

**United States Court of Appeals**  
**FOR THE DISTRICT OF COLUMBIA CIRCUIT**

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Filed December 2, 2005

No. 03-1361

COMMONWEALTH OF MASSACHUSETTS, ET AL.,  
PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY,  
RESPONDENT

ALLIANCE OF AUTOMOBILE MANUFACTURERS, ET AL.,  
INTERVENORS

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Consolidated with  
03-1362, 03-1363, 03-1364, 03-1365, 03-1366, 03-1367,  
03-1368,

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On Petition for Rehearing En Banc

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Before: GINSBURG, *Chief Judge*, AND SENTELLE,  
HENDERSON,\* RANDOLPH, ROGERS,\*\* TATEL,\*\* GARLAND,\*  
BROWN, AND GRIFFITH,\*\* *Circuit Judges*.

**ORDER**

The petition of petitioners Commonwealth of Massachusetts, States of Maine, Oregon, Rhode Island, and Washington, and the District of Columbia for rehearing en banc and the opposition thereto were circulated to the full court, and a vote was requested. Thereafter a majority of the judges eligible to participate did not vote in favor of the petition. Upon consideration of the foregoing, it is

**ORDERED** that the petition be denied.

**Per Curiam**

**FOR THE COURT:**

Mark J. Langer, Clerk

BY:

Michael C. McGrail

Deputy Clerk

\* Circuit Judges Henderson and Garland did not participate in this matter.

\*\* Circuit Judges Rogers, Tatel, and Griffith would grant the petition for rehearing en banc.

\*\* A separate statement by Circuit Judge Tatel, in which Circuit Judge Rogers joins, dissenting from the denial of rehearing en banc, is attached.

TATEL, *Circuit Judge*, with whom ROGERS, *Circuit Judge*, joins, dissenting from the denial of rehearing en banc:

In this case, several states and environmental groups petitioned for review of EPA's refusal to regulate greenhouse gases. The case presents two questions: 1) whether EPA has authority under the Clean Air Act (CAA) to regulate greenhouse gas emissions, and 2) whether, if it has such authority, its refusal to regulate greenhouse gases was arbitrary and capricious. Although the panel's decision denying the petitions has no precedential effect—the panel never considered the first question and Judge Randolph's views on the second are his alone—the case involves the threat of global warming and its attendant consequences for human health and the environment, and therefore presents an issue of “exceptional importance.” Fed. R. App. P. 35; *see also* Douglas H. Ginsburg & Donald Falk, *The Court En Banc: 1981-1990*, 59 Geo. Wash. L. Rev. 1008, 1025 (1991) (“A case may be of exceptional importance to the public if it concerns . . . a unique issue of great moment to the community . . .”). Indeed, if global warming is not a matter of exceptional importance, then those words have no meaning.

Contrary to *Ethyl Corp. v. EPA*, 541 F.2d 1 (D.C. Cir. 1976) (en banc), moreover, the panel's judgment permitted EPA to consider policy matters unconnected to the standard set by CAA section 202(a)(1). *See Ethyl*, 541 F.2d at 29 (“All of this is not to say that Congress left the Administrator free to set policy on his own terms. To the contrary, the policy guidelines are largely set, both in the statutory term ‘will endanger’ and in the relationship of that term to other sections of the Clean Air Act. These prescriptions direct the Administrator's actions.”); *Mass. v. EPA*, 415 F.3d 50, 74-82 (Tatel, J., dissenting). Specifically, EPA offered several policy justifications to avoid making an endangerment finding for greenhouse gases, none of which has any bearing on the only question legitimately before it under CAA section 202(a)(1): whether greenhouse gases emitted from new cars “in [the Administrator's] judgment cause, or contribute

to, air pollution which may reasonably be anticipated to endanger public health or welfare.” CAA § 202(a)(1), 42 U.S.C. § 7521(a)(1); *see also* *Mass. v. EPA*, 415 F.3d at 74-81 (Tatel, J., dissenting). As to that question, EPA acknowledges not only that automobile emissions produce greenhouse gases, *see* Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922, 52,931 (Sept. 8, 2003) (“[t]he U.S. motor vehicle fleet is one of many sources of [greenhouse gas] emissions both here and abroad”), but also that greenhouse gases in turn contribute to climate change, *see id.* (noting the President intends to “begin now to address the factors that contribute to climate change” in part through “voluntary reductions in [greenhouse gas] intensity”); *see also* *Mass. v. EPA*, 415 F.3d at 77-78 (Tatel, J., dissenting) (noting both that EPA never suggested that uncertainties surrounding the nature of global warming prevent an endangerment finding and that evidence before the Agency would not support that position). In short, EPA all but concedes that automobile greenhouse gas emissions “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” Although *Ethyl* recognizes EPA’s discretion to interpret data from health risk assessments, nothing in *Ethyl* authorizes the Agency to do what it did here, i.e., to ignore record evidence of impending public harm and to refuse altogether to assess related risks.

For these reasons, I respectfully dissent from the denial of rehearing en banc.