

United States Supreme Court Official Transcript.
MASSACHUSETTS, et al., Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.
No. 05-1120.
Wednesday, November 29, 2006
Oral Argument

Massachusetts v. Environmental Protection Agency

Appearances:

James R. Milkey, Esq., Assistant Attorney General, Boston, Mass; on behalf of Petitioners.

Gregory C. Garre, Esq., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of Respondents.

*1 Washington, D.C.

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:02 a.m.

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(10:02 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first today in 05-1120, Massachusetts versus Environmental Protection Agency. Mr. Milkey.

ORAL ARGUMENT OF JAMES R. MILKEY
ON BEHALF OF THE PETITIONERS

MR. MILKEY: Mr. Chief Justice, and may it please the Court:

If I may, I'd like to frame the merits very quickly and then turn immediately to standing. Although the case before you arises in an important policy area, it turns on ordinary principles of statutory interpretation and administrative law. EPA made a decision based on two grounds, both of which constitute plain errors of law reviewable under any standard. EPA's principle grounds was that it lacked authority over the emissions of the four substances at issue, even if they, in fact, endanger public health and welfare. That legal conclusion fails as a matter of law.

As a fallback position, EPA declined to consider if these substances are endangering public health and welfare, claiming its policy approach made more sense than the regulatory scheme encompassed in section 1202 of the Clean Air Act. Although EPA *4 possesses a good deal of discretion in applying the statutory endangerment test, it cannot rest its ruling on impermissible grounds as it did here.

We are not asking the Court to pass judgment on the science of climate change or to order EPA to set emission standards. We simply want EPA to visit the rulemaking petition based upon permissible considerations.

And now, Your Honor, I'd like to turn to standing. Petitioner showed a wide variety of injury in fact, all of which are the kinds of harms the statute was aimed at preventing. For example, our uncontested affidavits establish that as a matter of physics, the more greenhouse gases accumulate in the air, the more temperatures are going to rise, ocean waters expand, and the seas rise. And of course as the seas expand, they rise everywhere around the world. Some areas such as Massachusetts will be hit particularly hard because we're also subject to a land subsidence, but that --

JUSTICE SCALIA: I thought that the standing requires imminent harm. If you haven't been harmed already, you have to show the harm is imminent. Is this harm imminent?

MR. MILKEY: It is, Your Honor. We have shown that the sea levels are already occurring from the *5 current amounts of greenhouse gases in the air, and that means it is only going to get worse as the --

JUSTICE SCALIA: When? I mean, when is the predicted cataclysm?

MR. MILKEY: Your Honor, it's not so much a cataclysm as ongoing harm. The harm does not suddenly spring up in the year 2100, it plays out continuously over time. And even to the extent you focus on harms that occur in the future, there's nothing conjectural about that. Once these gases are emitted into the area, and they stay a long time, the laws of physics take over.

JUSTICE SCALIA: Well, there's a lot of conjecture about whether -- I gather

that there's something of a consensus on warming, but not a consensus on how much of that is attributable to human activity. And I gather that -- what is it? Something like seven percent of the total carbon dioxide emissions are attributable to automobiles in the United States?

MR. MILKEY: It's actually about 6 percent, Your Honor.

JUSTICE SCALIA: 6 percent? Thank you.

MR. MILKEY: But it's important to point out as well, though, that in the ruling we challenge, EPA has disavowed authority over all U.S. sources of *6 emissions, which constitute about 20 percent of global --

JUSTICE SCALIA: Yes, but that doesn't go to the harm that you're claiming. I mean, we're talking about the, you know, the standing issue right now. And if you've been harmed, you've claimed harm because of carbon dioxide emissions, right?

MR. MILKEY: Agreed, Your Honor. But my point was that they disclaimed authority over all sources of carbon --

JUSTICE SCALIA: I understand, but that has nothing to do with whether you have standing. That has to do with the merits of the case. But on the standing point, only new cars would be affected, right? So even the reduction of the 6 percent would take a few years, wouldn't it?

MR. MILKEY: It would take a few years, Your Honor, but it is a basic premise of the Clean Air Act that vehicle fleets regularly turn over --

JUSTICE SCALIA: I understand. But it goes to how imminent the harm is and how remediable the imminent harm is. If, in fact, the 6 percent will only be reduced to maybe five and a half in the next few years, your --

MR. MILKEY: Your Honor, we have shown in *7 the record that a 40 percent reduction in carbon dioxide from cars is currently feasible. And since those emissions account for --

JUSTICE SCALIA: Not in the first year.

MR. MILKEY: No, no. We agree, Your Honor.

JUSTICE SCALIA: I mean ultimately, when all the cars currently on the roads are off and the new cars with, you know, whatever measures you think will reduce the carbon dioxide are on the road, then 40 percent would be the figure.

MR. MILKEY: Yes, Your Honor.

JUSTICE GINSBURG: But whatever position holds for motor vehicles would similarly hold for power plants, and has there been any application to EPA with respect to carbon dioxide in power plants?

MR. MILKEY: There has, Your Honor. In fact, EPA has turned down a rulemaking petition to regulate them under the new source performance standard section of the Clean Air Act, and that is currently on appeal in the D.C. Circuit, but it is currently stayed pending the outcome of this case, and it just --

CHIEF JUSTICE ROBERTS: Do you get the benefit of that broader allegation in establishing your standard? In other words, if you've challenged EPA's refusal to apply a particular level of greenhouse *8 regulation to a particular model of car, can you say, well, they're following the same approach to a coal powered -- coal fueled power plant, and so we get to establish a broader injury? Or, aren't you limited to the specific legal challenge you're raising here?

MR. MILKEY: Your Honor, I think it's actually more direct in the sense that in the decision we challenge here, they said greenhouse gases are not air pollutants under any regulatory provision of the act. So at least on --

CHIEF JUSTICE ROBERTS: Don't you have to show injury from their decision here? The fact that other people, or you presumably as well might be injured by their decisions that you are not challenging here, that doesn't help your standing here, does it?

MR. MILKEY: I believe it does, Your Honor, because we cannot win that other case unless we win this case here in terms of the authority question. And in any event, it is important to point out that because of the scale of the problem, relatively small percentage deductions in global emissions can lead to real world results.

JUSTICE KENNEDY: But at the outset, you made this, some of this perhaps reassuring statement that we need not decide about global warming in this *9 case. But don't we have to do that in order to decide the standing argument, because there's no injury if there's not global warming? Or, can you show standing simply because there is a likelihood that the perceived would show that there's an injury?

