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## A Realistic Forecast for U.S. Climate Action

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# A Realistic Forecast for U.S. Climate Action

## **Keywords**

Climate Power Play: Financial, Legislative, and Regulatory Moves toward a New Energy Economy

# A REALISTIC FORECAST FOR U.S. CLIMATE ACTION

SAM CROCKETT NEEL\*

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[C]limate change is real. The campaign of denial that prevents us from going forward is frankly as poisonous to our democracy as carbon pollution is to our planet. And yet I am confident we can beat that campaign. When we do, it . . . will strengthen our economy. It will redirect our future . . . . But to get this done, we do have to wake up, we do have to pay attention.<sup>1</sup>

#### INTRODUCTION

United States Senator Sheldon Whitehouse, a Democrat from Rhode Island, has called himself “the most optimistic person in Congress” about Congress’s ability to tackle climate change.<sup>2</sup> Senator Whitehouse was elected to the Senate in 2006, a year in which Democrats won control of both the Senate and the U.S. House of Representatives.<sup>3</sup> Considering that the outgoing Republican chairman of the Senate Environment and Public Works Committee, Oklahoma Senator James Inhofe, stated that climate change was the “greatest hoax ever perpetrated on the American people,”<sup>4</sup> and incoming Democratic chairwoman Barbara Boxer, a Democrat from California, made addressing climate change a top priority, environmentalists hoped that legislative action on climate change was in sight.<sup>5</sup> The House of Representatives passed an Obama Administration-approved cap-and-trade bill, the “American Clean Energy and Security Act of 2009,” but the bill never moved in the

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1. Sheldon Whitehouse, Prepared Remarks, *Time To Wake Up on Climate Change*, 63 AM. U. L. REV. 1517, 1524 (2014).

2. *Id.* at 1518; see also Ben Geman, *Amid the Deep Freeze, One Senator’s Warm Outlook for Climate Legislation*, NAT’L J. (Feb. 13, 2014), <http://www.nationaljournal.com/energy/amid-the-deep-freeze-one-senator-s-warm-outlook-for-climate-legislation-20140213> (highlighting Senator Whitehouse’s optimism about climate change legislation, which he derives from observations of shifts in public opinion and the likely effects of upcoming EPA regulations on power plants).

3. Michael D. Shear & Alec MacGillis, *Democrats Take Control of Senate as Allen Concedes to Webb in Va.*, WASH. POST (Nov. 10, 2006), <http://www.washingtonpost.com/wp-dyn/content/article/2006/11/09/AR2006110900775.html?sid=ST2011020903555>; *With Six Victories, Democrats Take Control of U.S. Senate*, PBS (Nov. 8, 2006, 10:45 PM), [http://www.pbs.org/newshour/updates/politics-july-dec06-senate\\_election](http://www.pbs.org/newshour/updates/politics-july-dec06-senate_election).

4. See Senator James M. Inhofe, Chairman, Comm. on Env’t & Public Works, Opening Statement at the Climate Roundtable Exploring Greenhouse Gas Technologies (May 25, 2006), available at <http://www.inhofe.senate.gov/epw-archive/press/bopening-statement-by-chairman-inhofe-committee-on-environment-and-public-works-climate-roundtable/b> (claiming that Americans should not aspire to limit fossil fuels but rather to use them more efficiently, which will not occur through regulation).

5. See Noam N. Levey & Richard Simon, *Senate on Verge of New Agenda*, L.A. TIMES (Nov. 9, 2006), <http://articles.latimes.com/2006/nov/09/nation/na-senate9> (comparing the opposing positions of Senators Inhofe and Boxer on environmental issues and underscoring Senator Boxer’s pledge “to make sure that the U.S. Senate is once again an environmental leader”).

Senate.<sup>6</sup> Thus, over eight years later, including two years in which Democrats controlled the White House and both houses of Congress, Senator Whitehouse had to use the words “we can do this,” rather than “we did this,” when discussing climate change legislation that would cap carbon pollution.<sup>7</sup> However, Senator Whitehouse remains optimistic despite Congress’s inability to pass meaningful legislation in the past eight years.<sup>8</sup>

This Note begins with a background on domestic climate change law and policy, focusing on the U.S. Environmental Protection Agency’s (EPA) regulation of greenhouse gases under the Clean Air Act and resulting litigation. Second, this Note proceeds to analyze public opinion on climate change and comments on the potential success of efforts to shape legislative discourse on climate change. Finally, this Note concludes that an upcoming U.S. Supreme Court decision on the extent of the EPA’s authority to regulate greenhouse gases and the 2014 midterm elections will determine the fate of climate action for the foreseeable future.

## I. U.S. CLIMATE POLICY AND LEGISLATION

In September 2013, the United Nations Intergovernmental Panel on Climate Change (IPCC), an international scientific body on climate change, concluded that “[w]arming of the climate system is unequivocal.”<sup>9</sup> Moreover, the report stated that it is “extremely likely” that human activity is causing the warming.<sup>10</sup> Scientists have concluded that increased greenhouse gas emissions have caused glaciers to melt, sea levels to rise, and weather events to become more extreme.<sup>11</sup> In May 2014, the Obama Administration released the third National Climate Assessment, an 841-page report produced by “the largest and most diverse team to produce a U.S. climate

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6. American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong. (2009) (passed June 26, 2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009) (introduced but not voted on in committee).

7. See Whitehouse, *supra* note 1, at 1519 (conceding the present impossibility of passing such legislation).

8. See *id.* at 1520–23 (outlining the tools that will allow the United States to tackle climate change, among them, the EPA’s forthcoming carbon pollution standards and the diverse array of organizations that support climate change action).

9. See INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *Summary for Policymakers*, in CLIMATE CHANGE 2013: THE PHYSICAL SCIENCE BASIS 4 (Thomas F. Stocker, et al. eds., 2013), available at [http://www.climatechange2013.org/images/report/WG1AR5\\_ALL\\_FINAL.pdf](http://www.climatechange2013.org/images/report/WG1AR5_ALL_FINAL.pdf).

10. *Id.* at 17.

11. See *id.* at 17, 19–20, 24–25, 27–28 (further cautioning that even if greenhouse gas emissions were eliminated, the warming effect of previous emissions will continue to reverberate throughout the climate system for years).

assessment,” that detailed the observed and potential effects of climate change on the United States.<sup>12</sup> The assessment stated that climate change is already causing more flooding for coastal as well as inland residents, and that wildfires in the West are becoming more severe because of climate change.<sup>13</sup> Yet, Congress has not responded with any sense of urgency.<sup>14</sup>

#### A. *The Clean Air Act*

The Clean Air Act (CAA or “the Act”) gives the federal government the power to regulate air emissions.<sup>15</sup> The CAA regulates emissions of “air pollutants,” which is defined as “any air pollution agent or combination of such agents, including any physical, chemical, biological, radioactive . . . substance or matter which is emitted into or otherwise enters the ambient air.”<sup>16</sup> The EPA, the agency in charge of administering the CAA, determines whether an air pollutant “may reasonably be anticipated to endanger public health or welfare.”<sup>17</sup> If the Agency makes that determination, the air pollutant is subject to CAA regulation.<sup>18</sup> For nearly forty years, the EPA did not designate greenhouse gases as air pollutants, and thus, the gases remained unregulated until the Supreme Court addressed the issue in 2007.

