not a blank check" and asserting that "[b]ecause California cannot demonstrate that controls on vehicular emissions of greenhouse gases are necessary to meet any 'compelling and extraordinary conditions,' the EPA would have ample justification for denying California's . . . request").

⁶⁵ See Young, *supra* note 62, at A15. The EPA noticed California's request on April 30, 2007, and announced that it will accept comments on it until June 15, 2007. Notice of California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 21,260 (Apr. 30, 2007). It scheduled two public hearings, one to be held on May 22, 2007, and the other to be held on May 30, 2007. Notice of California State Motor Vehicle Pollution Control Standards; Request for Waiver of Federal Preemption; Opportunity for Public Hearing, 72 Fed. Reg. 26,626 (May 10, 2007).

⁶⁶ Letter from Arnold Schwarzenegger, Governor of California, to Stephen L. Johnson, Administrator, EPA (Apr. 25, 2007), available at <http://gov.ca.gov/index.php?/press-release/6031/>.

Committee on Environmental and Public Works convened hearings to discuss the EPA's response to California's request. The committee chairwoman, none other than Senator Barbara Boxer of California, opened the proceedings by stating that California's "application for a waiver clearly meets the legal standards for approval, and should be granted."⁶⁸ Accordingly, while the potential loss of state property and probable damage to residents' well-being over the long-term as a result of climate change are important to the states, California's actions demonstrate that the key and most urgent issue in this litigation is determining who may regulate in response to global climate change.

Because the CAA allows California to create its own laws with respect to motor vehicle emissions and other states to adopt those standards, we think the Court should have examined whether California and the piggy-backing states had a sovereign interest at stake in this case. If the Court concluded that there was a sovereign interest at stake, as we believe there is, there would have been no need for any state to satisfy the *Lujan* requirements and thus no need to create a *Lujan*-lite analysis for states.

D. *Final Reflections on Standing*

In general, even though the Court's approach to standing came with the unexpected creation of a *Lujan*-lite standard, we agree with the Court's adoption of Professor Merrill's suggestion with respect to the assertion of quasi-sovereign interests by states in federal courts. Going forward, we imagine that the Court will continue to consider the proper category into which a state's asserted interest falls and to further develop how those categories might be used to frame the standing analysis. In this regard, we suggest that the Court reevaluate some of the confusing language in *Snapp* in order to make the line between quasi-sovereign and sovereign interests more clear. Ultimately, if the Court adopts a clear framework based on the type of state interest at stake, we believe its state standing jurisprudence will become more cohesive and understandable.

⁶⁷ See, e.g., Editorial, *supra* note 63, at A14 (asserting that "[h]e'd be more than justified in suing" the EPA).

⁶⁸ See *Examining the Case for the California Waiver: Hearing Before the S. Comm. on Environment and Public Works*, 110th Cong. (2007) (statement of Sen. Barbara Boxer, Chair, Sen. Comm. on Env't and Pub. Works), available at http://epw.senate.gov/public/index.cfm?FuseAction=Hearings.Statement&Statement_ID=39508511-fd9e-469b-80af-faaf843f6696. Since the publication of this Essay in *Colloquy*, the EPA has denied California's waiver request. See California State Motor Vehicle Pollution Control Standards; Notice of Decision Denying a Waiver of Clean Air Act Preemption for California's 2009 and Subsequent Model Year Greenhouse Gas Emission Standards for New Motor Vehicles, 73 Fed. Reg. 12,156 (Mar. 6, 2008). Consistent with its continued ardent interest in preserving its laws limiting greenhouse gas emissions from new motor vehicles, California has petitioned for review of the EPA's denial of its waiver request. Felicity Barringer, *California Sues E.P.A. Over Denial of Waiver*, N.Y. TIMES, Jan. 3, 2008, at A14; see also Petition for Review, California v. EPA, No. 08-70011 (9th Cir. Jan. 2, 2008), available at http://ag.ca.gov/cms_attachments/press/pdfs/n1514_epapetition-1.pdf.

