

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 MASSACHUSETTS, ET AL., :

4 Petitioners :

5 v. : No. 05-1120

6 ENVIRONMENTAL :

7 PROTECTION AGENCY, ET AL. :

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9 Washington, D.C.

10 Wednesday, November 29, 2006

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

15 APPEARANCES:

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17 Boston, Mass; on behalf of Petitioners.

18 GREGORY C. GARRE, ESQ., Deputy Solicitor General,  
19 Department of Justice, Washington, D.C.; on  
20 behalf of Respondents.

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P R O C E E D I N G S

(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

1 possesses a good deal of discretion in applying the  
2 statutory endangerment test, it cannot rest its ruling  
3 on impermissible grounds as it did here.

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

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

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

24 MR. MILKEY: It is, Your Honor. We have  
25 shown that the sea levels are already occurring from the

1 current amounts of greenhouse gases in the air, and that  
2 means it is only going to get worse as the --

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

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

13 JUSTICE SCALIA: Well, there's a lot of  
14 conjecture about whether -- I gather that there's  
15 something of a consensus on warming, but not a consensus  
16 on how much of that is attributable to human activity.  
17 And I gather that -- what is it? Something like seven  
18 percent of the total carbon dioxide emissions are  
19 attributable to automobiles in the United States?

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

22 JUSTICE SCALIA: 6 percent? Thank you.

23 MR. MILKEY: But it's important to point out  
24 as well, though, that in the ruling we challenge, EPA  
25 has disavowed authority over all U.S. sources of

1 emissions, which constitute about 20 percent of  
2 global --

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

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

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

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

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

25 MR. MILKEY: Your Honor, we have shown in

1 the record that a 40 percent reduction in carbon dioxide  
2 from cars is currently feasible. And since those  
3 emissions account for --

4 JUSTICE SCALIA: Not in the first year.

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

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

11 MR. MILKEY: Yes, Your Honor.

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

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

22 CHIEF JUSTICE ROBERTS: Do you get the  
23 benefit of that broader allegation in establishing your  
24 standard? In other words, if you've challenged EPA's  
25 refusal to apply a particular level of greenhouse

1 regulation to a particular model of car, can you say,  
2 well, they're following the same approach to a coal  
3 powered -- coal fueled power plant, and so we get to  
4 establish a broader injury? Or, aren't you limited to  
5 the specific legal challenge you're raising here?

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

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

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

23 JUSTICE KENNEDY: But at the outset, you  
24 made this, some of this perhaps reassuring statement  
25 that we need not decide about global warming in this



1 case. But don't we have to do that in order to decide  
2 the standing argument, because there's no injury if  
3 there's not global warming? Or, can you show standing  
4 simply because there is a likelihood that the perceived  
5 would show that there's an injury?

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

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

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

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

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

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

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

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

25 MR. MILKEY: Well, Your Honor, if I can deal

1 with the traceability part of that question first,  
2 traceability is easy to show here because the extent of  
3 our harm is caused by the overall amount of the gases in  
4 the air. And being focused on the 20 percent of all  
5 U.S. sources, or the 6 percent of the cars, that's still  
6 a sizeable portion of the problem, so we know that 6 or  
7 20 percent is there.

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

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

13 MR. MILKEY: To the global carbon dioxide  
14 emission.

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

19 MR. MILKEY: It would be, we have shown in  
20 the record it would be about a two-and-a-half percent  
21 over the time it takes to turn the fleet over. But it's  
22 important that given the nature of the harms, even small  
23 reductions can be significant. For example, if we're  
24 able to save only a small fraction of the hundreds of  
25 millions of dollars that Massachusetts parks agencies

1 are projected to lose, that reduction is itself  
2 significant.

