

JULY 2019

POLICY BRIEF



Summary

- The Obama administration's purpose in crafting the Endangerment Finding was to help execute the "war on coal."
- It was EPA's refusal to issue an endangerment finding, one way or another, that led to the Supreme Court's Endangerment Finding decision, not EPA's failure to regulate greenhouse gases.
- The grounds for reversing the Endangerment Finding are robust, and this action is long overdue.

Should EPA Reverse Its Endangerment Finding on Greenhouse Gases?

By Joseph L. Bast

Introduction

Carbon dioxide (CO₂) is a naturally occurring gas that constitutes only four molecules of every 10,000 in Earth's atmosphere. The Obama administration classified CO₂ as a pollutant to be regulated under the Clean Air Act. Since then, regulations that harm the U.S. economy have been legally justified by referring to this "Endangerment Finding."

The Obama administration pushed through the Endangerment Finding without following the agency's normal procedures, relying on research that did not meet its own data-quality standards and disregarding extensive commentary opposing its decision by distinguished experts as well as its own staff. All administrations prior to Obama's refused to follow this path, and for good reason.

The Endangerment Finding is vulnerable on purely scientific grounds. Although its supporters claim to have a "mountain" of research in its defense, upon closer scrutiny, their case is nothing more than a molehill of real science and data, on top of which is piled reams of speculation based on invalidated computer models and circumstantial evidence. This is widely known in the scientific community and understood by the Trump administration.

The grounds for reversing the Endangerment Finding are robust, and this action is long overdue.

What Is the Endangerment Finding?

The Clean Air Act of 1970, with its later amendments, was passed to mitigate air pollution from motor vehicles and industrial facilities that could be harmful to human health. On April 2, 2007, in *Massachusetts v. EPA*, 549 U.S. 497 (2007), the U.S. Supreme Court found “the Clean Air Act authorizes EPA to regulate greenhouse gas emissions from new motor vehicles in the event that it forms a ‘judgment’ that such emissions contribute to climate change.”¹ It ordered EPA to issue a judgment, *one way or the other*, on the matter. Obama’s first EPA administrator, Lisa Jackson, did so on April 17, 2009. Her finding was that greenhouse gases do contribute to climate change and therefore pose a threat to human health and welfare.

EPA then held a 60-day public comment period, the minimum required by law. During the comment period, which ended June 23, 2009, the agency received more than 380,000 public comments. Many of the comments provided devastating critiques of EPA’s science and procedures.² Despite these comments and an internal study produced by Alan Carlin, a se-

nior EPA economist,³ strongly opposing a finding of endangerment, and bypassing entirely EPA’s own Science Advisory Board, on December 7, 2009, Jackson signed two findings:

- **Endangerment Finding:** The Administrator finds that the current and projected concentrations of the six key well-mixed greenhouse gases—carbon dioxide (CO₂), methane (CH₄), nitrous oxide (N₂O), hydrofluorocarbons (HFCs), perfluorocarbons (PFCs), and sulfur hexafluoride (SF₆)—in the atmosphere threaten the public health and welfare of current and future generations.
- **Cause or Contribute Finding:** The Administrator finds that the combined emissions of these well-mixed greenhouse gases from new motor vehicles and new motor vehicle engines contribute to the greenhouse gas pollution that threatens public health and welfare.⁴

To briefly recap the story told in greater detail below: EPA brought judicial review on itself by refusing to make a finding on greenhouse gases, one way or the other, not by refusing

¹ See the full Court decision at <https://supreme.justia.com/cases/federal/us/549/497/> and EPA’s interpretation of the court finding and steps taken at <https://www.epa.gov/ghgemissions/endangerment-and-cause-or-contribute-findings-greenhouse-gases-under-section-202a-clean>. Quotations from *Massachusetts v. EPA* that follow are from the Court’s synopsis.