II. RAMPED UP REVIEW OF RULEMAKING DENIALS

A second aspect of *Massachusetts* that we predict will likely have long-term implications for administrative law involves the Court's willingness to thoroughly scrutinize the reasons that the EPA offered for denying the petition to regulate greenhouse gases. The D.C. Circuit (which is by far the most important court in the country when it comes to shaping administrative law) established years ago that courts may review inaction in the rulemaking context—albeit only through a highly deferential and very narrow version of “arbitrary and capricious” review.⁶⁹ The D.C. Circuit has explained that constrained review, rather than searching review, is appropriate because the decision whether to engage in rulemaking boils down to a legislative judgment that may turn on a variety of policy considerations ill-suited to judicial review, such as resource allocation concerns.⁷⁰

Despite the D.C. Circuit's well-settled views on the topic, the Supreme Court prior to *Massachusetts* had never explicitly weighed in on whether an agency's denial of a rulemaking petition is subject to review, and if so, what standard of review should apply.⁷¹ The Supreme Court's pronouncements on the topic in *Massachusetts* accordingly merit attention. In a nutshell, the Court—following the lead of the D.C. Circuit—declared that refusals to promulgate rules *are* susceptible to judicial review but that such review is limited and very deferential.⁷²

Given the D.C. Circuit's established views on the topic, we are not surprised that the Court in *Massachusetts* made clear that an agency's decision not to engage in rulemaking should be subject to some kind of judicial review.⁷³ What we find surprising, however, is the level of scrutiny that the Court applied when reviewing the EPA's reasons for declining to regulate. To be sure, the Court articulated a verbal formula that sounds quite constrained: refusals to promulgate rules are susceptible only to “extremely

⁶⁹ See, e.g., *Midwest Indep. Transmission Sys. Operator, Inc. v. FERC*, 388 F.3d 903, 910–11 (D.C. Cir. 2004); *Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989); *Am. Horse Prot. Ass'n v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987); *WWHT, Inc. v. FCC*, 656 F.2d 807, 816–17 (D.C. Cir. 1981). See generally Ronald M. Levin, *Understanding Unreviewability in Administrative Law*, 74 MINN. L. REV. 689, 763–68 (1990) (discussing the D.C. Circuit's treatment of the issue of the reviewability of denials of rulemaking petitions).

⁷⁰ See, e.g., *NRDC v. SEC*, 606 F.2d 1031, 1046–48 (D.C. Cir. 1979).

⁷¹ The Supreme Court had previously held in *Heckler v. Chaney* that an agency's decision not to initiate an enforcement proceeding is not ordinarily subject to judicial review. 470 U.S. 821 (1985). Although the Court in *Heckler* expressly left open the question of the reviewability of a rulemaking denial, *id.* at 825 n.2, many of the Court's observations in *Heckler* as to why a decision not to enforce should not be subject to review could have equally been applied to an agency's decision not to initiate a rulemaking. For example, both an agency's decision not to enforce and an agency's decision not to engage in rulemaking may simply reflect the agency's own assessment of how its limited resources best should be allocated. Thus, after *Heckler*, there was reason to think that *Heckler* could be extended to decisions to refuse to engage in rulemaking. See Levin, *supra* note 69, at 762–63.

⁷² *Massachusetts v. EPA*, 127 S. Ct. 1453, 1459 (2007).

⁷³ *Id.*

limited” and “highly deferential” review.⁷⁴ The Court’s actual review of the EPA’s reasons for declining to regulate, however, was meticulous and probing—a far cry from what one would expect of “highly deferential” review.

In its detailed review of the EPA’s decision to decline to regulate emissions from new motor vehicles, the Court analyzed two reasons offered by the EPA to justify its inaction. First, the EPA concluded that it lacked the statutory authority to regulate because the emissions are not “air pollutants” as that term is used in the CAA.⁷⁵ Second, the EPA justified its inaction by relying on a long list of policy considerations—ranging from a desire to avoid piecemeal regulation to concerns about interfering with the President’s foreign policy initiatives—that convinced the EPA that it would be unwise to regulate at this time, even if it did have the statutory authority to act.⁷⁶