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

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

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

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

21 So it will necessarily reduce our harm and  
22 satisfy redressibility.

23 JUSTICE SCALIA: I mean, do we know that  
24 that's a straight line ratio, that a reduction of  
25 two-and-a-half percent of carbon dioxide -- well, two

1 and a half overall would save two-and-a-half percent of  
2 your coastline? Is that how it works? I'm not a  
3 scientist, but I'd be surprised if it was so rigid.

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

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

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

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

25 MR. MILKEY: It was, Your Honor.

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

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

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

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

17 JUSTICE SCALIA: What of a small landowner?

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

20 MR. MILKEY: Yes --

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

23 MR. MILKEY: Your Honor, first of all, I do  
24 think we have special standing. For example, here it's  
25 uncontested that greenhouse gases are going to make

1 ozone problems worse, which makes it harder for us to  
2 comply with our existing Clean Air Act responsibilities.

3           And the -- in the West Virginia case, which  
4 is a D.C. Circuit case, the Court found that that itself  
5 provided an independent source of standing. In terms of  
6 Supreme Court cases, the -- it's been -- for 200 years,  
7 this Court has recognized loss of state sovereign  
8 property as a traditional --

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

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

16           MR. MILKEY: Your Honor, I think if someone  
17 is losing property because of this problem, then that  
18 person would have standing, but we're nowhere near a de  
19 minimis threshold here. We have shown we own property,  
20 200 miles of coastline which we're losing, and we think  
21 the standing is straightforward.

22           JUSTICE SCALIA: No, I'm not sure -- I think  
23 our opinions have even said it, but certainly  
24 commentators have often said it, that really the far  
25 margin of our standing cases has been, you know, the

1 famous scrap case, in which the allegation was that the  
2 added pollution from municipal incineration of municipal  
3 waste which would -- which couldn't be transported by  
4 rail for burial because the ICC rates were too high,  
5 that added pollution interfered with the students' --  
6 they were Georgetown Law students -- their hiking in the  
7 George Washington Forest along the Blue Ridge.

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

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

18           JUSTICE GINSBURG: Mr. Milkey, does it make  
19 a difference that you're not representing a group of law  
20 students, but a number of States who are claiming that  
21 they are disarmed from regulating and that the  
22 regulatory responsibility has been given to the Federal  
23 Government and the Federal Government isn't exercising  
24 it? I thought you had a discrete claim based on the  
25 sovereignty of States and their inability to regulate



1 dependent on the law Congress passed that gives that  
2 authority to the EPA. I thought that was --

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

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

11 MR. MILKEY: In short, Your Honor --

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

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

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

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

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

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

22           CHIEF JUSTICE ROBERTS: Let's say the first  
23 day this law is passed, there are a lot of air  
24 pollutants that come out of motor vehicles. I mean, is  
25 EPA immediately in violation of this statute if they

1 don't issue emissions regulations for every one those  
2 air pollutants on day one?

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

7 CHIEF JUSTICE ROBERTS: And presumably the  
8 principle that they want to deal with what they regard  
9 as the more serious threats sooner. They want to deal  
10 with lead first and then they want to deal with other  
11 stuff. I mean, what is the -- when did they -- I  
12 guess -- move into an abuse of discretion in not  
13 exercising a judgment with respect to a particular  
14 pollutant?

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

24 The very section in which they explained why  
25 they weren't going to regulate is entitled "Different

1 Policy Approach." Rejecting mandatory motor vehicle  
2 regulation as a bad idea is simply not a policy choice  
3 that Congress left to EPA.

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

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

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

24 If they want to say that, they can say that  
25 and then, if at all, there'd be a narrow arbitrary and

1 capricious challenge on that. But the point is here  
2 they relied on the impermissible consideration that they  
3 simply disagreed with the policy behind the statute.

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

11 MR. MILKEY: It is and it isn't, Your Honor,  
12 because that statement will alleges be true. There will  
13 always be scientific uncertainty. Agencies will always  
14 have an understandable interest in seeing more  
15 information. They never --

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

23 MR. MILKEY: Your Honor, when EPA regulated  
24 lead back in the ethyl days, as the Court court itself  
25 took note, there were huge amounts of uncertainty at

1 that time. And EPA has a lot of discretion in  
2 evaluating that, that uncertainty.