² See Tim Benson, “Comments, Petitions, and Testimony Opposing EPA’s CO₂ Endangerment Finding,” The Heartland Institute, January 18, 2017, https://www.heartland.org/_template-assets/documents/publications/EPA%20Endangerment%20Comments%20II.pdf.

³ Alan Carlin, “Proposed NCEE Comments on Draft Technical Support Document for Endangerment Analysis for Greenhouse Gas Emissions Under the Clean Air Act,” Draft, National Center for Environmental Economics, March 9, 2009, <https://cei.org/wp-content/uploads/2009/01/DOC062509-004.pdf>.

⁴ This phrasing is taken from EPA’s website: “Endangerment and Cause or Contribute Findings for Greenhouse Gases under the Section 202(a) of the Clean Air Act,” last viewed on June 6, 2019, <https://www.epa.gov/ghgemissions/endangerment-and-cause-or-contribute-findings-greenhouse-gases-under-section-202a-clean>.

to regulate greenhouse gases. It flunked the Court’s test of “arbitrary, capricious . . . or otherwise not in accordance with law” by relying on uncertainty and efficacy arguments that failed to fulfill its statutory duty. Those arguments, or improvements along the lines suggested below, would carry the day if used to justify a new finding of no endangerment.

The Endangerment Finding was extremely controversial. Several legal efforts were made to force EPA to repeal it, but those efforts failed. In October 2017, the Competitive Enterprise Institute and the Science and Environmental Policy Project, two Washington, DC think tanks, sent a letter signed by 60 climate and health experts asking then-EPA Administrator Scott Pruitt to review the Endangerment Finding.⁵ A comment by Pruitt suggested he was open to reevaluating the finding, but after he left office in July 2018, a reevaluation was no longer an administration priority.⁶

Why Did the Supreme Court Order EPA to Issue an Endangerment Finding?

Environmental advocacy groups sued EPA during the George W. Bush administration, demanding it issue an endangerment finding regarding greenhouse gases emitted by cars and trucks.⁷ EPA refused to do so, saying the plain-

tiffs lacked legal standing, the science was too uncertain, and the legislative record made it clear Congress did not intend for EPA to have the authority to regulate such gases.

The environmental groups added the State of Massachusetts and some municipalities in Massachusetts to their lawsuit, claiming their concern over the cost of addressing rising sea levels—which they said are being caused by global warming resulting from greenhouse gases emitted by humans—gave the state legal standing. They then appealed the case to the U.S. Supreme Court.

The plaintiffs in *Massachusetts v. EPA* won for two reasons: First, because EPA was statutorily required to issue a finding, *one way or the other*, once greenhouse gases and global warming became subjects of genuine scientific and public concern, and second, because the Obama administration failed to contest the plaintiffs’ false scientific claims. On the second point, according to the Supreme Court’s ruling:

In sum—at least according to petitioners’ *uncontested affidavits*—the rise in sea levels associated with global warming has already harmed and will continue to harm Massachusetts. The risk of catastrophic harm, though remote, is nevertheless real. That risk would be reduced

⁵ The letter can be found here: https://cei.org/sites/default/files/CEI_SEPP_letter_to_Administrator_Pruitt_-_Endangerment_Finding_-_October_2017%20%281%29.pdf.

⁶ Ledyard King, “EPA’s Pruitt says challenge to endangerment finding still on the table,” *USA Today*, January 30, 2018, <https://www.usatoday.com/story/news/politics/2018/01/30/epas-pruitt-says-challenge-endangerment-finding-still-table/1078282001/>.