With respect to the EPA’s claim that it lacked statutory authority to regulate, we think it was proper for the Court to carefully scrutinize the EPA’s reasoning. The Court, after all, faced a purely legal issue: Did the CAA authorize the EPA to regulate greenhouse gases or not? This question, of course, could be resolved through traditional statutory construction by looking at the plain language of the CAA. That is, the Court had to do little more than analyze the statutory text (which is easily susceptible to judicial review) in order to assess and ultimately reject the agency’s claim that it lacked the statutory authority to regulate. In this sense, the Court’s willingness to subject the EPA’s statutory justification to significant scrutiny does not break any new ground. Rather, it simply applies a rule that the D.C. Circuit has long embraced: A refusal to institute a rulemaking may be overturned where the agency has made a “plain error[] of law, suggesting that the agency has been blind to the source of its delegated power.”⁷⁷

We, however, cannot say the same of the Court’s scrutiny of the EPA’s second reason for declining to regulate. Here, the EPA did not rely upon any clear statutory text, legal principles, or specific factual findings that the Court could easily subject to judicial review. Rather, the EPA’s second reason for declining to regulate turned on various policy considerations that convinced the EPA that regulating greenhouse gases at this time would be unwise.⁷⁸

⁷⁴ *Id.* (quoting *Nat’l Customs Brokers*, 883 F.2d at 96).

⁷⁵ Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,925–29 (Sept. 8, 2003).

⁷⁶ *Id.* at 52,929–31.

⁷⁷ *Am. Horse Prot. Ass’n v. Lyng*, 812 F.2d 1, 5 (D.C. Cir. 1987) (internal citation omitted).

⁷⁸ Notice of Denial of Petition for Rulemaking, Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. at 52,930–32. None of the policy considerations were easily susceptible to judicial review because, as the Court itself admitted, the Court lacked “the expertise [and] the authority to evaluate” such policy judgments. *Massachusetts*, 127 S. Ct. at 1463.

In reviewing the EPA's policy determinations, the Court acknowledged the EPA's "laundry list" of reasons not to regulate.⁷⁹ However, the Court quickly dismissed all of these considerations, declaring that they were "divorced from the statutory text."⁸⁰ The Court's reliance on the statutory text here is interesting; the relevant statutory text provides only that the Administrator of the EPA "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."⁸¹ Thus, as Justice Scalia pointed out in his dissent, the relevant statutory text makes it quite clear that when the Administrator actually "*makes* a judgment whether to regulate greenhouse gases, that judgment must relate to whether they are air pollutants that 'cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.'"⁸² However, the statute "*says nothing at all* about the reasons for which the Administrator may *defer* making a judgment."⁸³

Despite the statute's apparent silence on the issue of when the EPA can *defer* making a judgment, the Court read the statutory text to mean that Congress tightly constrained the EPA's discretion to defer. Specifically, the Court declared that once the EPA decides to act on a petition for rulemaking under section 202 of the CAA, the EPA can deny the petition for rulemaking and thereby avoid taking further action *only* if (a) it determines that greenhouse gases do not contribute to global warming, or (b) it provides some "reasonable explanation as to why it cannot or will not exercise its discretion to determine whether [they do]."⁸⁴ In other words, the Court seemed to be warning the EPA that, even though the agency possesses significant discretion to rely on policy considerations to decide *when* it wants to respond to rulemaking petitions, it loses that discretion once it actually acts on a petition.

Here, in acting on the rulemaking petition, the EPA plainly had not determined whether greenhouse gases contribute to global warming, nor did the Court think that the EPA had offered "a reasoned justification for declining to form a scientific judgment."⁸⁵ The EPA's policy concerns suggested reasons why the EPA might *prefer* not to regulate at this time, but the concerns did not—according to the Court—demonstrate that the EPA *could not* form a reasoned scientific judgment as to whether greenhouse

⁷⁹ *Massachusetts*, 127 S. Ct. at 1462.

⁸⁰ *Id.*

⁸¹ 42 U.S.C. § 7521(a)(1) (2000).

⁸² *Massachusetts*, 127 S. Ct. at 1473 (Scalia, J., dissenting) (quoting 42 U.S.C. § 7521(a)(1)).

⁸³ *Id.*

⁸⁴ *Id.* at 1462 (majority opinion). To the extent this means that the EPA's discretion to pursue other priorities of the Administration or the President would be constrained, that was congressional design, the Court said.