##### 1. *Massachusetts v. EPA*

The controversy in *Massachusetts v. EPA*<sup>19</sup> originated from a rulemaking petition to the EPA by a group of organizations requesting regulation under CAA section 202 of new motor vehicles’ greenhouse gas emissions.<sup>20</sup> The petitioners alleged that climate change has extraordinarily negative implications for the environment and human health and emphasized greenhouse gases’ significant role

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12. CLIMATE CHANGE IMPACTS IN THE UNITED STATES: THE THIRD NATIONAL CLIMATE ASSESSMENT, at iv (Jerry M. Melillo et al. eds., 2014), available at <http://nca2014.globalchange.gov>.

13. *Id.* at 1.

14. See *While Congress Sleeps*, ECONOMIST (June 29, 2013), <http://www.economist.com/news/united-states/21580186-barack-obama-offers-stopgap-measures-slow-global-warming-while-congress-sleeps> (reporting that President Obama planned to attack climate change exclusively through the regulatory power Congress has already granted, rather than by relying on congressional action).

15. See 42 U.S.C. §§ 7401–7671q (2012) (codifying the Clean Air Act of 1963, Pub. L. No. 88-206, 77 Stat. 392; the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676; and other subsequent amendments).

16. *Id.* § 7602(g).

17. *Id.* § 7408(a)(1)(A).

18. *Id.* § 7408(a).

19. 549 U.S. 497 (2007).

20. *Id.* at 510.

in accelerating climate change.<sup>21</sup> In 1998, the EPA's General Counsel concluded that, although the EPA had declined to regulate greenhouse gas emissions, it had the authority to do so.<sup>22</sup>

During the rulemaking comment period in 2001, the National Research Council issued a report that concluded “[g]reenhouse gases are accumulating in Earth’s atmosphere as a result of human activities, causing surface air temperatures and subsurface ocean temperatures to rise.”<sup>23</sup> However, the EPA, under President George W. Bush (“the Bush EPA”), denied the rulemaking petition in 2003.<sup>24</sup> The Bush EPA concluded that the CAA did not give the EPA authority to regulate greenhouse gas emissions and that “it would be unwise” for the EPA to regulate greenhouse gases even if it had the authority to do so.<sup>25</sup> Moreover, the Bush EPA reasoned that Congress decided against adopting greenhouse gas emission limits, and thus, greenhouse gases could not be “air pollutants” under the CAA.<sup>26</sup> The Bush EPA explained that, even if it had authority to regulate greenhouse gases, it would refuse to do so because a causal link between emissions and climate change “cannot be unequivocally established.”<sup>27</sup> Finally, the Bush EPA criticized agency regulations as a “piecemeal approach” to climate change that would impede President Bush’s comprehensive efforts to address the matter.<sup>28</sup>

The U.S. Court of Appeals for the D.C. Circuit denied the petitioners’ request for review of the Bush EPA’s decision not to regulate greenhouse gas emissions.<sup>29</sup> In 2007, the case came before the Supreme Court in *Massachusetts v. EPA*, and, in a five-to-four decision, the Court held that the EPA did have authority to regulate greenhouse gases from new motor vehicles under the CAA.<sup>30</sup> The Court concluded that the definition of “air pollutant” is broad and comprises all airborne matter, which Congress stressed through frequent repetition of the term “any.”<sup>31</sup> The Court further held that the EPA could not “avoid its statutory obligation” by claiming that

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21. *Id.*

22. *Id.*

23. *Id.* at 511 (alteration in original).

24. *Id.* at 511–12.

25. *See id.* (reasoning that Congress’s tendency to enact customized solutions to specific climate problems and its rejection of an amendment that would have set compulsory constraints on greenhouse gas emissions discourage a broad interpretation of the Act’s grant of regulatory power).

26. *Id.* at 512–13.

27. *Id.* at 513.

28. *Id.* (internal quotation marks omitted).

29. *Id.* at 514 (citing *Massachusetts v. EPA*, 415 F.3d 50, 58 (D.C. Cir. 2005)).

30. *Id.* at 532.

31. *Id.* at 528–29.

some scientific uncertainty justified not regulating greenhouse gases at the time.<sup>32</sup> Finding the Bush EPA's action arbitrary and capricious, the Court remanded the case to the EPA to review whether it had discretion to regulate greenhouse gases.<sup>33</sup>

## 2. *The Obama Administration and the Clean Air Act*

The Supreme Court's *Massachusetts v. EPA* decision, issued in President Bush's penultimate year in office, effectively gave the green light for incoming President Barack Obama's climate change agenda. Before President Obama completed his first year in office, his Administration's EPA issued its "Endangerment Finding," declaring that "elevated concentrations of greenhouse gases in the atmosphere may reasonably be anticipated to endanger the public health and to endanger the public welfare of current and future generations."<sup>34</sup> Less than six months later, the EPA issued its "Timing Rule,"<sup>35</sup> "Tailpipe Rule,"<sup>36</sup> and "Tailoring Rule."<sup>37</sup>

The three EPA rules, all released in 2010, signaled the Obama Administration's commitment to executive action on climate change. The Timing Rule states that once a regulation requiring control of an air pollutant goes into effect, that air pollutant is subject to EPA regulation under the CAA.<sup>38</sup> The "Tailpipe Rule" sets emission standards for cars and light trucks in a joint final rule with the National Highway Traffic Administration.<sup>39</sup> The "Tailoring Rule" delineates which greenhouse gas emitters will require permits, exempting relatively insignificant emitters for the sake of administrative efficiency.<sup>40</sup>

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32. *Id.* at 534.

33. *Id.* at 534–35.

34. Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,516 (Dec. 15, 2009).

35. Reconsideration of Interpretation of Regulations that Determine Pollutants Covered by Clean Air Act Permitting Programs, 75 Fed. Reg. 17,004 (Apr. 2, 2010) [hereinafter Timing Rule].

36. Light-Duty Vehicle Greenhouse Gas Emission Standards and Corporate Average Fuel Economy Standards, 75 Fed. Reg. 25,324 (May 7, 2010) [hereinafter Tailpipe Rule].

37. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010) [hereinafter Tailoring Rule].

38. Timing Rule, 75 Fed. Reg. at 17,004–06; *see also* Coal. for Responsible Regulation, Inc. v. EPA, 684 F.3d 102, 115 (D.C. Cir. 2012) (per curiam) (describing how "once the Tailpipe Rule set motor-vehicle emission standards for greenhouse gases, [greenhouse gases] became a regulated pollutant under the Act, requiring PSD and Title V greenhouse permitting<sup>35</sup>"), *cert. granted sub nom.* Util. Air Regulatory Grp. v. EPA, 134 S. Ct. 418 (2013).

39. Tailpipe Rule, 75 Fed. Reg. at 25,324.

40. Tailoring Rule, 75 Fed. Reg. at 31,514.



The EPA attempted to phase in the regulation of emissions from stationary sources by issuing its Timing and Tailoring Rules.<sup>41</sup> Thus, the CAA's Prevention of Significant Deterioration of Air Quality<sup>42</sup> ("PSD") and Title V<sup>43</sup> permitting programs would activate when the Tailpipe Rule took effect.<sup>44</sup> According to the EPA's interpretation of the CAA, the Tailpipe Rule, which regulates emissions from mobile vehicles, triggered regulation of certain greenhouse gas emitting stationary sources under PSD and Title V permitting programs.<sup>45</sup> The Tailoring Rule temporarily exempted all but the "largest [greenhouse gas] emitters" from PSD and Title V requirements because requiring permits for all emitters would significantly increase the administrative burden on the permitting program, potentially bringing it to a standstill.<sup>46</sup> The Tailoring Rule also greatly increased the statutory threshold for what constitutes a "major" new source subject to PSD permitting requirements.<sup>47</sup>

### 3. Coalition for Responsible Regulation, Inc. v. EPA

Many states and industry groups petitioned the D.C. Circuit to review the EPA's Endangerment Finding and Tailpipe, Timing, and Tailoring rules.<sup>48</sup> The petitioners alleged that the rules were "based on improper constructions of the CAA and . . . otherwise arbitrary and capricious."<sup>49</sup>

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41. Timing Rule, 75 Fed. Reg. at 17,004; Tailoring Rule, 75 Fed. Reg. at 31,514.