MR. MILKEY: Your Honor, especially in this case where none of our affidavits were challenged, I don't think the Court needs to go there ultimately on the merits because we showed through our uncontested affidavits that these harms will occur. There was no evidence put in to the contrary, and I would add that the reports on which EPA itself relies conclude that climate change is

occurring in --

CHIEF JUSTICE ROBERTS: Those affidavits talked about the fact that if the government starts to regulate, the technology is going to change, if the technology changes, other governments will adopt it, and all that, and that strikes me as sort of spitting out conjecture on conjecture, the sort that we disapproved of.

MR. MILKEY: Your Honor, although we believe we have shown other governments will follow suit, we are not in any sense relying on that. We can easily show our standing without relying on that. And that's because --

*10 CHIEF JUSTICE ROBERTS: Same argument if the automobile emissions were 1 percent contributors?

MR. MILKEY: It would be the same argument. And I would add that EPA in other contexts has determined on several occasions that a 1 percent contribution is significant under the Clean Air Act.

CHIEF JUSTICE ROBERTS: How is that consistent with our taxpayer standing cases where the argument is that a taxpayer doesn't have standing to challenge an illegal expenditure as a general matter simply because his contribution, the benefit that he's claiming is so small and so widely dispersed?

MR. MILKEY: Your Honor, it is different because here there is particularized injury that we have shown. The injury doesn't get any more particular than states losing 200 miles of coastline, both sovereign territory and property we actually own, to rising seas.

JUSTICE ALITO: If you look ahead, I don't know how far imminence allows you to look ahead, but let's say we're looking at 5 years or 10 years, what particularized harm does the record show that Massachusetts will, or faces an imminent threat of suffering, that can be traceable to the reductions that you want to produce through these regulations?

MR. MILKEY: Well, Your Honor, if I can deal *11 with the traceability part of that question first, traceability is easy to show here because the extent of our harm is caused by the overall amount of the gases in the air. And being focused on the 20 percent of all U.S. sources, or the 6 percent of the cars, that's still a sizeable portion of the problem, so we know that 6 or 20 percent is there.

In terms of the particular harms, similarly we have shown --

JUSTICE ALITO: 6 percent is the total emissions, the total contribution from motor vehicles in the United States, right?

MR. MILKEY: To the global carbon dioxide emission.

JUSTICE ALITO: To the global. And so, the reduction that you could achieve under the best of circumstances with these regulations would be a small portion of that, would it not?

MR. MILKEY: It would be, we have shown in the record it would be about a two-and-a-half percent over the time it takes to turn the fleet over. But it's important that given the nature of the harms, even small reductions can be significant. For example, if we're able to save only a small fraction of the hundreds of millions of dollars that Massachusetts parks agencies *12 are projected to lose, that reduction is itself significant.

CHIEF JUSTICE ROBERTS: That assumes everything else is going to remain constant, though, right? It assumes there isn't going to be a greater contribution of greenhouse gases from economic development in China and other places that's going to displace whatever marginal benefit you get here.

MR. MILKEY: Yes, Your Honor. But reducing domestic emissions will reduce our harm, the harm we would otherwise face regardless of what --

CHIEF JUSTICE ROBERTS: Not if your harm is the alleged loss of coastline. Not necessarily. It depends upon what happens across the globe with respect to greenhouse emissions.

MR. MILKEY: Your Honor, we would still lose coastline but we would not lose as much because these harms are cumulative, and while reducing U.S. emissions will not eliminate all the harm we face, it can reduce the harm that these emissions are causing.

So it will necessarily reduce our harm and satisfy redressibility.

JUSTICE SCALIA: I mean, do we know that that's a straight line ratio, that a reduction of two-and-a-half percent of carbon dioxide -- well, two *13 and a half overall would save two-and-a-half percent of your coastline? Is that how it works? I'm not a scientist, but I'd be surprised if it was so rigid.

MR. MILKEY: Your Honor, I don't believe it's established it's necessarily a straight line. But I want to emphasize that small vertical rises cause a large loss of horizontal land. For example, where the slope is less than 2 percent, which is true of much of the Massachusetts coastline, every foot rise will create a loss of more than 50 feet of horizontal land. And for example, in the State of New York, the Oppenheimer affidavit projects that New York could well lose thousands of acres of its sovereign territory by the year 2020. So the harm is already occurring. It is ongoing and it will happen well into the

future.

CHIEF JUSTICE ROBERTS: What's your strongest case from this Court to support your standing allegation?

MR. MILKEY: Your Honor, what I would say to that is our standing here is so much more direct and particularized than, for example, the harm this Court found sufficient in *Laidlaw*, which was --

CHIEF JUSTICE ROBERTS: *Laidlaw* was a specific citizen suit provision, wasn't it?

MR. MILKEY: It was, Your Honor.

*14 CHIEF JUSTICE ROBERTS: So doesn't that make it somewhat analytically distinct from this case?

MR. MILKEY: I don't believe so, Your Honor. Here I think the fact that the States are showing harm not only to them in a property sense, but in their sovereign capacity --

JUSTICE KENNEDY: What's your authority for that? I have the same question as the Chief Justice. I was looking at your brief for the strongest case. Suppose there were a big landowner that owned lots of coastline. Would he have the same standing that you do or do you have some special standing as a State, and if so what is the case which would demonstrate that?

MR. MILKEY: Well, Your Honor, first of all, we agree that a large landowner would himself or herself have --

JUSTICE SCALIA: What of a small landowner?

JUSTICE KENNEDY: No, no. I'm asking whether you have some special standing --

MR. MILKEY: Yes --

JUSTICE KENNEDY: -- as a State and, if so, what's the authority for that?

MR. MILKEY: Your Honor, first of all, I do think we have special standing. For example, here it's uncontested that greenhouse gases are going to make *15 ozone problems worse, which makes it harder for us to comply with our existing Clean Air Act responsibilities.

And the -- in the West Virginia case, which is a D.C. Circuit case, the Court found that that itself provided an independent source of standing. In terms of Supreme Court cases, the -- it's been -- for 200 years, this Court has

recognized loss of state sovereign property as a traditional --

JUSTICE KENNEDY: Well, I don't know. 1907 was Georgia versus Tennessee Copper, and that was pre-Massachusetts versus Mellon. That seems to me your best case.

What about a small landowner? I asked the question about a big landowner. Suppose you have a small landowner and he owned a lot?

MR. MILKEY: Your Honor, I think if someone is losing property because of this problem, then that person would have standing, but we're nowhere near a de minimis threshold here. We have shown we own property, 200 miles of coastline which we're losing, and we think the standing is straightforward.