⁷ The advocacy groups were Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U. S. Public Interest Research Group.

to some extent if petitioners received the relief they seek. We therefore hold that petitioners have standing to challenge the EPA's denial of their rulemaking petition.⁸ [emphasis added]

These claims and this conclusion could have been refuted by referring to actual climate science.⁹ However, EPA didn't argue the science. "EPA does not dispute the existence of a causal connection between man-made greenhouse gas emissions and global warming," the Court said. "At a minimum, therefore, EPA's refusal to regulate such emissions 'contributes' to Massachusetts' injuries." The fault here reaches back to the previous administration, as the Court also observed:

We moreover attach considerable significance to EPA's "agree[ment] with the President that 'we must address the issue of global climate change,'" 68 Fed. Reg. 52929 (quoting remarks announcing Clear Skies and Global Climate Initiatives, 2002 Public Papers of George

W. Bush, Vol. 1, Feb. 14, p. 227 (2004)), and to EPA's ardent support for various voluntary emission-reduction programs, 68 Fed. Reg. 52932. As Judge Tatel observed in dissent below, "EPA would presumably not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming." 415 F. 3d, at 66.

EPA under either Bush or Obama could easily have made a strong case against regulating greenhouse gases on grounds of scientific uncertainty—most scientists do not believe climate science is able to measure or predict the human impact on the global climate¹⁰—but EPA under both administrations chose instead to pander to environmental activists and a misled public by not challenging apocalyptic claims about man-made global warming. So, the Court relied instead on the science fed to it by the plaintiffs, primarily reports by the U.N. Intergovernmental Panel on Climate Change (IPCC).¹¹ Those reports have been widely discredited.¹² For example, in 1990, IPCC predicted warming of 0.3

⁸ Also see note 6 of the Court decision: "At any rate, no party to this dispute contests that greenhouse gases both 'ente[r] the ambient air' and tend to warm the atmosphere. They are therefore unquestionably 'agent[s]' of air pollution."

⁹ See, for example, Jay Lehr, ed., "A Critique of the U.S. Global Change Research Program's 2017 Climate Science Special Report," The Heartland Institute, March 2018, <https://www.heartland.org/publications-resources/publications/a-critique-of-the-us-global-change-research-programs-2017-climate-science-special-report>; Jay Lehr *et al.*, "A Climate Science Tutorial Prepared for Hon. William Alsup," The Heartland Institute, April 2018, <https://www.heartland.org/publications-resources/publications/a-climate-science-tutorial-prepared-for-hon-william-alsup>.

¹⁰ See Craig Idso, Robert Carter, and S. Fred Singer, *Why Scientists Disagree about Global Warming* (Chicago, IL: The Heartland Institute, 2017), <https://www.heartland.org/publications-resources/publications/why-scientists-disagree-about-global-warming>; also see the multi-volume series *Climate Change Reconsidered* produced by the Nongovernmental International Panel on Climate Change, at www.climatechangereconsidered.org.

¹¹ See *Massachusetts v. EPA*, footnotes 9, 10, 12, and 14, <https://supreme.justia.com/cases/federal/us/549/497/>.

¹² Donna Laframboise, *The Delinquent Teenager Who Was Mistaken for the World's Top Climate Expert* (Toronto, Ontario: 2011); Barry Lewin, *Searching for the Catastrophe Signal: The Origins of The*

degrees Celsius per decade.¹³ However, empirical temperature data over the three decades that followed show average temperatures rose by only about 0.13 degrees C per decade, less than half the pace IPCC predicted.¹⁴

The Court went on to reason the Bush administration’s arguments about the efficacy of regulating new vehicle emissions—what it referred to dismissively as “a laundry list of reasons not to regulate”—were rendered moot due to EPA’s refusal to render an endangerment finding, and then by “the enormity of the potential consequences associated with man-made climate change.” In other words, had EPA issued a finding of non-endangerment sooner and had not surrendered on the magnitude of the hypothetical threat of catastrophic climate change and on the causation argument, then its arguments over jurisdiction and efficacy may have mattered.