42. Stationary sources such as steel mill plants that "have the potential to emit[] one hundred tons per year or more of any air pollutant" and all other stationary sources that have "the potential to emit two hundred and fifty tons per year or more of any air pollutant" require a permit. 42 U.S.C. §§ 7475, 7479(1) (2012); *Coal. for Responsible Regulation*, 684 F.3d at 115. One of the most stringent requirements of the PSD program is that it requires new and modified stationary sources use "the best available control technology for each pollutant subject to regulation." 42 U.S.C. § 7475(a)(4).

43. Title V is a CAA operating permit program for stationary sources that have the potential to emit at least "one hundred tons per year or more of any air pollutant." 42 U.S.C. § 7602(j). For a detailed explanation of the relationship between PSD and Title V permitting, see DAVID R. WOOLEY & ELIZABETH M. MORSS, *CLEAN AIR ACT HANDBOOK* § 8:36 (2013) (discussing litigation involving interpretations of Title V and NSR permitting requirements).

44. Timing Rule, 75 Fed. Reg. at 17,019.

45. Tailoring Rule, 75 Fed. Reg. at 31,514; see also *Coal. for Responsible Regulation*, 684 F.3d at 115 (stating that the Tailpipe Rule subjected greenhouse gases to PSD and Title V permitting under the CAA).

46. Tailoring Rule, 75 Fed. Reg. at 31,514.

47. See *id.* at 31,516 (increasing the total tons per year ("tpy") permit threshold for large greenhouse gas emitters from 250 tpy of greenhouse gases to 100,000 tpy of greenhouse gases).

48. *Coal. for Responsible Regulation*, 684 F.3d at 102, 116.

49. *Id.* at 113.

*i. Review of the EPA's endangerment finding*

Petitioners argued that the EPA erred in making its Endangerment Finding.<sup>50</sup> They alleged that the EPA did not have support from an adequate scientific record, did not “quantify” climate change’s endangerment risk to public health or welfare, misinterpreted the definition of “air pollutant” by aggregating six greenhouse gases, failed to first consult its Science Advisory Board, and denied all petitions for reconsideration of the Endangerment Finding.<sup>51</sup> Additionally, petitioners argued that policy concerns, such as the benefits of greenhouse gas emitting activities, should have been considered in the Endangerment Finding.<sup>52</sup>

The court disposed of the claim that the scientific record was inadequate, noting that the evidence in support of the finding was “substantial.”<sup>53</sup> While the petitioners alleged that there was too much uncertainty to support the Endangerment Finding, the court stated that “the existence of some uncertainty does not, without more, warrant invalidation of an endangerment finding.”<sup>54</sup> The court similarly dismissed the petitioners’ quantification argument as a reformulated version of the uncertainty claim.<sup>55</sup> With respect to the petition to review EPA’s definition of “air pollutant,” which includes the aggregate of six greenhouse gases, the court found that none of the petitioners had standing because they had no injury.<sup>56</sup> The court was also unconvinced that the EPA’s failure to submit its Endangerment Finding to the Science Advisory Board was even relevant to the rule.<sup>57</sup>

Next, the court rejected the petitioners’ argument that one contributor to the IPCC report on which the EPA relied did not

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50. *Id.* at 117.

51. *Id.*

52. *Id.*

53. *See id.* at 120 (focusing particularly on evidence suggesting that greenhouse gases prevent heat from escaping earth’s atmosphere and that human activity is increasing the quantity of greenhouse gases in the atmosphere, potentially contributing to the planet’s measured warming).

54. *Id.* at 121.

55. *See id.* at 122–23 (explaining that the CAA does not require the EPA to compute the exact threshold at which greenhouse gases create harmful effects on the planet to find endangerment, nor does it require *absolute* proof that human activity contributes to global climate change).

56. *See id.* at 123 (relying on the petitioners’ admission that the mere regulation of these gases did not harm a “motor-vehicle-related petitioner” and underscoring the fact that no other petitioner had demonstrated an injury-in-fact due to regulation of greenhouse gases, precluding review of the issue on its merits).

57. *Id.* at 124 (declining to subscribe to the petitioners’ argument that the EPA violated its mandate by not consulting with the Scientific Advisory Board).

adhere to “best science practices.”<sup>58</sup> The court recognized only two such errors and concluded that neither was material to the EPA’s Endangerment Finding.<sup>59</sup> Finally, the court also disposed of the petitioners’ policy argument by quoting Justice Kennedy’s majority opinion in *Massachusetts v. EPA*: “a ‘laundry list of reasons not to regulate’ simply has ‘nothing to do with whether greenhouse gas emissions contribute to climate change.’”<sup>60</sup>

*ii. The Tailpipe Rule*

The petitioners alleged that the EPA’s Tailpipe Rule was arbitrary and capricious and based on an improper interpretation of CAA section 202(a)(1).<sup>61</sup> Specifically, they argued that the Agency failed to consider the rule’s “cost impacts” on stationary source regulation through PSD and Title V permitting.<sup>62</sup> Had the EPA considered cost impacts, the petitioners alleged, the Agency would have either excluded carbon dioxide from emission standards, decided against setting greenhouse gas emissions standards, or interpreted the CAA in such a way as to avoid triggering the regulation of emissions from stationary sources.<sup>63</sup>

The court first upheld the Tailpipe Rule, finding that once the EPA made a greenhouse gases endangerment finding, the plain text of section 202(a)(1) compelled the EPA to regulate greenhouse gas emissions from new motor vehicles.<sup>64</sup> The court also found that the EPA did not have to consider costs of regulating emissions from stationary sources when promulgating the Tailpipe Rule because those sources were not the subject of regulation under the rule.<sup>65</sup>

With respect to the regulation of stationary sources, the court addressed only the triggering of the CAA’s PSD program.<sup>66</sup> The court rejected the petitioners’ alternative interpretations of the PSD permitting triggers.<sup>67</sup> First, petitioners argued that the PSD program applies only to “air pollutants that, unlike greenhouse gases, pollute locally.”<sup>68</sup> However, greenhouse gases, according to the court, “are

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58. *Id.* at 124–25.

59. *Id.* at 125.

60. *Id.* at 118 (quoting *Massachusetts v. EPA*, 549 U.S. 497, 533–34 (2007)).

61. *Id.* at 126.

62. *Id.*

63. *Id.*

64. *Id.* at 126–27.

65. *Id.* at 128.

66. *Id.* at 136. The court stated that the petitioners failed to raise alternative interpretations of Title V; thus, the petitioners waived those arguments. *Id.*

67. *Id.* at 136–38.