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

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

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

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

3 (Laughter.)

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

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

10 JUSTICE SCALIA: Yes, and I agree with that.  
11 It is when it comes out an air pollutant. But is it an  
12 air pollutant that endangers health? I think it has to  
13 endanger health by reason of polluting the air, and this  
14 does not endanger health by reason of polluting the air  
15 at all.

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

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

24 MR. MILKEY: Your Honor, we are not saying,  
25 first of all that global warming is air pollution, any

1 more than we're saying that asthma is air pollution.  
2 They're both effects. I would point you to the example  
3 of acid rain, where the pollutant there, sulfur dioxide,  
4 the problem is it causes its harm after it leaves the  
5 air, after it gets washed out. Air pollutants do not  
6 need to cause harm in the ambient air.

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

25           Your Honor, if there are no more questions



1 I'd like to reserve my time.

2 CHIEF JUSTICE ROBERTS: Thank you,  
3 Mr. Milkey.

4 Mr. Garre.

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

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

9 After carefully considering the issue the  
10 nation's expert agency in environmental matters  
11 concluded that Congress has not authorized it to embark  
12 on the regulation of greenhouse gas emissions to address  
13 global climate change. And that even if it has, now is  
14 not the time to exercise such authority, in light of the  
15 substantial scientific uncertainty surrounding global  
16 climate change and the ongoing studies designed to  
17 address those uncertainties. Plaintiffs have provide no  
18 reason to override that quintessential administrative  
19 judgment.

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

25 MR. GARRE: Your Honor, I don't think that

1 it does. In the sense, I think EPA made clear in its  
2 decisional document that it considered as an alternative  
3 matter, that if it, even assuming it did have the  
4 authority, that it wouldn't be appropriate to exercise  
5 it at this time.

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

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

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

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

13           Now their claim with respect to that, is  
14 that at least three of the four considerations are not  
15 proper things for the agency to take into account:  
16 namely whether the President wants to do something  
17 different, whether we're running foreign policy  
18 properly, whether cooperation with other countries are  
19 relevant to this particular issue.

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

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

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

5 MR. GARRE: I think it depends on the  
6 reasons that the agency gave. And one of the reasons  
7 that the agency gave was the substantial scientific  
8 uncertainty surrounding the issue of global climate  
9 change. Petitioners acknowledge that that was an  
10 appropriate consideration for the agency. So even if  
11 you think the other considerations were inappropriate,  
12 and we certainly do not, but even if you think they are,  
13 the agency gave an appropriate reason. And that reasons  
14 --

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

23 MR. GARRE: But Your Honor --

24 JUSTICE BREYER: If they write that all of  
25 these considerations justify our result, again, one of

1 them by themselves, it sounds, they think would not have  
2 been sufficient.

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

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

17 MR. GARRE: Your Honor, if you are referring  
18 to the amicus brief, Your Honor, there are -- assuming  
19 there are amicus briefs on the other side. The Ballunas  
20 amicus brief -- I think it is fair for the Court to look  
21 at, to look at the document that the agency had before  
22 it. That -- that document produced by the National  
23 Research -- Research Council, that's the research arm of  
24 the National Academy of Sciences. And it's one of the  
25 gold standards of research.