The Endangerment Finding did not itself impose any requirements on industry or other entities, but it became the prerequisite for implementing greenhouse gas emissions standards for vehicles, and then many other rules

and regulations implemented by the Obama administration. Some of those regulations are being suspended or repealed by the Trump administration, and the Supreme Court itself blocked a major regulation, the Clean Power Plan, by putting a “stay” on the regulation in February 2016.¹⁵ EPA issued an Advanced Notice of Proposed Rulemaking proposing repeal of the Clean Power Plan in October 2017. On June 19, 2019, it issued a rule that replaced most of the Obama-era Clean Power Plan policies with more common-sense standards.¹⁶

Did the Supreme Court Reject the Claim the Science Is Too Uncertain to Justify Regulating Greenhouse Gases?

The Supreme Court’s ruling that EPA must issue an Endangerment Finding, *one way or the other*, is often misrepresented by the media and environmental activists as a rejection of claims made by the Bush administration that the science is too uncertain to justify regulating greenhouse gases. In fact, the Bush administration had argued that scientific uncertainty

Intergovernmental Panel on Climate Change (London, England: GWPF Books, 2017); and Appendix A of John Christy, testimony to U.S. Senate Committee on Commerce, Science, and Transportation Subcommittee on Space, Science and Competitiveness, December 8, 2015, https://www.heartland.org/_template-assets/documents/publications/christy_testimony.pdf.

¹³ “First Assessment Report,” U.N. Intergovernmental Panel on Climate Change, 1990, p. xxii, https://www.ipcc.ch/site/assets/uploads/2018/03/ipcc_far_wg_i_full_report.pdf.

¹⁴ Roy W. Spencer, “Global Warming,” <http://www.drroyspencer.com/2019/01/uah-global-temperature-update-for-december-2018-0-25-deg-c/>.

¹⁵ Jonathan Adler, “Supreme Court puts the brakes on the EPA’s Clean Power Plan,” *The Washington Post*, February 9, 2016, https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/?noredirect=on&utm_term=.9e7070244f73.

¹⁶ “EPA Finalizes Affordable Clean Energy Rule, Ensuring Reliable, Diversified Energy Resources while Protecting our Environment,” News Release, U.S. Environmental Protection Agency, June 19, 2019, <https://www.epa.gov/newsreleases/epa-finalizes-affordable-clean-energy-rule-ensuring-reliable-diversified-energy>.

over the causes and consequences of climate change was one reason why EPA *did not have to issue an endangerment finding*. The Court said uncertainty could be the basis for a finding of no endangerment, but not the basis for refusing to conduct the study and reaching a decision, one way or the other. The Court wrote,

Nor can EPA avoid its statutory obligation by noting the uncertainty surrounding various features of climate change and concluding that it would therefore be better not to regulate at this time. See 68 Fed. Reg. 52930–52931. *If the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming, EPA must say so.* That EPA would prefer not to regulate greenhouse gases because of some residual uncertainty—which, contrary to Justice Scalia’s apparent belief, *post*, at 5–8, is in fact all that it said, see 68 Fed. Reg. 52929 (“We do not believe ... that it would be either effective or appropriate for EPA to establish [greenhouse gas] standards for motor vehicles at this time” (emphasis added))—is irrelevant. *The statutory question is whether sufficient information exists to make an endangerment finding.* [emphasis added]

As this quotation makes clear, EPA could have issued a finding that scientific uncertainty means it is impossible to say with certainty that man-made greenhouse gases contribute to global warming, and therefore it’s impossible to say they endanger public health and welfare. If it had, the Court probably would not

have supported plaintiffs’ efforts to engage the Court in a scientific debate over whether such a finding was the right one. It is only because EPA had previously refused to issue a finding and chose instead to parse words and straddle the issue during the Bush administration that this case reached the Supreme Court and resulted in the Endangerment Finding verdict.

Can the Endangerment Finding Be Reconsidered or Reversed?