68. *Id.* at 136 (internal quotation marks omitted).

indisputably a pollutant subject to regulation under the Act.”<sup>69</sup> Likewise, the court dismissed the petitioners’ argument that the PSD program applies to regional pollution.<sup>70</sup> The court stated that the petitioners’ interpretation of “air pollutant” was inconsistent with the purpose of the PSD program: to protect against “precisely the types of harms caused by greenhouse gases.”<sup>71</sup> Thus, the court concluded that “any air pollutant” was unambiguous and included “all regulated air pollutants, including greenhouse gas.”<sup>72</sup>

*iii. The Timing and Tailoring Rules*

After upholding the EPA’s Endangerment Finding and Tailpipe Rule, the D.C. Circuit found that none of the petitioners had standing to challenge the Timing and Tailoring Rules.<sup>73</sup> The court “note[d] that Petitioners fail[ed] to make any *real* arguments against the Timing Rule.”<sup>74</sup> According to the court, the Timing Rule caused no harm to the petitioners as it did nothing more than delay the implementation of the PSD and Title V programs.<sup>75</sup> In addition, the Tailoring Rule effectively phased in the application of the regulation for greenhouse gases, providing leeway for smaller sources.<sup>76</sup> Thus, because the petitioners were already obligated to comply with PSD and Title V for greenhouse gases under the “automatic operation of the statute,” the court concluded that neither the Timing nor Tailoring Rules caused the alleged injury.<sup>77</sup>

In fact, “the Timing and Tailoring Rules actually mitigate[d] Petitioners’ purported injuries.”<sup>78</sup> Because of the Timing Rule, the application of PSD and Title V to greenhouse gases was delayed until January 2, 2011.<sup>79</sup> Without the Tailoring Rule, an enormous number of private and public entities would be subjected to PSD and Title V

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69. *Id.* at 137.

70. *Id.* at 138.

71. *Id.* (citing 42 U.S.C. § 7475(a)(3)-(4) (2006)).

72. *Id.* at 134.

73. *See id.* at 146 (concluding that the petitioners failed to demonstrate that either the Timing or Tailoring Rules caused them “injury in fact” that was “concrete or imminent,” causally linked to the complained conduct, and likely redressable by a favorable decision).

74. *Id.* at 144 (emphasis added) (exemplifying the petitioners’ lack of meritorious arguments by explicitly rebutting one in which petitioners contended that the Timing Rule itself seeks to extend the PSD and Title V permitting requirements to greenhouse emissions, rather than its true effect in delaying the programs already under “automatic operation of the CAA”).

75. *Id.*

76. *Id.* at 146.

77. *Id.* at 144.

78. *Id.* at 146.

79. *Id.*

permitting requirements, which would overwhelm state authorities.<sup>80</sup> Thus, the court held that there was no redressability because vacating the Tailoring Rule would actually cause more harm to the petitioners.<sup>81</sup> Accordingly, the court dismissed all challenges to the Timing and Tailoring Rules based on lack of standing.<sup>82</sup>

*iv. The Supreme Court grants certiorari*

The petitioners appealed to the Supreme Court, and the Court granted certiorari in October 2013.<sup>83</sup> However, the Court granted certiorari to review only the issue of whether the EPA correctly determined that its regulation of new motor vehicles also permitted the Agency to regulate greenhouse gas emissions from stationary sources.<sup>84</sup>

The reaction to the Court's certiorari decision was mixed. Environmentalists applauded the Court's refusal to review the EPA's Endangerment Finding, interpreting it as yet another verification of the science behind climate change.<sup>85</sup> Additionally, the Court's limited review effectively finalized the EPA's new motor vehicle and light truck regulations.<sup>86</sup> On the other hand, critics of the EPA

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80. *Id.*

81. *Id.*

82. *Id.* at 148.

83. The Court consolidated a number of cases, including *Coalition for Responsible Regulation*, into *Utility Air Regulatory Group v. EPA*, 134 S. Ct. 418 (2013), which was argued Feb. 24, 2014.

84. *Id.* (stating that the only issue the Court would consider was “[w]hether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases”).

85. The Supreme Court initially ruled in *Massachusetts v. EPA* that the EPA had authority to regulate greenhouse gases if the Agency determined that the gases endangered public health and welfare. See *supra* Part I.A.1 for the discussion on *Massachusetts v. EPA*. The Court held once again that the EPA has the requisite authority to regulate greenhouse gas emissions, including those from power plants. See *Am. Elec. Power Co. v. Connecticut*, 131 S. Ct. 2527, 2537 (2011) (holding that the CAA authorizes the EPA to regulate greenhouse gases and thus displaces federal common law rights to “seek abatement of” greenhouse gas emissions). Environmentalists saw the Court's refusal to review the Endangerment Finding as a reaffirmation of climate science. See, e.g., David Doniger, *Supreme Court Rejects Challenges to Climate Science and EPA Carbon Pollution Standards*, NAT'L RESOURCES DEF. COUNCIL SWITCHBOARD BLOG (Oct. 15, 2013), [http://switchboard.nrdc.org/blogs/ddoniger/supreme\\_court\\_rejects\\_challeng.html](http://switchboard.nrdc.org/blogs/ddoniger/supreme_court_rejects_challeng.html) [hereinafter Doniger, *Supreme Court Rejects Challenges*] (emphasizing the significance of the ruling that reaffirmed for the third time the “overwhelming science showing that carbon pollution is driving dangerous climate change”); see also David Doniger, Director, Climate & Clean Energy Program, Remarks at the *American University Law Review* Symposium, *Climate Power Play: Financial, Legislative, and Regulatory Moves Toward a New Energy Economy* (Nov. 18, 2013) (video available at [http://www.aulawreview.org/index.php?option=com\\_vid\\_links&view=category&id=0&Itemid=164](http://www.aulawreview.org/index.php?option=com_vid_links&view=category&id=0&Itemid=164)).

86. See Doniger, *Supreme Court Rejects Challenges*, *supra* note 85; see also Mark Sherman & Dina Cappiello, *High Court Will Review EPA Global Warming Rules*, ASSOCIATED PRESS (Oct. 15, 2013), <http://bigstory.ap.org/article/high-court-will>

regulations were cautiously optimistic that the Court decided to hear the case, even though the Court would not be rehearing all arguments made before the D.C. Circuit.<sup>87</sup>

Although the Court is set to announce its *Utility Air Regulatory Group v. EPA*<sup>88</sup> opinion later in 2014, it has already issued a major Clean Air Act ruling this term. On April 29, 2014, the Court, in a six-to-two decision in *EPA v. EME Homer City Generation, L.P.*,<sup>89</sup> reversed the D.C. Circuit's decision and upheld the EPA's Cross-State Air Pollution Rule ("Transport Rule").<sup>90</sup> Although the Transport Rule did not address greenhouse gas emissions, it dealt with the EPA's authority under the Clean Air Act to require twenty-seven states to reduce their sulfur dioxide and nitrogen oxide emissions to protect "downwind" states from the pollution.<sup>91</sup> One of the central issues in *Homer* was whether the EPA was permitted to consider costs of "the emission reductions an upwind State must make to improve air quality in polluted downwind areas."<sup>92</sup> The Court found that the EPA's use of costs in its analysis was "efficient and equitable" because it enables the EPA to achieve emissions reductions in a cost-effective manner and can prevent states from "free riding on their neighbors' efforts to reduce pollution."<sup>93</sup> EPA Administrator Gina McCarthy described the Court's decision as "one of the biggest wins [the EPA] ever had."<sup>94</sup> Additionally, the opinion may predict the outcome of the Court's decision in *Utility Air*, as Chief Justice Roberts and Justice Kennedy

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review-epa-global-warming-rules (quoting EPA Administrator Gina McCarthy's statement that the Court will review "a very narrow legal question," and that the decision reaffirmed "that EPA has the authority to protect public health by reducing carbon pollution under the Clean Air Act").