JUSTICE SCALIA: No, I'm not sure -- I think our opinions have even said it, but certainly commentators have often said it, that really the far margin of our standing cases has been, you know, the *16 famous scrap case, in which the allegation was that the added pollution from municipal incineration of municipal waste which would -- which couldn't be transported by rail for burial because the ICC rates were too high, that added pollution interfered with the students' -- they were Georgetown Law students -- their hiking in the George Washington Forest along the Blue Ridge.

That seems to me a much more immediate kind of damage; yet that's been referred to as really the far margin of our standing cases. You're talking not about their being affected by ambient air but being affected by a stratospheric effect which then has another consequence that you allege.

MR. MILKEY: Your Honor, once these are emitted the laws of physics take over, so our harm is imminent in the sense that lighting a fuse on a bomb is imminent harm. It may take --

JUSTICE GINSBURG: Mr. Milkey, does it make a difference that you're not representing a group of law students, but a number of States who are claiming that they are disarmed from regulating and that the regulatory responsibility has been given to the Federal Government and the Federal Government isn't exercising it? I thought you had a discrete claim based on the sovereignty of States and their inability to regulate *17 dependent on the law Congress passed that gives that authority to the EPA. I thought that was --

MR. MILKEY: Your Honor, you are correct that we are saying that provides us also an independent source of our standing.

JUSTICE SCALIA: I don't understand that. You have standing whenever a Federal law preempts State action? You can complain about the implementation of that law because it has preempted your State action? Is that the basis of standing

you're alleging?

MR. MILKEY: In short, Your Honor --

JUSTICE SCALIA: Do you know any case that has ever held that?

MR. MILKEY: Your Honor, I would cite you to the amicus brief of the State of Arizona et al., which cites several cases, albeit not in this Court, that stand for that principle.

Your Honor, if I may turn to the merits quickly, section 202(a) (1) provides EPA jurisdiction over any air pollutant that motor vehicles emit. It's not restricted to certain types of air pollutants or to air pollutants that cause certain kinds of harm. And not only does the act define air pollutant with comprehensive breadth, but we know these four substances are air pollutants from other evidence.

*18 For example, Congress itself expressly referred to carbon dioxide as an air pollutant in section 103(g). And since by definition all air pollutants are air pollution agents, we know that Congress understood carbon dioxide to be an agent of air pollution. And if air pollution --

CHIEF JUSTICE ROBERTS: Moving from your authority argument to the exercise of authority, the clause 202(a) (1) requires EPA to prescribe standards which in their judgment cause or contribute to air pollution reasonably anticipated to endanger public health. And they say they haven't made that judgment yet, so they're not in violation of that statutory command.

MR. MILKEY: That is correct, Your Honor; but they have said that they have put off making a judgment based on impermissible grounds. While EPA's explanation is difficult even to follow, one overarching point shines through and that is the agency does not agree with taking a regulatory approach regardless of how it might otherwise come out.

CHIEF JUSTICE ROBERTS: Let's say the first day this law is passed, there are a lot of air pollutants that come out of motor vehicles. I mean, is EPA immediately in violation of this statute if they *19 don't issue emissions regulations for every one those air pollutants on day one?

MR. MILKEY: No, Your Honor. EPA has a lot of room to move based both on the endangerment standard itself and on background principles of administrative law.

CHIEF JUSTICE ROBERTS: And presumably the principle that they want to deal with what they regard as the more serious threats sooner. They want to deal with lead first and then they want to deal with other stuff. I mean, what is

the -- when did they -- I guess -- move into an abuse of discretion in not exercising a judgment with respect to a particular pollutant?

MR. MILKEY: The answer to that, Your Honor, is that when they do not rely on any of those grounds, they do not rely on lack of information, they did not rely on background principles of administrative law. What though said here is -- and -- that they did not, in fact, contest the seriousness of the problem. But note, in two back to back sentences on page A-82 of the third petition they say: We must address the, issue but we disagree with the regulatory approach.

The very section in which they explained why they weren't going to regulate is entitled "Different *20 Policy Approach." Rejecting mandatory motor vehicle regulation as a bad idea is simply not a policy choice that Congress left to EPA.

JUSTICE GINSBURG: But if you are right and then it went back and the EPA then said, well, an obvious reason also is constraint on our own resources, we have the authority to say what comes first, Congress -- we couldn't possibly do everything that Congress has authorized us to do; so it's our decision, even though we have the authority to do this, we think that we should spend our resources on other things.

Suppose they said that? You said they didn't say it this time around, but how far will you get if all that's going to happen is it goes back and then EPA says our resources are constrained and we're not going to spend the money?

MR. MILKEY: Your Honor, while background administrative law principles provide EPA at least some room to move, we think it's important that EPA say that. If they -- it's a very different opinion if they say, we are not going to regular here because we just don't want to spend the resources on this problem and we want to look elsewhere.

If they want to say that, they can say that and then, if at all, there'd be a narrow arbitrary and *21 capricious challenge on that. But the point is here they relied on the impermissible consideration that they simply disagreed with the policy behind the statute.

CHIEF JUSTICE ROBERTS: That's not all they said. I'm looking at A-85 and they said establishing emissions now would require EPA to make scientific and technical judgments without the benefit of studies that are being developed to reduce the uncertainty in the area. That's different than saying they disagreed with the regulatory approach.

MR. MILKEY: It is and it isn't, Your Honor, because that statement will allege be true. There will always be scientific uncertainty. Agencies will

always have an understandable interest in seeing more information. They never --

CHIEF JUSTICE ROBERTS: There's a difference between the scientific status of the harm from lead emissions from vehicles that -- when you have lead in the gasoline, to the status, the status of scientific knowledge with respect to the impact on global warming today? Those are two very different levels of uncertainty.

MR. MILKEY: Your Honor, when EPA regulated lead back in the ethyl days, as the Court court itself took note, there were huge amounts of uncertainty at *22 that time. And EPA has a lot of discretion in evaluating that, that uncertainty.

And if the EPA determined that the level of uncertainty was such that it was not reasonable to anticipate endangerment, that is perfectly appropriate. It would also be appropriate if the agency determined that there was so much uncertainty that they couldn't even form a judgment on that. That would be applying the endangerment statute at the same time it put off. But the point is they did not say any of that. They instead relied on impermissible grounds.

JUSTICE SCALIA: Mr. Milkey, I had -- my problem is precisely on the impermissible grounds. To be sure, carbon dioxide is a pollutant, and it can be an air pollutant. If we fill this room with carbon dioxide, it could be an air pollutant that endangers health. But I always thought an air pollutant was something different from a stratospheric pollutant, and your claim here is not that the pollution of what we normally call "air" is endangering health. That isn't, that isn't -- your assertion is that after the pollutant leaves the air and goes up into the stratosphere it is contributing to global warming.