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

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

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

21 MR. GARRE: Your Honor, the report says that  
22 it is likely that there is a -- a connection, but that  
23 it cannot unequivocally be established. I think that --  
24 if I could use that to go back to the standing question,  
25 Your Honor, which is the fundamental question of whether

1 they've showed not just a connection between greenhouse  
2 gas emissions in toto and the phenomenon of global  
3 climate change, but the particular class of greenhouse  
4 gas emissions at issue in this case. Six percent of  
5 global greenhouse gas emissions, at most. That assumes  
6 you put all U.S. vehicles off the road or that they are  
7 all zero emission cars. So you're talking about  
8 emissions --

9 CHIEF JUSTICE ROBERTS: -- it is not a  
10 mathematical question, right? I mean, you would -- it's  
11 that you would -- what is the number? What's enough?  
12 10 percent? 15 percent? Presumably, there's more to it  
13 than the percentage of emissions attributable to be this  
14 particular --

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

20 JUSTICE BREYER: Suppose it is not  
21 greenhouse gas. Suppose it was Agent Orange. Suppose  
22 there a car is coming down the street and it sprays out  
23 Agent Orange. And I come into the Court and I say, you  
24 know, I think that Agent Orange is going to kill me with  
25 cancer. And the reply is, well, we have some scientists

1 here who say your chance of dying of cancer from Agent  
2 Orange is only 1 in 30. Maybe 1 in 50. Maybe 1 in a  
3 thousand. Maybe 1 in 10,000. And therefore, you have  
4 no standing to require the EPA to regulate this  
5 pollutant, Agent Orange, which is in a green cloud all  
6 over the city.

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

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

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

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

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



1 to act.

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

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

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

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

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

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

22 MR. GARRE: Well, I will be more specific.  
23 And if I could also just point to what they grounded  
24 their case on here. They grounded their case on here,  
25 in the declarations, on the notion if the United States

1 regulates greenhouse gas emissions of vehicles, then  
2 other countries will follow suit with respect to the  
3 emissions of vehicles and other greenhouse gas  
4 emissions. That's clear from the McCracken declaration  
5 on page 239, paragraph 32 of the JA, as well as the  
6 Walsh declaration.

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

10 MR. GARRE: Well --

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

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

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

22 MR. GARRE: Well --

23 JUSTICE SOUTER: That seems to be the  
24 assumption you're making. You are saying unless they  
25 can pinpoint the correlation between reduction of gas

1 and effect, let's say in coastline loss, they have not  
2 shown either causation or a sufficient likelihood of  
3 redressibility.

4 MR. GARRE: Your Honor --

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

12 Why is that insufficient?

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

16 JUSTICE SOUTER: Let's assume the rest --  
17 let's assume that the rest of the world does nothing. I  
18 don't think that's a very reasonable assumption, but  
19 let's make that assumption. So that the only thing  
20 we're talking is the 6 percent. If the 6 percent can be  
21 reduced -- I think the suggestion was over a reasonable  
22 period of time, by two and a half percent of the 6,  
23 there is, I suppose, reason to expect that there will  
24 be, maybe not two and a half percent less coastline  
25 lost, but some degree of less coastline lost because

1 there is a correlation between the gas and the loss of  
2 the coastline. Why is that an unreasonable assumption  
3 to make in order to show causation and redressibility,  
4 bearing in mind that redressibility is a question of  
5 more or less, not a question of either/or.

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

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

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

19 MR. GARRE: I think --

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

23 MR. GARRE: And that's fine, Justice Souter,  
24 I grant you that. But they still have to show that  
25 there is reason that it is likely to believe, that the

1 reduction in that tiny fraction of United States  
2 emissions, putting aside the 99 percent or the 95  
3 percent in the rest of the world and what they do, and  
4 the evidence that shows that greenhouse gas emissions in  
5 those countries are increasing, they have to show the  
6 regulation of that tiny fraction would have an affect on  
7 their alleged injuries, not to completely redress them,  
8 Your Honor. We don't say that --

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

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

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

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

25 MR. GARRE: I don't think that it is fair,

1 Your Honor. I don't want to pretend to be an expert on  
2 global climate change. But the one thing I can say is  
3 from the materials I looked at is that this an  
4 extraordinarily complex area of science. I'm not aware  
5 of any studies available that would suggest that the  
6 regulation of that minuscule fraction of greenhouse gas  
7 emissions would have any effect whatsoever on the  
8 global -- -