87. See Press Release, Senate Env. & Pub. Works Comm., Vitter: Positive Sign for Supreme Court to Take a Closer Look at EPA's Regulating Power (Oct. 15, 2013), available at [http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord\\_id=bdb5b5b2-994d-1ad5-4d79-c540a8d34bd5](http://www.epw.senate.gov/public/index.cfm?FuseAction=PressRoom.PressReleases&ContentRecord_id=bdb5b5b2-994d-1ad5-4d79-c540a8d34bd5) (calling on the EPA to suspend any further greenhouse gas rulemaking until after the Supreme Court's decision and characterizing the Court's review of the EPA's regulatory power as "a very positive development"); Sherman & Cappiello, *supra* note 86 (quoting Roger Martella, a former Bush EPA official, as saying "[r]ead in its broadest sense, it arguably opens the door to whether EPA can regulate greenhouse gases from stationary sources at all").

88. *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 418 (argued Feb. 24, 2014).

89. 134 S. Ct. 1585 (2014).

90. *Id.* at 1609; Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals, 76 Fed. Reg. 48,208 (Aug. 8, 2011) [hereinafter Transport Rule].

91. *Homer*, 134 S. Ct. at 1596.

92. *Id.* at 1593.

93. *Id.* at 1607.

94. Anthony Adragna, *McCarthy Says EPA on Track to Propose Guidelines for Existing Power Plants June 2*, BLOOMBERG BNA (May 14, 2014), <http://www.bna.com/mccarthy-says-epa-n17179890452>.

joined with the majority to grant deference to the EPA's judgment when the Agency lacks explicit statutory authorization.<sup>95</sup> Thus, the *Homer* decision, although it does not mention greenhouse gases, is nonetheless promising for the President's past and future greenhouse gas regulations.<sup>96</sup>

## II. RECENT EXECUTIVE ACTION; LEGISLATIVE RESPONSE AND PROSPECTS

In his remarks at the 2013 *American University Law Review* Symposium, Senator Whitehouse stated that President Obama's climate efforts, although delayed, are the strongest of any president.<sup>97</sup> On June 25, 2013, President Obama released his Administration's "Climate Action Plan."<sup>98</sup> In his announcement of the plan at Georgetown University, President Obama declared that courage and swift action are required to ensure that climate change does not profoundly impact future generations.<sup>99</sup> The plan has three key pillars: (1) cut carbon pollution, (2) prepare the country for the impacts of climate change, and (3) lead international efforts in combating global climate change.<sup>100</sup>

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95. See Jonathan Keim, *EPA v. EME Homer City: Sign of Things to Come in the Greenhouse Gas Cases?*, NAT'L R. (May 2, 2014), <http://www.nationalreview.com/bench-memos/377143/epa-v-eme-homer-city-sign-things-come-greenhouse-gas-cases-jonathan-keim> (theorizing that "[i]f EPA can consider marginal costs of compliance for states, as [it] did here, why can't EPA also use broader economic effects of applying statutory thresholds in the greenhouse gas cases to undermine the remainder of Congress's authority?").

96. See Adragna, *supra* note 94 (stating that, according to EPA Administrator McCarthy, *Homer* "provided a wonderful platform and boost to the agency as we're going into greenhouse gas rulemaking, which is going to be challenging and requires the same kind of agency discretion"); Valerie Volcovici, *Analysis—EPA's US Supreme Court Win a Boost for Pending Carbon Rules*, REUTERS (Apr. 30, 2014), <http://in.reuters.com/article/2014/04/29/usa-courts-environment-idINL2N0NLIMV20140429> (noting the "flexibility" the Court granted the EPA and the significance of how both *Homer* and *Utility Air* dealt with EPA regulations that require states meet a national standard, and *Homer* ignored state autonomy in favor of greater EPA control).

97. See Whitehouse, *supra* note 1, at 1520 (recognizing the effectiveness of President Obama's Climate Action Plan, which will establish standards that limit carbon pollution from power plants).

98. See EXEC. OFFICE OF THE PRESIDENT, THE PRESIDENT'S CLIMATE ACTION PLAN 5 (2013) [hereinafter CLIMATE ACTION PLAN], available at <http://www.whitehouse.gov/sites/default/files/image/president27sclimateactionplan.pdf> (introducing the Administration's comprehensive plan to minimize carbon pollution which impacts climate change and public health).

99. President Barack Obama, Remarks at the Georgetown University on Climate Change (June 25, 2013) [hereinafter Obama Remarks on Climate Change] (transcript available at <http://www.whitehouse.gov/the-press-office/2013/06/25/remarks-president-climate-change>) (calling on younger generations to ensure that the United States remains a global leader in the fight against climate change).

100. See CLIMATE ACTION PLAN, *supra* note 98, at 5.

The plan advances a multi-pronged approach to cut carbon pollution. It calls for up to \$8 billion in loan guarantee authority for advanced fossil fuel energy and efficiency projects.<sup>101</sup> It directs the U.S. Department of the Interior to permit enough renewable energy projects on public lands by 2020 to power more than six million homes.<sup>102</sup> It calls for expanding energy efficiency projects to make buildings at least 20% more efficient by 2020,<sup>103</sup> reducing carbon pollution by at least three billion metric tons cumulatively by 2030 through efficiency standards for appliances and federal buildings.<sup>104</sup> It builds upon the Administration's light-duty vehicle greenhouse gas emission standards and calls for developing fuel economy standards for heavy-duty vehicles.<sup>105</sup> Additionally, the plan calls for reducing levels of hydrofluorocarbons and methane.<sup>106</sup>

President Obama also released an accompanying Presidential Memorandum that directed the EPA to issue a proposed rule to limit greenhouse gas emissions from new and existing power plants.<sup>107</sup> The EPA announced its revised proposal for new power plants under CAA section 111(b) on September 20, 2013,<sup>108</sup> and the Agency published the proposed rule on January 8, 2014.<sup>109</sup> The proposed rule limits new coal plant emissions to 1100 pounds of carbon dioxide per megawatt hour.<sup>110</sup> New natural gas power plants would be limited to 1000 pounds of carbon dioxide per megawatt hour for larger units and 1100 for smaller units.<sup>111</sup> The proposed rule received praise from environmentalists,<sup>112</sup> but, like all other greenhouse gas

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101. *Id.* at 7.

102. Obama Remarks on Climate Change, *supra* note 99.

103. CLIMATE ACTION PLAN, *supra* note 98, at 9.

104. *Id.*

105. *Id.* at 8.

106. *Id.* at 10.

107. Power Sector Carbon Pollution Standards, 78 Fed. Reg. 39,535 (June 25, 2013).

108. EPA Proposes Carbon Pollution Standards for New Power Plants, U.S. ENVTL. PROTECTION AGENCY (Sept. 20, 2013), <http://yosemite.epa.gov/opa/admpress.nsf/0/da9640577ceacd9f85257beb006cb2b6!OpenDocument>.

109. Standards of Performance for Greenhouse Gas Emissions from New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1430 (Jan. 8, 2014). The EPA appears to be on track to propose the rule in June 2014. Adragna, *supra* note 94.

110. 79 Fed. Reg. at 1433.