MR. MILKEY: Respectfully, Your Honor, it is not the stratosphere. It's the troposphere.

*23 JUSTICE SCALIA: Troposphere, whatever. I told you before I'm not a scientist.

(Laughter.)

JUSTICE SCALIA: That's why I don't want to have to deal with global warming, to tell you the truth.

MR. MILKEY: Under the express words of the statute -- and this is 302(g) -- for something to be an air pollutant it has to be emitted into the ambient air or otherwise entered there.

JUSTICE SCALIA: Yes, and I agree with that. It is when it comes out an air

pollutant. But is it an air pollutant that endangers health? I think it has to endanger health by reason of polluting the air, and this does not endanger health by reason of polluting the air at all.

MR. MILKEY: Your Honor, respectfully, I disagree, and there is nothing in the act that actually requires the harm to occur in the ambient air. In fact, some of the harm here does occur there.

JUSTICE SCALIA: Well, it talks about air pollution all the time. That's what the, that's what the thing is about, air pollution. It's not about global warming and it's not about the troposphere.

MR. MILKEY: Your Honor, we are not saying, first of all that global warming is air pollution, any *24 more than we're saying that asthma is air pollution. They're both effects. I would point you to the example of acid rain, where the pollutant there, sulfur dioxide, the problem is it causes its harm after it leaves the air, after it gets washed out. Air pollutants do not need to cause harm in the ambient air.

Your Honor, I would add that our interpretation satisfies common sense because, while EPA has plenary authority over substances that motor vehicles emit, those substances are regulated only if EPA determines that they cause endangerment. By defining the term "air pollutant" comprehensively, Congress has not prejudged what may cause endangerment, but it has allowed other pollutants to be regulated as their harms become appreciated. It is EPA's interpretation that fails the common sense test. They have suggested that the term "air pollutant agent" creates an independent test so important that it may prevent some harmful compounds from being regulated without providing any hint of what the term means or how it applies in this case. And they cannot explain any number of anomalies such as the fact that methane is already a regulated air pollutant, yet they claim they can't look at its climate effects.

Your Honor, if there are no more questions *25 I'd like to reserve my time.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Milkey.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE, ON BEHALF OF
RESPONDENTS

MR. GARRE: Thank you. Mr. Chief Justice, and may it please the Court.

After carefully considering the issue the nation's expert agency in

environmental matters concluded that Congress has not authorized it to embark on the regulation of greenhouse gas emissions to address global climate change. And that even if it has, now is not the time to exercise such authority, in light of the substantial scientific uncertainty surrounding global climate change and the ongoing studies designed to address those uncertainties. Plaintiffs have provide no reason to override that quintessential administrative judgment.

JUSTICE GINSBURG: Mr. Garre, doesn't the EPA's decision on the first, "we don't have any authority," doesn't that infect its subsequent decision, "well, even if we did, we wouldn't exercise it." But they've already decided they don't have authority.

MR. GARRE: Your Honor, I don't think that *26 it does. In the sense, I think EPA made clear in its decisional document that it considered as an alternative matter, that if it, even assuming it did have the authority, that it wouldn't be appropriate to exercise it at this time.

And importantly, too, I mean, just to be clear on this, EPA has never made an endangerment finding with respect to global climate change. That was true in 1998 and 1999 when the agency had a different position on authority to regulate. Even then the agency's position was clear. Even assuming we have the authority, now is not the time to exercise it. So I don't think --

JUSTICE GINSBURG: -- I take it that on that question, is there authority, the EPA has come out one way, but at least it is debatable because as you just said, the predecessors of the current people said we do have the authority.

MR. GARRE: Well, to that degree, Your Honor, this Court has made clear, for example, in the Brand X case that even where agencies change positions, where they've provided reasonable grounds for a new interpretation, that interpretation is entitled to Chevron deference. We think that that is true in this case.

*27 JUSTICE BREYER: On this particular issue, the opinion as I read it, of the EPA, consists of 32 pages. Twenty of those pages, 22 in fact, deal with whether they have statutory authority. And of the 10 that deal with the issue we're talking about now, five of them give as their reason that they think that the President has a different policy. Of the remaining five, two more consider international aspects of the problem and how you have to get other countries to cooperate; and then the conclusion of that part says in light of these considerations, we decide not to exercise our power.

Now their claim with respect to that, is that at least three of the four considerations are not proper things for the agency to take into account: namely whether the President wants to do something different, whether we're

running foreign policy properly, whether cooperation with other countries are relevant to this particular issue.

So what they've asked us to do is send it back so they can get the right reasons. Now -- if they want not to do it. What's your response to that?

MR. GARRE: Justice Breyer, I don't think that it depends on how many pages that the agency devoted to the --

*28 JUSTICE BREYER: The reason it depended on that is whether or not these other, improper considerations might have influenced the ultimate decision not to go ahead.

MR. GARRE: I think it depends on the reasons that the agency gave. And one of the reasons that the agency gave was the substantial scientific uncertainty surrounding the issue of global climate change. Petitioners acknowledge that that was an appropriate consideration for the agency. So even if you think the other considerations were inappropriate, and we certainly do not, but even if you think they are, the agency gave an appropriate reason. And that reasons

JUSTICE BREYER: When I write an opinion -- when I write an opinion, sometimes I write the words: "We decide this matter in light of the following three factors taken together." And I guess a lawyer who said, "one of those factors alone the Court has held justified the result all by itself" -- in saying the Court has held that, I guess that wouldn't be so. That would be a bad lawyer, wouldn't it?

MR. GARRE: But Your Honor --

JUSTICE BREYER: If they write that all of these considerations justify our result, again, one of *29 them by themselves, it sounds, they think would not have been sufficient.

MR. GARRE: I -- I don't think that that is a fair reading of the EPA decisional document, Your Honor. Certainly, the agency didn't go out of its way to say, "and reading these considerations together and not any of them individually." And with respect to the scientific uncertainty, Your Honor, you also have to take into account that the EPA had before it and pointed to the report of the National Research Council on global climate change.

JUSTICE STEVENS: I find it interesting that the scientists whose worked on that report said there were a good many omissions that would have indicated that there wasn't nearly the uncertainty that the agency described.

MR. GARRE: Your Honor, if you are referring to the amicus brief, Your Honor, there are -- assuming there are amicus briefs on the other side. The Ballunas

amicus brief -- I think it is fair for the Court to look at, to look at the document that the agency had before it. That -- that document produced by the National Research -- Research Council, that's the research arm of the National Academy of Sciences. And it's one of the gold standards of research.