The Supreme Court in *Massachusetts v. EPA* did not require or order EPA to find greenhouse gases endanger human health. It only mandated that a finding be issued *one way or the other*. The Clean Air Act *requires* EPA to reopen and reconsider endangerment findings if new evidence arises after the finding was first issued that calls into question the basis for the finding. An EPA administrator is free to reconsider and then reverse the Endangerment Finding, provided he or she follows the proper procedures.

The EPA administrator could decide the finding needs to be reversed for any number of reasons, some of them summarized below. Importantly, *he or she doesn’t need a court’s approval for changing the finding*. The new Endangerment Finding would take effect as soon after the public comment period as the administrator wants. Environmental activists can (and are likely to) sue EPA if it reverses the Endangerment Finding, but the new Endangerment Finding will be the law of the land until and unless it is changed. As noted above, the courts are likely to defer to the agency’s own judgment.

What Arguments Could EPA Use in a New Endangerment Finding?

The Supreme Court ruled the legal threshold for the *content* of an endangerment finding is lower than the legal threshold for arguing against the need to issue an endangerment finding in the first place. The Court wrote:

Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change *or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.* [emphasis added]

This is a poorly written paragraph, and so is likely to buy many lawyers second and third homes. However, the first path for EPA seems to require making an argument that relatively few scientists would be willing to endorse, “that greenhouse gases do not contribute to climate change.” The legal logic appears to be (a) cars and trucks emit carbon dioxide, (b) carbon dioxide is a greenhouse gas, (c) greenhouse gases cause climate change, (d) climate change harms human health and well-being, (e) the Clean Air Act requires regulation of any substances put into the air that may harm human health and well-being, so therefore (f) car and truck emissions ought to be regulated.

Entirely missing from this legal analysis are

the meaningful questions that should be asked to decide whether *man-made* greenhouse gases from cars and trucks should be regulated. What is the impact on the global climate of greenhouse gas emissions from human activity in the United States? Can it even be measured with current science? Can future climate conditions be accurately forecast? Is all “climate change” bad, or is some of it good? Is the net impact of “climate change” good or bad? Would the net impact on human health and well-being of regulating car and truck emissions be good or bad?

“THE SUPREME COURT RULED THE LEGAL THRESHOLD FOR THE CONTENT OF AN ENDANGERMENT FINDING IS LOWER THAN THE LEGAL THRESHOLD FOR ARGUING AGAINST THE NEED TO ISSUE AN ENDANGERMENT FINDING IN THE FIRST PLACE.”

The Court seems to be saying the language of the Clean Air Act doesn’t allow such distinctions, that according to the IPCC greenhouse gases and climate change are bad *by definition*, and *by statutory definition*, any human

emissions into air or water can be regulated. If this is what a literal reading of the Clean Air Act produces, then the Clean Air Act needs to be revised or repealed.

Thankfully, the second path for EPA offered by the Court is much more promising. It is to “provide some reasonable explanation as to why [EPA] cannot or will not exercise its discretion to determine whether [greenhouse gases] do [contribute to climate change].” This too is poorly phrased, failing to distinguish between man-made and other greenhouse gases and whether “climate change” is good or bad for human health and well-being, and “not exercise its discretion to determine whether they do” *probably* means “issue a finding of

non-endangerment.” But it seems to say the uncertainty and efficacy arguments (“reasonable explanations”) that EPA used, unsuccessfully, to argue that it didn’t need to issue an endangerment finding can now be updated and used in a new endangerment finding.

Following the second path, an EPA administrator could confidently explain he or she is reversing the Endangerment Finding for the following reasons:

A. EPA violated its own rules of procedure in adopting the Endangerment Finding.

Regulations that have a potential impact of more than \$500 million in any one year on either the public or private sector; are novel, controversial, or precedent-setting; or have significant interagency interest must be accompanied by a scientific assessment that meets the OMB Office of Information and Regulatory Affairs’ definition of a “Highly Influential” action. The Endangerment Finding clearly should have required a highly influential scientific assessment, but it did not get one. Based on an audit by the highly regarded InterAcademy Council,¹⁷ the IPCC reports do not meet the requirements of “Influential Scientific Information.”