111. *Id.*

112. See David Doniger, *EPA Starts New Year with Climate Action: Carbon Pollution Standards for New Power Plants Published for Public Comment*, NAT'L RESOURCES DEF. COUNCIL SWITCHBOARD BLOG (Jan. 7, 2014), [http://switchboard.nrdc.org/blogs/ddoniger/epa\\_starts\\_new\\_year\\_with\\_clima.html](http://switchboard.nrdc.org/blogs/ddoniger/epa_starts_new_year_with_clima.html) (recognizing the EPA's efforts to cut carbon pollution from power plants, which will protect future generations from climate change); Erica Martinson, *President Obama's big carbon crackdown readies for launch*, POLITICO (May 16, 2014), <http://www.politico.com/story/2014/05/carbon-crackdown->



proposals from the Obama Administration, the rule received harsh criticism from members of Congress.<sup>113</sup>

#### A. *Reactions to President Obama's Climate Action Plan*

Proponents of climate action have hailed President Obama's plan as bold. Prominent climate scientist Michael Mann has described the plan as "the most aggressive and promising climate plan to come out of the executive branch in years."<sup>114</sup> Michael Gerrard, Director of Columbia University's Center for Climate Change Law, predicts that the plan will accelerate the closing of the oldest and dirtiest power plants "even before the rules complete the tortuous process of taking full effect."<sup>115</sup>

However, the President's plan has vocal critics on both sides of the political aisle. Representative Ed Whitfield, a Republican from Kentucky and Chairman of the House Energy and Commerce's Subcommittee on Energy and Power, paired up with Senator Joe Manchin, a Democrat from West Virginia, in January 2014 to introduce H.R. 3826<sup>116</sup> (the "Manchin-Whitfield bill"). The Manchin-Whitfield bill would require the EPA to issue separate standards for natural gas and coal power plants.<sup>117</sup> Additionally, the bill would

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barack-obama-106783.html (highlighting Kyle Aarons of the Center for Climate and Energy Solutions saying the proposed "rule is the most significant climate action this administration will take").

113. See, e.g., Laura Barron-Lopez, *EPA Publishes Emissions Rule to GOP's Dismay*, HILL (Jan. 8, 2014), <http://thehill.com/blogs/e2-wire/e2-wire/194865-epa-publishes-emissions-rule-for-new-plants-to-gops-dismay> (describing the proposed rule and criticism from Republican Congressman Ed Whitfield from Kentucky, who stated, "[w]e will continue our vigorous oversight of this rulemaking, which has been fraught with irregularities, and we continue to believe that EPA is acting far beyond the scope of its legal authority").

114. *Forum: How Daring Is Obama's New Climate Plan*, YALE ENV'T 360 (July 22, 2013), [http://e360.yale.edu/feature/yale\\_e360\\_forum\\_on\\_obama\\_climate\\_agenda/2673](http://e360.yale.edu/feature/yale_e360_forum_on_obama_climate_agenda/2673) (statement of Michael Mann).

115. *Id.* (statement of Michael Gerrard). To listen to Michael Gerrard's remarks at the *American University Law Review* Symposium, see Michael Gerrard, Andrew Sabin Professor of Professional Practice, Columbia Law School, Remarks at the *American University Law Review* Symposium, Climate Power Play: Financial, Legislative, and Regulatory Moves Toward a New Energy Economy (Nov. 18, 2013) (video available at [http://www.aulawreview.org/index.php?option=com\\_vidlinks&view=category&id=0&Itemid=164](http://www.aulawreview.org/index.php?option=com_vidlinks&view=category&id=0&Itemid=164)). But see *Forum, supra* note 114 (statement of Bill McKibben) (asserting that the primary effect of President Obama's climate plan is diverging investment away from coal to positively impact the climate).

116. Electricity Security and Affordability Act, H.R. 3826, 113th Cong. (passed Mar. 6, 2014). Congressman Whitfield's subcommittee held a hearing on October 29, 2013. See *EPA's Regulatory Threat to Affordable, Reliable Energy: The Perspective of Coal Communities: Hearing Before the Subcomm. on Oversight & Investigations of the H. Comm. on Energy & Commerce*, 113th Cong. (2013), available at <https://energycommerce.house.gov/hearing/epa%E2%80%99s-regulatory-threat-affordable-reliable-energy-perspective-coal-communities>.

117. H.R. 3826, 113th Cong. § 2(b)(1).

require demonstration that emissions reduction technologies are used at six different power plant sites for at least twelve months before the EPA could issue greenhouse gas regulations.<sup>118</sup> Finally, the bill would remove from the EPA—and give to Congress—the power to set dates for the EPA’s regulations to go into effect.<sup>119</sup> If enacted, this bill would minimize the EPA’s regulation of natural gas and coal power plants and undermine President Obama’s efforts to control carbon pollution from power plants.<sup>120</sup> On March 6, 2014, the Whitfield-Manchin bill passed the House of Representatives by a vote of 229 to 183.<sup>121</sup> The Senate has not yet acted on the legislation, but there have been attempts to add the bill’s text as an amendment to a separate energy efficiency bill.<sup>122</sup>

*B. Static Public Opinion and Movement to Steer the Debate*

Senator Whitehouse argued that environmentalists and progressives are challenging the “political power and . . . the propaganda of denial” exercised by the polluting industries and their political supporters.<sup>123</sup> This is a difficult challenge because, although scientists have concluded that global warming is “unequivocal” and that it is “extremely likely” that humans are its primary cause,<sup>124</sup> the American political landscape and public opinion polls suggest that legislative action on climate change is not yet in sight.<sup>125</sup> Many

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118. *Id.* § 2(b)(2)(A).

119. *Id.* § 3(b).

120. *Id.*

121. *Final Vote Results for Roll Call 106*, OFF. CLERK U.S. HOUSE REPRESENTATIVES (Mar. 6, 2014 11:11 A.M.), <http://clerk.house.gov/evs/2014/roll106.xml>.

122. Nick Juliano & Elana Schor, *Still No Deal on Amendments as Test Vote Planned for Shaheen-Portman*, ENERGY & ENV’T PUBLISHING DAILY (May 6, 2014), <http://www.eenews.net/stories/1059999054> (detailing how there is “pent-up demand” to add energy measures such as the Manchin-Whitfield bill to an energy efficiency bill sponsored by Senators Jeanne Shaheen, a Democrat from New Hampshire, and Rob Portman, a Republican from Ohio, because “the Senate has not passed a major energy bill since 2007”).

123. *See supra* Whitehouse, note 1, at 1521.

124. *E.g.*, INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE, *supra* note 9; CLIMATE CHANGE IMPACTS IN THE UNITED STATES, *supra* note 12.

125. *See GOP Deeply Divided Over Climate Change*, PEW RES. (Nov. 1, 2013), <http://www.people-press.org/2013/11/01/gop-deeply-divided-over-climate-change> (finding that 67% of Americans believe there is “solid evidence that the earth is warming”); *see also*, Regina A. Corso, *Less than Half of Americans Believe Humans are Cause of Global Climate Change*, HARRIS INTERACTIVE (Apr. 10, 2014), <http://www.harrisinteractive.com/NewsRoom/HarrisPolls/tabid/447/mid/1508/articleId/1412/ctl/ReadCustom%20Default/Default.aspx> (finding that 75% of Americans believe global climate change exists, but only 45% believe humans are its main cause); Andrew Dugan, *Americans Most Likely to Say Global Warming is Exaggerated*, GALLUP (Mar. 17, 2014), <http://www.gallup.com/poll/167960/americans-likely-say-global-warming-exaggerated.aspx> (finding that 60% of Americans believe that “most scientists believe that global warming is occurring”).

members of Congress and state legislatures continue to question the validity of climate science and, therefore, will not support climate legislation and will continue to attack President Obama's climate agenda.<sup>126</sup> For example, United States Congressman Marsha Blackburn,<sup>127</sup> a Republican from Tennessee, stated on NBC's *Meet the Press* on February 14, 2014, that "unproven hypotheses" should not dictate U.S. policy.<sup>128</sup> Additionally, she argued that climate change proposals should include cost-benefit analyses to account for the benefits of increased greenhouse gas emissions, such as increased agricultural production.<sup>129</sup>

Congressman Blackburn is not alone; many policymakers throughout the country share her views. In the Kansas state legislature, several legislators are calling for Congress to block President Obama's climate plan because the legislators believe the science behind climate change is false.<sup>130</sup> Republican State Senator Forrest Knox stated: "The only thing you know for sure about the weather in Kansas, as you all know, is it's going to change . . . That's all we know about climate, too."<sup>131</sup> In North Carolina, the state legislature passed a bill that banned scientific predictions of rising sea levels.<sup>132</sup> In Wyoming, the state legislature approved a budget amendment that sought to block the adoption of Next Generation Science Standards—standards aimed at improving science education across the nation—because of the standards' inclusion of climate

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126. See, e.g., Rebecca Shabad, *State Panel to Congress: Oppose Obama's Climate Plan*, THE HILL (Feb. 14, 2014), <http://thehill.com/blogs/e2-wire/e2-wire/198436-state-legislative-panel-urges-congress-to-oppose-obamas-climate-plan> (noting that a resolution in the Kansas state legislature calls on Congress to oppose President Obama's climate plan because state legislators believe the science behind climate change is inaccurate).