*30 JUSTICE STEVENS: But in their selective quotations, they left out parts that indicated there was far less uncertainty than the agency purported to find.

MR. GARRE: Well, Your Honor, I think one thing that we ought to be able to agree on is there is that there is uncertainty surrounding the phenomenon of global climate change. I think the debate is on which areas are more uncertain than the others. But certainly I think the agency was entitled to conclude, particularly if you take into account the deference this Court should give to that kind of determination, that the scientific uncertainty surrounding the issue of global climate change, surrounding issues of the extent of natural variability in climate, surrounding the issues of impact of climate feedbacks like ocean circulation, and low cloud cover, are permissible considerations for the agency to take into -- -

JUSTICE STEVENS: Is there uncertainty on the basic proposition that these greenhouse gases contribute to global warming.

MR. GARRE: Your Honor, the report says that it is likely that there is a -- a connection, but that it cannot unequivocally be established. I think that -- if I could use that to go back to the standing question, Your Honor, which is the fundamental question of whether *31 they've showed not just a connection between greenhouse gas emissions in toto and the phenomenon of global climate change, but the particular class of greenhouse gas emissions at issue in this case. Six percent of global greenhouse gas emissions, at most. That assumes you put all U.S. vehicles off the road or that they are all zero emission cars. So you're talking about emissions --

CHIEF JUSTICE ROBERTS: -- it is not a mathematical question, right? I mean, you would -- it's that you would -- what is the number? What's enough? percent? 15 percent? Presumably, there's more to it than the percentage of emissions attributable to be this particular --

MR. GARRE: I think that's true, Your Honor. But what petitioners here to show, they bear the burden in order to establish standing under this case, is that regulation of the class of greenhouse gases at issue in this case will make a difference to them.

JUSTICE BREYER: Suppose it is not greenhouse gas. Suppose it was Agent Orange. Suppose there a car is coming down the street and it sprays out Agent Orange. And I come into the Court and I say, you know, I think that Agent

Orange is going to kill me with cancer. And the reply is, well, we have some scientists *32 here who say your chance of dying of cancer from Agent Orange is only 1 in 30. Maybe 1 in 50. Maybe 1 in a thousand. Maybe 1 in 10,000. And therefore, you have no standing to require the EPA to regulate this pollutant, Agent Orange, which is in a green cloud all over the city.

Now, would you say that the person who's made that claim has no standing?

MR. GARRE: Your Honor, I think that that is a fundamentally different case, for the simple reason that global climate change is a global phenomenon. I mean one --

JUSTICE BREYER: I was only addressing, using that to -- to address your problem that the chances are too small that, in fact, any one individual will be affected by the 7 percent or 6 percent of the material that comes out of the truck -- the CO₂.

MR. GARRE: The -- the individual in that case, Your Honor, like the plaintiffs here, would have to show specific facts demonstrating injury, redressibility and traceability. Now in this case --

JUSTICE KENNEDY: Your problem, I think, you take the position, the proposition that the greater the harm the greater the risk, the smaller the probability has to be before it is reasonable to act, and necessary *33 to act.

MR. GARRE: Your Honor, this Court's standing cases make clear that you have to show that granting the relief requested is likely to redress the alleged harms. And again, looking at the --

JUSTICE SOUTER: They are saying it is likely to do so, even though we cannot give you a point for point percentage correlation between reduction of gas and coastline loss. You're saying, it seems to me, that they have somehow got to pinpoint this mathematically --

MR. GARRE: I don't -- we're not saying that.

JUSTICE SOUTER: -- before, before there is redressibility.

MR. GARRE: We're not saying that, Your Honor. We're saying that they have, they certainly have to do more than they have done here. And they're granted their standing --

JUSTICE SOUTER: Tell me what it is that they need, be more specific about what they need to do.

MR. GARRE: Well, I will be more specific. And if I could also just point to what they grounded their case on here. They grounded their case on here, in the declarations, on the notion if the United States *34 regulates greenhouse gas emissions of vehicles, then other countries will follow suit with respect to the emissions of vehicles and other greenhouse gas emissions. That's clear from the McCracken declaration on page 239, paragraph 32 of the JA, as well as the Walsh declaration.

JUSTICE SCALIA: I think it can be argued that the Assistant Attorney General hasn't argued that here.

MR. GARRE: Well --

JUSTICE SCALIA: He has said that 6 percent is enough.

MR. GARRE: That, that's true, Your Honor, but I still think you have to look at the basis that they've relied upon on standing. And they haven't shown specific facts which should provide any comfort to this Court that regulation of less than 6 percent or fewer greenhouse emissions worldwide will have any effect on their alleged injuries.

JUSTICE SOUTER: Why is there -- why is there reason to assume that it will have no effect?

MR. GARRE: Well --

JUSTICE SOUTER: That seems to be the assumption you're making. You are saying unless they can pinpoint the correlation between reduction of gas *35 and effect, let's say in coastline loss, they have not shown either causation or a sufficient likelihood of redressibility.

MR. GARRE: Your Honor --

JUSTICE SOUTER: But why do they have to show a precise correlation as opposed simply to establishing what I think is not really contested, that there is a correlation between greenhouse gases and the kind of loss that they're talking about; and it is reasonable to suppose that some reduction in the gases will result in some reduction in future loss.

Why is that insufficient?

MR. GARRE: Justice Souter, one fundamental reason is that we don't know what the rest of the world is going to do, whether or not --

JUSTICE SOUTER: Let's assume the rest -- let's assume that the rest of the world does nothing. I don't think that's a very reasonable assumption, but

let's make that assumption. So that the only thing we're talking is the 6 percent. If the 6 percent can be reduced -- I think the suggestion was over a reasonable period of time, by two and a half percent of the 6, there is, I suppose, reason to expect that there will be, maybe not two and a half percent less coastline lost, but some degree of less coastline lost because *36 there is a correlation between the gas and the loss of the coastline. Why is that an unreasonable assumption to make in order to show causation and redressibility, bearing in mind that redressibility is a question of more or less, not a question of either/or.

They don't have to show that it will stop global warming. Their point is that will reduce the degree of global warming and likely reduce the degree of loss, if it is only by two and a half percent. What's wrong with that?

MR. GARRE: Justice Souter, their burden is to show that if the Court grants their requested relief it will redress their injuries. I'm not aware --

JUSTICE SOUTER: Not redress their injury in the sense that it will prevent any global warming or stop global warming and stop coastal erosion; their argument is a different one. It will reduce the degree of global warming and reduce the degree of coastal loss.

MR. GARRE: I think --

JUSTICE SOUTER: That's their argument. Not all or nothing. But a part. That's what they're trying to show.

