# Massachusetts v. E.P.A., 127 S.Ct. 1438 (2007) - Standing

# Learning Objectives for this Module

## Learn the agency duties when petitioned for a rulemaking.

## Learn the distinction between injury to all and particularized injury.

## Learn about standard for redressability for cases without simple solutions.

## Learn what the agency might have done to avoid this lawsuit.

# Reading Assignment

## [Massachusetts v. E.P.A., 127 S.Ct. 1438 (2007)](http://biotech.law.lsu.edu/cases/adlaw/mass-v-epa.htm) – the global warming case. Read paragraphs 23-85.

# Issues to be addressed

## Legal Background – we will return to this when we talk about the Chevron analysis in the reminder of this case

### What does the Clean Air Act §7521(a)(1) require the EPA to issue regulations on?

#### [35] "The [EPA] Administrator shall by regulation prescribe (and from time to time revise) in accordance with the provisions of this section, 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 ...

#### What other agency regulates autos?

### What is the definition of pollutant in the act?

#### [36] The Act defines "air pollutant" to include "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." §7602(g).

#### "Welfare" is also defined broadly: among other things, it includes "effects on ... weather ... and climate." §7602(h).

#### Can you be a polluter under the law?

### What was the National Climate Program Act of 1978?

#### In 1978, Congress enacted the National Climate Program Act, 92 Stat. 601, which required the President to establish a program to "...assist the Nation and the world to understand and respond to natural and man-induced climate processes and their implications..."

#### What does this tell us about concerns with greenhouse gasses (GHG) – is it just something Al Gore thought up?

### What did the National Academy of Sciences Tell President Carter?

#### "If carbon dioxide continues to increase, the study group finds no reason to doubt that climate changes will result and no reason to believe that these changes will be negligible... . A wait-and-see policy may mean waiting until it is too late."

### What did the Global Climate Protection Act of 1987 require the EPA to do?

#### Finding that "manmade pollution -- the release of carbon dioxide, chlorofluorocarbons, methane, and other trace gases into the atmosphere -- may be producing a long-term and substantial increase in the average temperature on Earth," §1102(1), 101 Stat. 1408, Congress directed EPA to propose to Congress a "coordinated national policy on global climate change...Congress emphasized that "ongoing pollution and deforestation may be contributing now to an irreversible process" and that "[n]ecessary actions must be identified and implemented in time to protect the climate."

#### Who was president in 1987? Is this really a liberal plot?

### The First Global Warming Treaty

#### What is the Kyoto Protocol?

#### Why did the senate say it would reject it?

##### Did it apply equally to all countries?

#### What was Congress worried about?

##### What is the potential economic consequence of the treaty for the US?

#### Was this a partisan vote?

##### Who was President?

## The Petition for Rulemaking

### The Request

#### On October 20, 1999, a group of 19 private organizations filed a rulemaking petition asking EPA to regulate "greenhouse gas emissions from new motor vehicles under §202 of the Clean Air Act."

#### As to EPA's statutory authority, the petition observed that the agency itself had already confirmed that it had the power to regulate carbon dioxide.

#### What does the EPA have to do with a request for rulemaking?

### What had the EPA said about its authority over CO2 in the past?

#### In 1998, Jonathan Z. Cannon, then EPA's General Counsel, prepared a legal opinion concluding that "CO2 emissions are within the scope of EPA's authority to regulate," even as he recognized that EPA had so far declined to exercise that authority.

##### Are they regulated in other areas?

##### Where would CO2 pose an acute threat?

#### Whose EPA was this?

### Did EPA seek public comment on the petition?

#### [45] Fifteen months after the petition's submission, EPA requested public comment on "all the issues raised in [the] petition," adding a "particular" request for comments on "any scientific, technical, legal, economic or other aspect of these issues that may be relevant to EPA's consideration of this petition." 66 Fed. Reg. 7486, 7487 (2001).

## Standing in This Case

### Nature of the Injury

#### Is global warming and ocean rise an injury to everyone?

#### How do the projected effects in southern Louisiana different from those in west Texas?

#### How do we use this to craft an argument that Massachusetts suffers an injury that is sufficiently individualized to justify standing?

### Case and Controversy

#### "While it does not matter how many persons have been injured by the challenged action, the party bringing suit must show that the action injures him in a concrete and personal way. This requirement is not just an empty formality. It preserves the vitality of the adversarial process by assuring both that the parties before the court have an actual, as opposed to professed, stake in the outcome, and that the legal questions presented ... will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." 504 U. S., at 581 (Lujan)

### Is this a Procedural Rights Case?

#### However, a litigant to whom Congress has "accorded a procedural right to protect his concrete interests," -- here, the right to challenge agency action unlawfully withheld, §7607(b)(1) -- "can assert that right without meeting all the normal standards for redressability and immediacy..."