127. Congressman Blackburn prefers to be called Congressman Blackburn, not Congresswoman Blackburn. See Helena Andrews, *The Lady Prefers 'Congressman'*, POLITICO (Apr. 15, 2008), <http://www.politico.com/news/stories/0408/9622.html>.

128. See Brett LoGiurato, *Bill Nye 'The Science Guy' Debated a GOP Congresswoman on Climate Change, And it was Surreal*, BUS. INSIDER (Feb. 16, 2014), <http://www.businessinsider.com/bill-nye-marsha-blackburn-climate-change-debate-meet-the-press-2014-2> (highlighting how scientist Bill Nye believes climate science is settled while Congressman Blackburn thinks it is unproven).

129. *Id.*

130. See Shabad, *supra* note 126 (noting that the Kansas State House Committee's report alleges that President Obama's climate plan is based on "false assumptions about the effects of human activity and carbon dioxide on the earth").

131. *Id.*

132. See Alon Harish, *New Law in North Carolina Bans Latest Scientific Predictions of Sea-Level Rise*, ABC NEWS (Aug. 2, 2012), <http://abcnews.go.com/US/north-carolina-bans-latest-science-rising-sea-level/story?id=16913782> (describing the controversy created by the bill and highlighting opposition to the bill by State Representative Deborah Ross, who "compared it to burying one's 'head in the sand'").

change science.<sup>133</sup> In doing so, the Wyoming Board of Education became the first state to formally reject the standards.<sup>134</sup>

Most Americans, however, believe climate change is occurring. In October 2013, a Pew Research Poll showed 67% of Americans believe that there is “solid evidence” of warming; however, the partisan breakdown of that figure is striking.<sup>135</sup> The poll showed that 88% of Democrats believe there is “solid evidence” of warming, but only half of Republicans agree.<sup>136</sup> Broken down even further, 70% of Tea Party Republicans, but only 30% of non-Tea Party Republicans, believe there is no solid evidence of warming.<sup>137</sup> Moreover, 44% of Americans—66% of Democrats, 43% of independents, and 24% of Republicans—believe global warming is caused mainly by human activity.<sup>138</sup>

In an effort to align the opinions of climate scientists and the American public and its legislators, climate change activists are pouring money into 2014 midterm election campaigns.<sup>139</sup> Billionaire Tom Steyer is planning to spend \$100 million through his NextGen Super PAC in the 2014 midterm elections on one issue: climate change.<sup>140</sup> Steyer has been described as climate activists’ counterweight to conservative industry titans and donors, Charles and David Koch.<sup>141</sup> In 2013, Steyer’s efforts helped elect a

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133. Bob Moen, *Wyoming Is 1st State To Reject Science Standards*, AP NEWS (May 9, 2014), <http://www.businessweek.com/ap/2014-05-09/wyoming-is-1st-state-to-reject-science-standards> (describing opposition to teaching climate change as settled science by the Governor, legislature, and conservative groups in a state dominated by the fossil fuel industry).

134. *Id.* In Kentucky, the state legislature also rejected the standards, but the state’s Democratic Governor, Steve Beshear, overrode the legislature’s objections and adopted the standards. See Jim Warren, *Beshear To Implement Science Standards in Wake of Panel’s Rejection*, LEXINGTON HERALD-LEADER (Sept. 11, 2013), <http://www.kentucky.com/2013/09/11/2816570/legislative-panel-finds-science.html> (describing responses to Governor Beshear’s executive action on the standards).

135. *Climate Change: Key Data Points from Pew Research*, PEW RES. (Jan. 27, 2014) [hereinafter *Pew Research, Climate Change*], <http://www.pewresearch.org/key-data-points/climate-change-key-data-points-from-pew-research> (highlighting not only the extreme divide between political parties on whether global warming is occurring but also whether human activity is the primary cause of that warming).

136. *Id.*

137. *Id.*

138. *Id.*

139. See, e.g., Evan Halper, *Billionaire Climate Change Crusader Tom Steyer Doubles Down*, L.A. TIMES (Feb. 19, 2014), <http://www.latimes.com/nation/politics/politicsnow/la-pn-steyer-climate-change-fundraising-20140219,0,1588471.story#axzz2uGSJQa00> (detailing Tom Steyer’s plan to spend \$100 million on attack ads aimed at political candidates who oppose “efforts to curb global warming”).

140. *Id.*

141. See Lindsay Abrams, *Billionaire v. Billionaires? Tom Steyer challenges the Koch Brothers to a Climate Debate*, SALON (Apr. 28, 2014), [http://www.salon.com/2014/04/28/billionaire\\_vs\\_billionaires\\_tom\\_steyer\\_challenges\\_the\\_koch\\_brothers\\_to\\_a\\_climate\\_debate](http://www.salon.com/2014/04/28/billionaire_vs_billionaires_tom_steyer_challenges_the_koch_brothers_to_a_climate_debate) (describing the Koch brothers as “Billionaires, conservative champions and enemies of green energy,” and Steyer as “Billionaire, former hedge fund manager

Democratic Governor of Virginia, Terry McAuliffe, and Massachusetts Democrat Ed Markey to the U.S. Senate, both of whom believed in climate change science and promised action.<sup>142</sup> However, this type of funding, and the “allied command”<sup>143</sup> Senator Whitehouse sees forming, is likely to pose significant challenges in 2014 only for Democrats who do not fully support climate action.<sup>144</sup>

Tea Party members of Congress who are largely skeptical of climate science have controlled Republican discourse on climate change since 2009.<sup>145</sup> Republicans who once might have accepted climate science and supported legislative action have been pushed to the Right on the issue out of the fear of losing primary elections to Tea Party candidates.<sup>146</sup> The substantial gains by the Tea Party in

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turned full-time liberal activist . . . who pledged \$100 million to fighting climate-denying candidates in the midterm elections”).

142. See Joshua Green, *Tom Steyer, Climate-Change Batman*, BLOOMBERG BUSINESSWEEK (May 7, 2013), <http://www.businessweek.com/articles/2013-05-07/tom-steyer-climate-change-batman> (describing how Steyer spent \$630,000 in the Massachusetts primary after Markey’s primary opponent, Democratic Congressman Steve Lynch, refused to back down from his support of the Keystone XL pipeline).

143. See *supra* Whitehouse, note 1, at 1523 (arguing that there is an army of supporters for carbon regulations and proactive responses to climate change, but the group lacks an allied command, which will be met once the groups form an organized plan).

144. See, e.g., Jaime Fuller, *Progressive Super PAC to Help Dems in Five Close Senate Races—But not Pryor and Landrieu*, WASH. POST (Apr. 23, 2014, 12:44 PM), <http://www.washingtonpost.com/blogs/post-politics/wp/2014/04/23/progressive-super-pac-to-help-dems-in-five-close-senate-races-but-not-pryor-and-landrieu> (describing a Super PAC’s efforts to help progressive Senate candidates and noting the PAC’s refusal to support Senators Mark Pryor from Arkansas and Mary Landrieu, both of whom support the construction of the Keystone XL pipeline); see also Halper, *supra* note 139 (discussing Tom Steyer’s Next Gen Super PAC’s climate efforts).