MR. GARRE: And that's fine, Justice Souter, I grant you that. But they still have to show that there is reason that it is likely to believe, that the *37 reduction in that tiny fraction of United States emissions, putting aside the 99 percent or the 95 percent in the rest of the world and what they do, and the evidence that shows that greenhouse gas emissions in those countries are increasing, they have to show the regulation of that tiny fraction would have an affect on their alleged injuries, not to completely redress them, Your Honor. We don't say that --

JUSTICE SOUTER: Don't they have to show that it is reasonable to suppose it will have an effect?

MR. GARRE: They have to show that it is likely, Your Honor. And they haven't even tried to make that showing. The one thing that they've --

JUSTICE SOUTER: Why is that showing -- and I agree with, by the way, with the Chief's suggestion a moment ago, life is not, or physics are not so simple as to assume that there's going to be a be a direct two and a half percent reduction of coastline for a two and a half percent reduction from the 6

percent.

But isn't it intuitively reasonable to suppose that with some reduction of the greenhouse gases, there will be some reduction of the ensuing damage or the ensuing climate change which causes the damage? Isn't that fair?

MR. GARRE: I don't think that it is fair, *38 Your Honor. I don't want to pretend to be an expert on global climate change. But the one thing I can say is from the materials I looked at is that this an extraordinarily complex area of science. I'm not aware of any studies available that would suggest that the regulation of that minuscule fraction of greenhouse gas emissions would have any effect whatsoever on the global --

JUSTICE SOUTER: But do you have any --

JUSTICE BREYER: Suppose others cooperate? Suppose, for example, they regulate this and before you know it, they start to sequester carbon with the power plants, and before you know it, they decide ethanol might be a good idea, and before you know it, they decide any one of 15 things, each of which has an impact, and lo and behold, Cape Cod is saved. Now why is it unreasonable? Why is it unreasonable to go to an agency and say now you do your part, which is 6 percent, and now we're going to go to a different agency like NHTSA and we're going to ask them too, and we're going to go to your electricity regulation program, and coal. And there are like not a million things that have to be done, maybe there are only seven. But by the time we get those seven things done, we'll make a big difference. Now what is it in the law that says that *39 somehow a person cannot go to an agency and say we want you to do your part? Would you be up here saying the same thing if we're trying to regulate child pornography, and it turns out that anyone with a computer can get pornography elsewhere? I don't think so.

MR. GARRE: Your Honor, what I would point you to is your decision in Lujan versus Defenders of Wildlife, Justice Kennedy's opinion in ASARCO versus Kadish, where the Court made clear that you cannot establish standing based on predictions of the actions of independent actors not before it. That's true about other agencies that aren't here today. That's true about other countries whom this Court does not have jurisdiction over.

JUSTICE BREYER: So they couldn't have gone in and asked for ozone regulations, because that requires other countries? Or what about dumping heavy metals in the sea, and as the sea gets polluted because of what other countries do, but EPA tried to regulate that. Acid rain they tried to regulate. You're saying there is no standing to ask for any of that.

MR. GARRE: Well, first of all, Congress has specifically addressed two of the areas that you mentioned, Your Honor, and we're not saying that *40

categorically --

CHIEF JUSTICE ROBERTS: Just because there's no standing to challenge an agency's decision doesn't mean the agency can't regulate that particular area, right?

MR. GARRE: That's exactly right, Your Honor. That's exactly right.

JUSTICE BREYER: But you are saying if Congress passes a statute and they put the words CO2 right in this statute under ambient air, and they say anybody can go and sue if the EPA doesn't do it, you're saying Congress lacks the constitutional authority to do that, because it's Article III we're talking about?

MR. GARRE: Well, Your Honor, we're saying two things. First, every plaintiff has the obligation to establish that he has Article III standing under this Constitution. And secondly, there are members of this Court, for example, Justice Kennedy in his concurring opinion in *Defenders of Wildlife*, who did suggest that perhaps if Congress specifically addresses an issue, that could inform the standing analysis. For example --

CHIEF JUSTICE ROBERTS: They can't compromise the requirements of Article III.

MR. GARRE: It cannot, Your Honor. Congress could make findings with respect to causation or other *41 issues that this Court would have to give deference to and seriously consider, but you're right. It would not override the requirements of Article III. And there may be some global phenomenon that create more difficult challenges to establish standing but --

JUSTICE STEVENS: As I understand the government's position, you're not merely questioning standing but you also take the position you do not have the authority to do what the plaintiff asks you to do; is that correct?

MR. GARRE: That's true, Your Honor, moving to the merits, that's true. And with respect to that, the agency engaged in the same type of analysis that this Court laid out in the *Brown* and *Williamson* case.

JUSTICE STEVENS: May I ask you on that question, if we turn to the statute, to Section 201, there's reference to "shall regulate" if in the judgment of the administrator there is a for real danger and so forth. In your view, is there a duty to make a judgment?

MR. GARRE: Your Honor, our view is that agencies have inherent discretion to determine when to make that judgment.

JUSTICE STEVENS: Could they have a discretion never to make the judgment?

*42 MR. GARRE: I think that gets to the question of whether there is, what judicial review is available. We have assumed in this case that there's some measure of judicial review. So I think at some point you got to the point where the agency either has provided no reasons whatsoever, or there is no sound basis for the agency not to take that step. Then assuming that there is a role for the courts here, a court could come in and say that that was inappropriate.

JUSTICE STEVENS: But as I read your brief, you didn't really confront the question, s I understand it, of whether or not there was a duty to make a judgment at all. And I'm interested in what your position on that is.

MR. GARRE: Well, again, I think it goes to the question -- we think the statute does not put a deadline on when the agency has to have, and that therefore --

JUSTICE STEVENS: To me, just reading the text of the statute is a little ambiguous. I'm not entirely clear, but it seems to me that just reading that statute, I got the impression that Congress thought that the administrator had a duty to make a judgment when there was enough evidence out there that people were concerned about it and so forth, that there would *43 be a duty there, but you think not?

MR. GARRE: That's not the agency's interpretation. In fact in its decisional document under the section no mandatory duty, the agency explains why that's not its interpretation and we think that that's a reasonable interpretation. Congress knows how to constrain the exercise of discretion. We point in footnotes 18 and 19 of our brief of many examples where Congress has laid out deadlines or other constraints on the exercise of discretion, and those aren't present in Section 203.

JUSTICE STEVENS: But you would agree that if they did make a judgment, then you would have authority to regulate?

MR. GARRE: That's right. And then I think it's a point the D.C. Circuit made in the Ethyl Corporation case at footnote 37, that precisely because the statute imposes a duty to act once that endangerment finding is made, the agency has discretion to determine when to make the endangerment finding.