EPA also failed to get approval from its own Science Advisory Board, ignored and attempted to suppress research produced by its own

staff,¹⁸ and failed to truthfully review comments submitted by experts. When the Obama administration ran EPA, these procedural flaws were raised unsuccessfully in lawsuits aimed at forcing EPA to rescind the Endangerment Finding. However, it is up to the EPA administrator, not a judge, to decide if these procedural failures justify reversing the finding.

B. New scientific evidence discovered since 2009 or overlooked by the previous administration justifies reversing the Endangerment Finding.

Newly discovered evidence is required for the Endangerment Finding to be reversed, as EPA’s previous effort was affirmed by the Court of Appeals, so the science and process at issue there have been affirmed and legally stand decided. As it was noted previously, while the Endangerment Finding’s defenders claim to have a “mountain” of research in its defense, upon closer scrutiny their case is nothing more than a molehill of real science and data, on top of which is piled reams of speculation based on invalidated computer models and circumstantial evidence. This is widely known in the scientific community and understood by the Trump administration.

Climate sensitivity (the global temperature increase thought to be caused by a doubling of the amount of CO₂ in the atmosphere) has been found to be considerably lower than previously thought,¹⁹ global temperatures have

¹⁷ InterAcademy Council, “Review of the IPCC : A Review of the Procedures and Processes of the Intergovernmental Panel on Climate Change,” 2010, <http://reviewipcc.interacademycouncil.net/>

¹⁸ Alan Carlin, *supra* note 3.

¹⁹ Christopher Monckton, Willie Soon, David Legates, and W.M. Briggs, “Keeping It Simple: The Value of an Irreducibly Simple Climate Model,” *Science Bulletin* 60, no. 15 (2015): 1378–1390, where in

risen considerably less than predicted,²⁰ alleged harms to human health and well-being have not materialized,²¹ and new evidence of corruption taints all of the science cited in the 2009 finding.²²

C. Reducing greenhouse gas emissions from cars and trucks would not protect human health or well-being.

Attempting to reduce emissions from cars and trucks is enormously expensive (more than \$500 per ton)²³ and likely to cause significant hardship on consumers (\$3,800 per vehicle or more),²⁴ will not have a perceptible impact on the global climate,²⁵ and

would result in net harm to human health and well-being by causing more highway deaths and injuries.²⁶

6. Even if EPA Reverses the Endangerment Finding, Could the Courts Demand Regulation of Greenhouse Gases?

If the Endangerment Finding were reversed, regulation of greenhouse gases as a pollutant under the Clean Air Act could be reinstated by a future EPA administrator or an act of Congress. But unless the current administrator fails to follow proper procedures, it is unlikely the Supreme Court would force EPA to regulate greenhouse gases.

footnotes 7 to 33, 27 peer-reviewed articles are identified placing climate sensitivity at 1 to 4 degrees Celsius; see also Hermann Harde, "Radiation Transfer Calculations and Assessment of Global Warming by CO₂," *International Journal of Atmospheric Sciences* Volume 2017, Article ID 9251034; Willie Soon, Ronan Connolly, and Michael Connolly, "Re-evaluating the Role of Solar Variability on Northern Hemisphere Temperature Trends Since the 19th Century," *Earth-Science Reviews* 150 (2015): 409–52.

²⁰ Roy W. Spencer and William D. Braswell, "The Role of ENSO in Global Ocean Temperature Changes during 1955–2011," *Asia-Pacific Journal of Atmospheric Science* 50, no. 2 (2014): 229–37.

²¹ John Christy, *supra* note 12.