⁸⁵ *Id.* at 1463.

gases contribute to global warming.⁸⁶ Thus, none of the EPA's reasons for declining to regulate survived the Court's exacting review.

Perhaps the Court's willingness to apply such rigorous review is limited to the specifics of this case, namely the immense importance of global warming. In other words, there are petitions—and then there are *petitions*. When an agency denies a petition for rulemaking on a relatively small issue, such as an issue that involves only a narrow kind of economic regulation, the reviewing court is unlikely to be as troubled by the denial, even when denials are based on policy considerations. But when an agency is presented with very big issues that impact public health or safety—such as the EPA being presented with what is, according to many commentators, the most important environmental issue of the century—the courts might be willing to review the agency's decision more closely.⁸⁷ Although the Court's opinion does not state in so many words that this is what is driving its analysis, it may nevertheless serve as a basis to distinguish the case in the future. The problem, of course, with trying to use this distinction in the future is that the line between “important” and “unimportant” subjects is amorphous and malleable, and thus it may be nearly impossible to determine ahead of time when something will be “big” or “important” enough in a court's eyes to warrant closer judicial scrutiny.

An alternative (and perhaps more useful) means of restricting the Court's seemingly rigorous standard of review might be found at the end of the opinion. There the Court notes that it did not reach the question of whether “policy concerns can inform EPA's actions in the event that it makes” an endangerment finding.⁸⁸ In other words, the Court seems to leave the door open for the agency to decline to regulate for policy reasons even if it concludes that greenhouse gases contribute to climate change. Accordingly, perhaps the Court merely read section 202 to require the EPA to first make a scientific judgment (or to explain why it has not) before turning to policy considerations.⁸⁹ Or perhaps the Court simply wants to see the expert agency “do the work” in its area of expertise before turning to policy considerations. In either scenario, it seems possible that the Court's decision might allow policy reasons to be considered, but only after the

⁸⁶ *Id.*

⁸⁷ *Cf.* Nat'l Customs Brokers & Forwarders Ass'n of Am., Inc. v. United States, 883 F.2d 93, 103 (D.C. Cir. 1989) (noting that the court will act to overturn an agency judgment not to institute a rulemaking only in rare and compelling circumstances, such as when “grave health and safety problems” exist).

⁸⁸ *Massachusetts*, 127 S. Ct. at 1463.

⁸⁹ See generally William V. Luneburg, *Petitioning Federal Agencies for Rulemaking: An Overview of Administrative and Judicial Practice and Some Recommendations for Improvement*, 1988 WIS. L. REV. 1, 48 (“By statute an agency may have very substantial, or total, discretion not to act, or, when acting, to act in particular ways.”).

agency uses its expertise to render a judgment on the technical issue before it.⁹⁰

Besides trying to determine whether the Court's searching review applies broadly or narrowly, the Court's approach raises two other major questions. First and foremost, it remains to be seen what will and what will not qualify as a "reasonable" explanation in other cases when an agency declines to regulate in the future. Although the Court's opinion casts doubt on whether policy-driven considerations, like agency agenda setting and resource allocation issues, can constitute a "reasonable" explanation for declining to regulate in the context of section 202 of the CAA, the Court's opinion does not even hint at a general line between permissible and impermissible reasons to regulate. As a result, future courts will need to clarify what will and what will not count as good explanations for failing to regulate. Specifically, does *Massachusetts* completely remove policy-driven considerations from the permissible calculus of reasons not to regulate? Or does it permit policy reasons to be considered, but only after the agency does the hard scientific or technical calculus that is at the core of its expertise? Or does the decision simply tell us that the analysis will vary by the specific statutory command at issue?

For example, it is unclear whether it will be permissible for the EPA on remand to conclude that emissions of greenhouse gases do contribute to global warming, but decline to regulate greenhouse gases on the ground that the agency's resources are constrained and that the agency cannot possibly do everything that Congress has empowered it to do.⁹¹ On the one hand, if this is not permissible, the work of agencies will become exponentially more difficult since they will have to act on every potentially legitimate petition. On the other hand, if it turns out that such a justification is a permissible reason not to regulate, then agencies might well choose in the future to rest their decisions not to regulate on this type of not-so-easily reviewable ground so as to better insulate their decisions from searching judicial review. We are stuck, it seems, between the proverbial rock and a hard place.