JUSTICE KENNEDY: In Norton versus Utah Wilderness Alliance, having to do with the regulation of off-road vehicles, we indicated that one measure was whether or not the agency has unreasonably delayed its action.

*44 MR. GARRE: That's a separate sort of action, Your Honor. There are cases where people have said that this is unreasonable delay. That's not the claim

that the petitioners in this case brought.

CHIEF JUSTICE ROBERTS: Let me understand your answer to Justice Stevens' question. If EPA made the judgment under the statute, you think they would have had the authority?

MR. GARRE: Under the statute --

CHIEF JUSTICE ROBERTS: I thought you had a Brown and Williamson argument that EPA was precluded.

MR. GARRE: No, I was assuming -- in answering Justice Stevens' questions, that we were down in the exercise of discretion part. But you're right, Your Honor, the threshold position of the agency on this is that it lacks the authority to --

JUSTICE SCALIA: Can I ask about that? I found persuasive Solicitor General Garre's point that in the acid rain context, it isn't air pollution that harms health, but rather it is the effect of the pollutant after it leaves the air and produces the acid rain. Is there anything wrong with that response? It seems to me --

MR. GARRE: I think there is, Your Honor. The way that the agency looked at this is to look at the *45 question of whether Congress intended it to regulate greenhouse gas emissions to address global climate change, and it looked to the factors that this Court laid out in Brown and Williamson. The statute as a whole is specific legislation addressing global climate change, and it concluded that the agency had not authorized it to embark on that regulatory --

JUSTICE SCALIA: You concede that it's an air pollutant that affects health?

MR. GARRE: No. The agency -- what the agency found, Your Honor, was that because global climate change is not air pollution within the meaning of the statute -- which is to say that Congress did not authorize it to regulate it as air pollution.

JUSTICE SCALIA: Then why isn't it air pollution within the meaning of the statute, although whatever it is that causes acid rain is?

MR. GARRE: I think, Your Honor, that the key to the agency was that Congress did not give it regulatory authority over this. And I think on the question of whether or not greenhouse gas emissions qualify --

JUSTICE SCALIA: But you can't give me any text in this statute itself. It isn't the phrase "air pollution" or any other phrase?

*46 MR. GARRE: The agency pointed to the term "air pollution agent" in the statute, and concluded that because global climate change was not air pollution that Congress intended to address --

JUSTICE SCALIA: And that gets us back to acid rain.

MR. GARRE: And with respect to acid rain, it's a good example insofar as Congress has enacted a whole separate title of the Clean Air Act to address acid rain.

The other thing I want to mention on the interpretive question is, in the *Brown and Williamson* case, this Court assumed at the outset of its analysis that nicotine would be within the general terms of the definition of drug in the Food, Drug and Cosmetic Act, and that cigarettes would fall within the general term of drug --

JUSTICE SCALIA: So that's the position you're taking, that it is within the general term?

MR. GARRE: I think it's largely the position that the agency took, Your Honor, insofar as it reasoned that, look, we've looked at everything. We conclude that Congress doesn't intend us to regulate global climate change as air pollution. And so therefore, we're not going to say that greenhouse gases *47 are air pollution agents.

JUSTICE GINSBURG: Which is why there's a significant difference between the agency saying that for 60 years, and I think this Court stressed that in its opinion, and Congress reacting to that, what the agency's position was. And here where it's a newly minted position, because the agency's position not too long ago was that they did have the authority.

MR. GARRE: Well, Justice Ginsburg, it was 30 years before the agency reached the conclusion in 1998 that carbon dioxide was an air pollutant. And again, even when it reached that conclusion, it made clear that it didn't think that the agency would exercise its authority to regulate it.

JUSTICE GINSBURG: That's a different question. I'm just focusing on, did it have authority to deal with this issue?

MR. GARRE: And I think -- I mean, I grant you that there are differences between *Brown and Williamson* and this case, but the fundamental conclusion that the agency reached is the same. Which was, to borrow the phrase from the *Whitman* case, Congress did not intend to hide elephants in mouse holes. Here we are talking about an issue of the magnitude of regulating global climate change and greenhouse gas *48 emissions, which are fundamentally an important

part of the nation's economy. Nearly 85 percent of the economy is a direct or indirect source of greenhouse gas emissions.

And when we look at when Congress did mention carbon dioxide in the statute, which is in the 1990 amendments, Section 103(g), that was the first time that Congress mentioned CO₂. And when it did that, it went out of its way to say that it was giving non-regulatory authority to the agency, and moreover, that nothing in this section shall provide any basis for any air pollution control requirements. That's a strange thing for Congress to say if it believed that the agency already had this far-reaching authority to regulate greenhouse gas emissions.

There are other aspects of the statute that we think lead to the same conclusion in *Brown & Williamson*. There's a fundamental inconsistency, the agency concluded, between attempting to regulate greenhouse gas emissions under the national air ambient quality system, and that inconsistency is similar to the inconsistency that the Court pointed out in the *Brown and Williamson* case.

JUSTICE BREYER: I'd like you to address that. You said there was a lot of legislation in '49 Congress that would have been pretty inconsistent with serious regulation by the FDA. And in this case, I don't think Congress is opposing the notion. I don't know anybody there who's in favor of global warming. And it seems to me they haven't passed laws that is actually, that would be significantly interfered with by the EPA trying to do its best to deal with this problem. Or am I wrong?

MR. GARRE: I think you're wrong in the following respect, Your Honor.

JUSTICE BREYER: What articles would be --

MR. GARRE: Congress has passed at least six separate statutes to specifically address the issue of global warming, and all of them share two common features. One, we want you to research this issue and learn more about it. And two, we want you to work on an international framework for addressing global climate change. The agency reasonably concluded that unilateral U.S. regulation of greenhouse gases --

JUSTICE BREYER: Is there anything in the statute that prevents them from consulting with other nations or prevents the government from doing that when they determine how best to work out whatever standards or other forms of regulation they want?

MR. GARRE: There's nothing in the Clean Air '50 Act, if that's the statute you're referring to, but I --

JUSTICE SCALIA: I presume the problem that they have in mind is that we have nothing to give in international negotiations. If we have done everything we can to reduce CO₂, you know, what deal do we make with foreign nations? What incentive do they have to go along with us?

MR. GARRE: That's right, Your Honor. We've got a unique collective action problem, and yet, the reaction experience of the agency in dealing with the issue of stratospheric ozone depletion rate had precisely that situation, where the U.S. initially took steps. The stratospheric ozone depletion worsened, and it was only after international agreement was reached in the Montreal Protocol that a global solution to the problem was reached.