²² Some of the scandals that undermine the credibility of climate science, most of them occurring after 2009, include: the "Climategate" scandal, the Phil Jones "missing database" scandal, the John Beale scandal, the UN/IPCC peer-review scandal, the NOAA surface temperature "corrections" scandal, the climate model "tuning scandal," the PM 2.5 epidemiology scandal, the R.K. Pachauri scandal, the "RICO 20" scandal, and most recently the Russian collusion with environmental groups scandal.

²³ Julian Morris and Arthur Wardle, "CAFE and ZEV Standards: Environmental Effects and Alternatives," *Policy Brief*, Reason Foundation, August 3, 2017, <https://reason.org/policy-brief/cale-and-zev-standards-environmental-effects-and-alternatives/>.

²⁴ Salim Furth and David Kreutzer, "Fuel Economy Standards Are a Costly Mistake," The Heritage Foundation, March 4, 2016, <https://www.heritage.org/government-regulation/report/fuel-economy-standards-are-costly-mistake>.

²⁵ Environmental Protection Agency and National Highway Traffic Safety Administration, "2017 and Later Model Year Light-Duty Vehicle Greenhouse Gas Emissions and Corporate Average Fuel Economy Standards, Proposed Rules," *Federal Register*, Vol. 76, No. 231 (December 1, 2011), p. 75097, <https://www.gpo.gov/fdsys/pkg/FR-2011-12-01/pdf/2011-30358.pdf>.

²⁶ National Academy of Science, "Effectiveness and Impact of Corporate Average Fuel Economy (CAFÉ) Standards," 2011, Chapter 2, <https://www.nap.edu/read/10172/chapter/4>.

The Court was careful to say it will not review or second-guess *how* EPA regulates greenhouse gases. The Court said:

The scope of our review of the merits of the statutory issues is narrow. As we have repeated time and again, an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities. See *Chevron U. S. A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U. S. 837, 842–845 (1984). That discretion is at its height when the agency decides not to bring an enforcement action. Therefore, in *Heckler v. Chaney*, 470 U. S. 821 (1985), we held that *an agency’s refusal to initiate enforcement proceedings is not ordinarily subject to judicial review*. Some debate remains, however, as to the rigor with which we review an agency’s denial of a petition for rulemaking.

There are key differences between a denial of a petition for rulemaking and an agency’s decision not to initiate an enforcement action. See *American Horse Protection Assn., Inc. v. Lyng*, 812 F. 2d 1, 3–4 (CADDC 1987). In contrast to nonenforcement decisions, agency refusals to initiate *rulemaking* “are less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.” *Id.*, at 4; see also 5 U. S. C. §555(e). They moreover arise out of denials of petitions for rulemaking which (at least in the circumstances here) the af-

ected party had an undoubted procedural right to file in the first instance. *Refusals to promulgate rules are thus susceptible to judicial review, though such review is “extremely limited” and “highly deferential.”* *National Customs Brokers & Forwarders Assn of America, Inc. v. United States*, 883 F. 2d 93, 96 (CADDC 1989). [emphasis added]

As stated earlier, it was EPA’s refusal to issue an endangerment finding that led to the Court’s decision, not its failure to regulate greenhouse gases. The Court is unlikely to intervene so long as EPA follows proper procedures and provides a reasonable explanation for its decision to change course.

Conclusion

The Obama administration issued the Endangerment Finding for greenhouse gases in its first year. The administration’s purpose in crafting the Endangerment Finding was to help execute the “war on coal” promised by then-candidate Obama in an editorial board meeting but not made public until after his election.²⁷ As this *Policy Brief* makes plain, the Endangerment Finding is flawed public policy, rushed into place without going through the usual and necessary procedures to ensure a full hearing of scientific views and facts. An announcement by the EPA administrator that he or she is reopening the finding would be good news for science, consumers, and the environment.

²⁷ Erica Martinson, “Uttered in 2008, still haunting Obama.” *Politico*, April 5, 2012, <https://www.politico.com/story/2012/04/uttered-in-2008-still-haunting-obama-in-2012-074892>

About the Author

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