A second significant question that we think flows from the Court's decision has to do with whether rigorous review of agency inaction in the rulemaking context will create perverse incentives for agencies. The Court's opinion made clear that—because the EPA was not required by statute to act on the rulemaking petition within a certain timeframe—the EPA enjoyed significant latitude as to the timing and manner of its regula-

⁹⁰ We note that the Court leaves open the possibility that scientific uncertainty *might* justify the EPA's refusal to determine whether greenhouse gases contribute to global warming. See *Massachusetts*, 127 S. Ct. at 1463 ("If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so.").

⁹¹ See Transcript of Oral Argument at 20–21, *Massachusetts*, 127 S. Ct. 1438 (No. 05-1120) (Justice Ginsburg asks whether the EPA on remand could simply state that it needed to devote its limited resources elsewhere).

tions.⁹² Once the EPA decided to act on the rulemaking petition, however, it opened the door to a challenge to its reasons for declining to regulate.⁹³ A key lesson that agencies may well take away from *Massachusetts*, accordingly, could be as follows: Whatever discretion you enjoy prior to taking action on a rulemaking petition may well disappear once you affirmatively rule on a petition. If this is the lesson that agencies glean from *Massachusetts*, then agencies may well feel as if they should delay ruling on petitions for rulemaking for as long as possible—perhaps until a court finds that the agency has unreasonably delayed agency action.⁹⁴

We should note that if agencies do choose to sit on rulemaking petitions, agencies may be able to sit idle for quite some time. This is because, even *if* an agency is operating under a statutorily imposed deadline, a mandatory statutory deadline is only *one* factor considered under the predominant test applied by courts when reviewing claims of unreasonable agency delay.⁹⁵ Furthermore, the Supreme Court recently handed down a decision that makes it tough to get any review of agency inaction, unless the agency fails to take discrete action that it is required to take.⁹⁶

The key take-away from all of this should be fairly apparent: The Court's ramped up review of agency inaction ironically may not lead to better reasoning by agencies with respect to denials of rulemaking petitions. Rather, the Court's willingness to scrutinize the EPA's inaction in the rulemaking context may simply mean that agencies will increasingly delay ruling on petitions, and that parties seeking rulemaking proceedings may well have to wait even longer before the agency offers reasons to justify its disposal of the petition.

III. CONCLUSION

Although it will be some time before we know whether the Court's much-touted "global warming" decision ever leads to regulation of greenhouse gases, either under the current CAA or under new legislation, the

⁹² *Massachusetts*, 127 S. Ct. at 1462.

⁹³ *Id.* (“[O]nce EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute.”).

⁹⁴ See generally 5 U.S.C. § 706(1) (2000) (providing that a reviewing court may “compel agency action unlawfully withheld or unreasonably delayed”). Even before the Court in *Massachusetts* significantly strengthened the incentive for agencies to delay ruling on petitions for as long as possible, agencies took their time when making potentially reviewable decisions that were particularly difficult, politically or otherwise. This is, after all, what happened in *Massachusetts*. There, the EPA decided to act on the rulemaking petition only *after* a claim of unreasonable agency delay was brought against it. See Reply Brief in *Massachusetts v. EPA*, No. 05-1120, 2006 WL 3367871 at *18 (Nov. 15, 2006) (“Four years after receiving a petition to regulate greenhouse gases from motor vehicles, and in settlement of a lawsuit charging EPA with unreasonabl[e] delay in answering the petition, EPA issued a final decision declining to regulate greenhouse gases.”).

⁹⁵ See *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70, 80 (D.C. Cir. 1984).

⁹⁶ *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004).

significance of the decision will not be short-lived. Rather, we believe that the Court's opinion will likely have a long-term impact on both (1) the special Article III standing that states enjoy in federal courts, and (2) the level of scrutiny that agencies may face when justifying decisions not to engage in rulemaking. When added together, these two doctrinal developments result in an interesting mix. States are left in a relatively powerful position vis-à-vis federal agencies in terms of their ability both to file suits against agencies and to seek fairly exacting judicial review of the agency's reasons for declining to regulate. Although a twist on common perceptions about this case, fans of states' rights ought to be quite pleased.