JUSTICE BREYER: Do you think they have a good reason, yes or no? Because I'm not an expert in foreign affairs. The EPA probably is more than I am. But do you think that if they do rest their decision on their analysis of foreign affairs, that that is a proper basis for an agency like the EPA to refuse to regulate?

MR. GARRE: I think it's a proper basis within its inherent discretion, Your Honor, for at least two reasons. One, the agency is a part of the executive *51 branch and it had unique experience with the issue of stratospheric ozone depletion. And two, Congress has made clear, for example in the Global Climate Protection Act of 1987, that the EPA has a role in at least reporting to Congress on international cooperation and efforts in that realm.

JUSTICE SOUTER: But Congress has not directed, don't regulate domestically for purposes of global warming.

MR. GARRE: That's true, Your Honor, but --

JUSTICE SOUTER: The problem that I have with your reference to this very -- these various pieces of legislation that suggest that Congress has a different modus operandi in mind is that Congress certainly is aware that EPA has authority over pollutants, and it has never interfered with it.

MR. GARRE: Well, Your Honor, again, I think in looking at all the sources the agency looked to, the conclusion is, that the agency responsibly and prudently reached, is that Congress has not authorized it to embark on this regulatory endeavor. And I think the closest statute that comes to --

JUSTICE SOUTER: But isn't that a misstatement? Isn't the conclusion that they're trying to draw that Congress doesn't want them to exercise the *52 authority they have for this purpose? And isn't that something quite different? And doesn't that raise the question whether that is a legitimate concern for them under the statute that does give them the authority?

MR. GARRE: May I answer the question? No, Your Honor. I think the agency's conclusion was Congress had not authorized it to undertake the regulation of greenhouse gas emissions to address global climate change and that, even if it had, that authority should not be exercised.

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you,

Mr. Garre.

Mr. Milkey, you have 3 minutes remaining.

REBUTTAL ARGUMENT OF JAMES R. MILKEY
ON BEHALF OF THE PETITIONERS

JUSTICE SCALIA: Mr. Milkey, do you want us to send this case back to the EPA to ask them whether if only the last two pages of their opinion were given as a reason that would suffice? Would that make you happy?

MR. MILKEY: It would not make us happy, Your Honor.

JUSTICE SCALIA: I didn't think so.

(Laughter.)

MR. MILKEY: Your Honor, if I can address *53 the global aspect of the problem, the fact that the solution to the whole problem --

JUSTICE BREYER: What is your answer to Justice Scalia? Because I thought you said before that you thought it was appropriate for us to send this case back so that they could redetermine in light of proper considerations whether they wanted to exercise their authority.

MR. MILKEY: That is exactly --

JUSTICE BREYER: Am I wrong about that?

MR. MILKEY: Your Honor, that is exactly what we want. I understood Justice Scalia to be saying --

JUSTICE SCALIA: That's what I was asking, yes. And you think it will go back to them and they will say, oh my goodness, the scientific uncertainty is not enough by itself? You really expect that to happen?

MR. MILKEY: Respectfully, Your Honor, I think EPA will have a hard time saying that there is insufficient -- I mean, too much scientific uncertainty.

The very sentence --

JUSTICE SCALIA: They said it already.

MR. MILKEY: No, Your Honor.

JUSTICE SCALIA: The only question is whether that alone is enough.

*54 MR. MILKEY: Respectfully, Your Honor, they did not say that. They did not anywhere say why the existing uncertainty mattered. To the contrary, they emphasized the need to act in the face of current uncertainty, but never explained why that principle applies to a nonregulatory approach but not to a regulatory one.

CHIEF JUSTICE ROBERTS: What they said was until more is understood about causes, extent and significance of climate change and the potential options for addressing it, we believe it's inappropriate to regulate these emissions.

MR. MILKEY: Your Honor.

CHIEF JUSTICE ROBERTS: That strikes me as saying they think there is too much uncertainty for them to act.

MR. MILKEY: Your Honor, they did not say there is too much uncertainty for them to form a judgment, which is the key issue. They said they preferred more certainty, but because of the nature of the endangerment standard, which emphasizes the important of regulating in the face of uncertainty, they have to at least explain why the uncertainty matters. And that is -- what they did here is particularly troubling in the fact that they ignored all of the *55 indications pointing toward endangerment. They looked at what we don't know without ever looking at what we do know.

JUSTICE ALITO: If the EPA concludes that regulating an air pollutant would endanger public health and welfare, can it decline to regulate?

MR. MILKEY: Not under section 202, Your Honor.

JUSTICE ALITO: It has to regulate even if it concludes that regulation would make things worse?

MR. MILKEY: Would make things worse?

JUSTICE ALITO: Yes.

MR. MILKEY: I'm sorry, I didn't understand that.

No.

MR. MILKEY: No, Your Honor. If they thought there would be more endangerment that way they would not have to regulate.

JUSTICE ALITO: Then why can't they -- what is wrong with their view that for the United States to proceed unilaterally would make things worse and therefore they're going to decline to regular for that reason?

MR. MILKEY: Your Honor, first of all, I don't believe they actually said that, and there is *56 nothing in the statute that even hints that they can take foreign policy considerations into account. To the contrary, the statute is very specific in other sections about when they're supposed to look at foreign emissions

JUSTICE ALITO: Isn't the definition of public welfare extremely broad?

MR. MILKEY: Your Honor, it is certainly extremely broad, and it does include climate.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:02 a.m., the case in the above-entitled matter was submitted.)

Appendix not available.

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. 2006 WL 3101954 (Appellate Brief) Brief Amici Curiae of Robert H. Bork, Ronald A. Cass, Douglas W. Kmiec, Ronald D. Rotunda, And John Yoo in Support of Respondent United States Environmental Protection Agency (Oct. 24, 2006)

. 2006 WL 3101955 (Appellate Brief) Brief for Respondent Utility Air Regulatory Group (Oct. 24, 2006)

. 2006 WL 3095443 (Appellate Brief) Brief for the Respondent States of Michigan, North Dakota, Utah, South Dakota, Alaska, Kansas, Nebraska, Texas, and Ohio (Oct. 20, 2006)

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. 2006 WL 2569818 (Joint Appendix) JOINT APPENDIX (Aug. 30, 2006)

. 2006 WL 1491257 (Appellate Petition, Motion and Filing) Reply Brief of Petitioners (May 24, 2006)Original Image of this Document (PDF)

. 2006 WL 1358431 (Appellate Petition, Motion and Filing) Amicus Brief in Support of Petition for Writ of Certiorari (May 15, 2006)Original Image of this Document (PDF)

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