### What is §7607(b)(1)?

#### (b) Judicial review (1) A petition for review of action of the Administrator in promulgating any national primary or secondary ambient air quality standard, any emission standard or requirement under section 7412 of this title, any standard of performance or requirement under section 7411 of this title, any standard under section 7521 of this title (other than a standard required to be prescribed under section 7521 (b)(1) of this title), any determination under section 7521 (b)(5) [1] of this title, any control or prohibition under section 7545 of this title, any standard under section 7571 of this title, any rule issued under section 7413, 7419, or under section 7420 of this title, or any other nationally applicable regulations promulgated, or final action taken, by the Administrator under this chapter may be filed only in the United States Court of Appeals for the District of Columbia.

#### Specific Clean Air Act Provision on Jurisdiction

### Redressability

#### What is the redressability problem in this case?

#### Assume that the EPA could reduce automobile exhaust emission to zero:

##### What would be the impact on global warming?

##### Why?

#### What do you have to argue to make the redressability standard?

### Does Plaintiff have to show that the rule will solve global warming?

#### Sugar Cane Growers:

##### "A [litigant] who alleges a deprivation of a procedural protection to which he is entitled never has to prove that if he had received the procedure the substantive result would have been altered. All that is necessary is to show that the procedural step was connected to the substantive result"

#### Why is this going to be critical for a global warming case?

### Do the same standing requirements apply to states as to individuals?

#### " This is a suit by a State for an injury to it in its capacity of quasi-sovereign. In that capacity the State has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain. It has the last word as to whether its mountains shall be stripped of their forests and its inhabitants shall breathe pure air."

##### Justice Holmes explained in Georgia v. Tennessee Copper Co., 206 U. S. 230, 237 (1907)

#### Did anyone notice this case in lower court litigation?

##### Why not?

### What is the particularized injury that Mass claims to its own lands?

#### Because the Commonwealth "owns a substantial portion of the state's coastal property," it has alleged a particularized injury in its capacity as a landowner. The severity of that injury will only increase over the course of the next century: If sea levels continue to rise as predicted, one Massachusetts official believes that a significant fraction of coastal property will be "either permanently lost through inundation or temporarily lost through periodic storm surge and flooding events."

#### Sound familiar?

### Dissent - The State as Parens Patria

#### As a general rule, we have held that while a State might assert a quasi-sovereign right as parens patriae "for the protection of its citizens, it is no part of its duty or power to enforce their rights in respect of their relations with the Federal Government. In that field it is the United States, and not the State, which represents them." Massachusetts v. Mellon, 262 U. S. 447, 485-486 (1923)

### Causation

#### Why does EPA say causation fails?

##### What does EPA say is the main reason its efforts will not change the outcome?

#### Why does the court say small, incremental reforms are important?

##### Does the court accept that automobile emissions are only a small contributor to global warming?

#### Why would accepting the EPA's argument in this case hurt agencies in other cases when they want to regulate something?

##### Think STI (sexually transmitted infection) control

### The Remedy

#### Does redressability require that the remedy fix all the plaintiff's problems?

#### What does the court remind us about the factual arguments in this case as it sums up? Have these been tested in court?

#### What does the court say Mass has standing to do?

## The Dissent

### What is the heart of the dissent's belief that this is a political question?

#### Is there merit to this argument?

### Will US auto emissions standards affect global warming in a measurable, as opposed to theoretical way?

#### Does this meet the traditional tests for redressablity?

### This was a 5-4, Stevens driven case - will it survive?

## What could EPA have done differently?

### What does the EPA need to do to support its refusal to make a rule so that the courts cannot find the refusal arbitrary and capricious?

### Given the broad language of the Clear Air Act, what should EPA have done to avoid this case?

## Application to Private Suits

### What are the limitations of this case?

#### What did plaintiffs win?

#### Is the ultimate procedural injury case?

### Does this opinion imply that there is standing for private claims against private parties? - American Elec. Power Co., Inc. v. Connecticut, 131 S. Ct. 2527 (2011)

#### The Court ruled that the CAA preempted private claims for relief for climate change damages due to air pollution.

# Evaluation Questions

## What was the role of the petition for rulemaking in *Mass. v. EPA*?

## What is the agency required to do when it gets a petition requesting rulemaking?

## What was the standing problem before the court?

### How did the government attack the plaintiff’s standing?

### Which elements were at issue?

### What role was the state playing in the representation of its citizens?

### How did the court resolve the standing issue?

## Why did EPA say it did not have the authority to make a rule?

### Why did this invite judicial review?

## What was the evidence before the court that showed that congress had been aware of global warming?

### How did this affect the court’s analysis in the case?

## What might the agency have said that would have satisfied the court and have avoided this case?

### What was the conflict with DOT?

### What was the problem these rules might cause for the Department of State?