9 JUSTICE SOUTER: But do you have any --

10 JUSTICE BREYER: Suppose others cooperate?

11 Suppose, for example, they regulate this and before you  
12 know it, they start to sequester carbon with the power  
13 plants, and before you know it, they decide ethanol  
14 might be a good idea, and before you know it, they  
15 decide any one of 15 things, each of which has an  
16 impact, and lo and behold, Cape Cod is saved. Now why  
17 is it unreasonable? Why is it unreasonable to go to an  
18 agency and say now you do your part, which is 6 percent,  
19 and now we're going to go to a different agency like  
20 NHTSA and we're going to ask them too, and we're going  
21 to go to your electricity regulation program, and coal.  
22 And there are like not a million things that have to be  
23 done, maybe there are only seven. But by the time we  
24 get those seven things done, we'll make a big  
25 difference. Now what is it in the law that says that

1 somehow a person cannot go to an agency and say we want  
2 you to do your part? Would you be up here saying the  
3 same thing if we're trying to regulate child  
4 pornography, and it turns out that anyone with a  
5 computer can get pornography elsewhere? I don't think  
6 so.

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

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

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

1 categorically --

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

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

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

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

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

24 MR. GARRE: It cannot, Your Honor. Congress  
25 could make findings with respect to causation or other



1 issues that this Court would have to give deference to  
2 and seriously consider, but you're right. It would not  
3 override the requirements of Article III. And there may  
4 be some global phenomenon that create more difficult  
5 challenges to establish standing but --

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

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

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

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

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

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

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

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

19 JUSTICE STEVENS: To me, just reading the  
20 text of the statute is a little ambiguous. I'm not  
21 entirely clear, but it seems to me that just reading  
22 that statute, I got the impression that Congress thought  
23 that the administrator had a duty to make a judgment  
24 when there was enough evidence out there that people  
25 were concerned about it and so forth, that there would

1 be a duty there, but you think not?

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

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

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

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

1 MR. GARRE: That's a separate sort of  
2 action, Your Honor. There are cases where people have  
3 said that this is unreasonable delay. That's not the  
4 claim that the petitioners in this case brought.

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

9 MR. GARRE: Under the statute --

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

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

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

24 MR. GARRE: I think there is, Your Honor.  
25 The way that the agency looked at this is to look at the

1 question of whether Congress intended it to regulate  
2 greenhouse gas emissions to address global climate  
3 change, and it looked to the factors that this Court  
4 laid out in *Brown and Williamson*. The statute as a  
5 whole is specific legislation addressing global climate  
6 change, and it concluded that the agency had not  
7 authorized it to embark on that regulatory --

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

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

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

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

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

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

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

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

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

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

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

1 are air pollution agents.

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

9 MR. GARRE: Well, Justice Ginsburg, it was  
10 30 years before the agency reached the conclusion in  
11 1998 that carbon dioxide was an air pollutant. And  
12 again, even when it reached that conclusion, it made  
13 clear that it didn't think that the agency would  
14 exercise its authority to regulate it.

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

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

1 emissions, which are fundamentally an important part of  
2 the nation's economy. Nearly 85 percent of the economy  
3 is a direct or indirect source of greenhouse gas  
4 emissions.

5           And when we look at when Congress did  
6 mention carbon dioxide in the statute, which is in the  
7 1990 amendments, Section 103(g), that was the first time  
8 that Congress mentioned CO2. And when it did that, it  
9 went out of its way to say that it was giving  
10 non-regulatory authority to the agency, and moreover,  
11 that nothing in this section shall provide any basis for  
12 any air pollution control requirements. That's a  
13 strange thing for Congress to say if it believed that  
14 the agency already had this far-reaching authority to  
15 regulate greenhouse gas emissions.

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

24           JUSTICE BREYER: I'd like you to address  
25 that. You said there was a lot of legislation in



1 Congress that would have been pretty inconsistent with  
2 serious regulation by the FDA. And in this case, I  
3 don't think Congress is opposing the notion. I don't  
4 know anybody there who's in favor of global warming.  
5 And it seems to me they haven't passed laws that is  
6 actually, that would be significantly interfered with by  
7 the EPA trying to do its best to deal with this problem.  
8 Or am I wrong?

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

11 JUSTICE BREYER: What articles would be --

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

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

25 MR. GARRE: There's nothing in the Clean Air

1 Act, if that's the stature you're referring to, but I --

2 JUSTICE SCALIA: I presume the problem that  
3 they have in mind is that we have nothing to give in  
4 international negotiations. If we have done everything  
5 we can to reduce CO<sub>2</sub>, you know, what deal do we make  
6 with foreign nations? What incentive do they have to go  
7 along with us?

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

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

23 MR. GARRE: I think it's a proper basis  
24 within its inherent discretion, Your Honor, for at least  
25 two reasons. One, the agency is a part of the executive

1 branch and it had unique experience with the issue of  
2 stratospheric ozone depletion. And two, Congress has  
3 made clear, for example in the Global Climate Protection  
4 Act of 1987, that the EPA has a role in at least  
5 reporting to Congress on international cooperation and  
6 efforts in that realm.

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

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

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

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

23 JUSTICE SOUTER: But isn't that a  
24 misstatement? Isn't the conclusion that they're trying  
25 to draw that Congress doesn't want them to exercise the

1 authority they have for this purpose? And isn't that  
2 something quite different? And doesn't that raise the  
3 question whether that is a legitimate concern for them  
4 under the statute that does give them the authority?

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

11 Thank you very much.

12 CHIEF JUSTICE ROBERTS: Thank you,  
13 Mr. Garre.

14 Mr. Milkey, you have 3 minutes remaining.

15 REBUTTAL ARGUMENT OF JAMES R. MILKEY

16 ON BEHALF OF THE PETITIONERS

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

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

23 JUSTICE SCALIA: I didn't think so.

24 (Laughter.)

25 MR. MILKEY: Your Honor, if I can address

1 the global aspect of the problem, the fact that the  
2 solution to the whole problem --

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

9 MR. MILKEY: That is exactly --

10 JUSTICE BREYER: Am I wrong about that?

11 MR. MILKEY: Your Honor, that is exactly  
12 what we want. I understood Justice Scalia to be saying  
13 --

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

18 MR. MILKEY: Respectfully, Your Honor, I  
19 think EPA will have a hard time saying that there is  
20 insufficient -- I mean, too much scientific uncertainty.  
21 The very sentence --

22 JUSTICE SCALIA: They said it already.

23 MR. MILKEY: No, Your Honor.

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

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

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

13 MR. MILKEY: Your Honor.

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

17 MR. MILKEY: Your Honor, they did not say  
18 there is too much uncertainty for them to form a  
19 judgment, which is the key issue. They said they  
20 preferred more certainty, but because of the nature of  
21 the endangerment standard, which emphasizes the  
22 importance of regulating in the face of uncertainty, they  
23 have to at least explain why the uncertainty matters.  
24 And that is -- what they did here is particularly  
25 troubling in the fact that they ignored all of the

1 indications pointing toward endangerment. They looked  
2 at what we don't know without ever looking at what we do  
3 know.

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

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

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

11 MR. MILKEY: Would make things worse?

12 JUSTICE ALITO: Yes.

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

15 No.

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

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

24 MR. MILKEY: Your Honor, first of all, I  
25 don't believe they actually said that, and there is

1 nothing in the statute that even hints that they can  
2 take foreign policy considerations into account. To the  
3 contrary, the statute is very specific in other sections  
4 about when they're supposed to look at foreign emissions  
5 --

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

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

10 Thank you, Your Honor.

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

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

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