145. The 2010 midterm elections saw many proponents of climate action leave—and many climate science deniers get elected to—Congress. For example, Former Representative Bob Inglis, a Republican from South Carolina who voted against the 2009 cap-and-trade bill but believes in climate change, was defeated in a Republican primary by current Congressman Trey Gowdy, who does not believe in climate change. See *Bob Inglis: Conservatives Have a Climate Solution*, THINK PROGRESS (July 5, 2013, 9:27 AM), <http://thinkprogress.org/climate/2013/07/05/2252491/bob-inglis-conservatives-have-a-climate-solution>. Representative Inglis expressed his frustrations with the stance of many in his party on climate change, stating that those in his party who discredit climate change “slept at a Holiday Inn Express last night, and they’re experts on climate change” and that “[t]hey substitute their judgment for people who have Ph.D.s and work tirelessly [on climate change].” Alex Seitz-Wald, *Republican Rep. Bob Inglis Blasts GOP for Denying Global Warming*, THINKPROGRESS (Nov. 18, 2010, 9:54 AM), <http://thinkprogress.org/politics/2010/11/18/131040/inglis-gop-global-warming/?mobile=nc> (second alteration in original) (highlighting ousted Representative Inglis’s remarks to his colleagues in a House subcommittee hearing on climate change just weeks after the November 2010 midterm elections).

146. See Emily Atkin, *In Alaska Senate Race, A Fierce Competition To Prove Who Knows Less About Climate Science*, THINK PROGRESS (May 19, 2014, 11:24 AM), <http://thinkprogress.org/climate/2014/05/19/3439028/alaska-denier-race> (detailing how the Tea Party candidate in Alaska’s GOP Senate Primary is attacking his Republican opponents for “join[ing] with climate change alarmists to push for top-down federal regulation,”

Congress in 2010,<sup>147</sup> and the resulting gerrymandering that took place in state legislatures across the country, make it very unlikely that such a drastic shift will result in climate supporters taking back Congress in 2014.<sup>148</sup>

Polling shows that Americans do not view tackling climate change as a top priority for the President and Congress, with only 29% listing it as a top priority.<sup>149</sup> Yet, 65% of Americans support new emission limits on power plants.<sup>150</sup> Thus, because Congress is not going to pass meaningful climate legislation before 2016, and the public supports emission limits on power plants, the President is not likely to hold back on the implementation of his Climate Action Plan.<sup>151</sup> But the impact of a sustainable funding source and an “allied command” for climate action to counter the Koch brothers and Tea Party’s influence is likely to determine the future of the President’s plan beyond 2016.

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although neither of his opponents have publicly accepted climate science); Paul Steinhauer & Ashley Killough, *5 Things We Learned on Tuesday*, CNN (May 21, 2014), [http://www.cnn.com/2014/05/21/politics/5-things-may-20-primaries/index.html?hpt=po\\_cl](http://www.cnn.com/2014/05/21/politics/5-things-may-20-primaries/index.html?hpt=po_cl) (analyzing a handful of Republican primaries and theorizing that “[e]very establishment candidate ran like a tea party candidate. It’s hard to tell the difference this time around, because they had a uniting factor in opposing Obamacare but also united on issues like immigration and climate change”); Paul Waldman, *Where the 2016 GOP Contenders Stand on Climate Change*, WASH. POST (May 12, 2014, 12:21 PM), <http://www.washingtonpost.com/blogs/plum-line/wp/2014/05/12/where-the-2016-gop-contenders-stand-on-climate-change/> (highlighting the contrast between most of the 2012 GOP contenders, who had previously supported cap-and-trade, and the 2016 contenders, who either discredit climate science or staunchly advocate against climate action).

147. See Lisa Lerer & Alison Fitzgerald, *Tea Party Wins House for Republicans, Wants Rewards in Congress*, BLOOMBERG NEWS (Nov. 4, 2010), <http://www.bloomberg.com/news/2010-11-04/tea-party-wins-house-for-republicans-wants-rewards-in-congress.html> (illustrating the impact of the Tea Party in the 2010 elections, gaining twenty-eight seats for Tea Party-backed candidates and providing much-needed energy for Republicans).

148. See M.S., *How Can Republicans Be Both Safer and More Numerous?*, ECONOMIST (Oct. 3, 2013), <http://www.economist.com/blogs/democracyinamerica/2013/10/gerrymandering> (noting that, as a result of the 2010 redistricting, Republicans are more numerous following the 2012 elections and safer because they are located in more populated Republican districts, making it more difficult for climate supporters to regain the lost seats).

149. See *Pew Research, Climate Change*, *supra* note 135 (stating that global warming “ranked second to last amount twenty issues tested”).

150. See *id.* (finding that 74% of Democrats and 52% of Republicans support emissions limits on power plants).

151. See Paul Waldman, *Obama’s Efforts on Climate Change May Not Be Enough*, CNN (Feb. 23, 2014), <http://www.cnn.com/2014/02/23/opinion/waldman-climate-change> (noting that the Tea Party’s view dominates the Republican party, preventing any sort of action in Congress and therefore requiring President Obama to use the executive branch’s regulatory power); see also Martinson, *supra* note 112 (describing the Obama Administration’s publicity efforts in advance of the rollout of its proposed existing source rule and noting that Senator Whitehouse is encouraging the EPA to “go ahead boldly”).

## CONCLUSION

Senator Whitehouse does have reasons to be optimistic. Early in his presidency, President Obama made climate change a priority.<sup>152</sup> While a Democratic Congress tried—and failed—to pass meaningful legislation in 2009, a Republican House of Representatives, and industry groups in court, have tried—and failed—to thwart President Obama’s EPA’s greenhouse gas findings and regulations.<sup>153</sup> Moreover, the majority of Americans support the President’s efforts.<sup>154</sup>

Senator Whitehouse proclaimed that “Republicans cannot nominate a presidential candidate who denies that climate change is happening—not if they actually hope to win the election in 2016.”<sup>155</sup> However, Republican candidates for both President and Congress will recognize climate science and support carbon limits only if they know there are ramifications for failing to do so.<sup>156</sup> In 2014, there are two bellwether signs that present this opportunity. First, the Supreme Court’s pending decision in *Utility Air Regulatory Group v. EPA* will clarify the extent of the executive’s authority to regulate greenhouse gases from stationary sources.<sup>157</sup> A decision upholding the EPA’s regulations will further boost the implementation of the Obama Administration’s Climate Action Plan, while a decision striking down the regulations will give additional ammunition to the plan’s opponents. Second, the 2014 midterm elections—and the extent of

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152. See President Barack Obama, Remarks on National Fuel Efficiency Standards (May 19, 2009) (transcript available at <http://www.whitehouse.gov/the-press-office/remarks-president-national-fuel-efficiency-standards>) (announcing the various efforts that the Administration undertook to support the environment mere months after entering office).

153. Carl Hulse, *Senate Rejects Republican Effort To Thwart Carbon Limits*, N.Y. TIMES (June 10, 2010), <http://www.nytimes.com/2010/06/11/us/politics/11epa.html>.

154. See *Pew Research, Climate Change*, *supra* note 135 (noting that a majority of Americans support emissions limits on power plants).

155. Whitehouse, *supra* note 1, at 1524.

156. Some of the current Republican frontrunners are already proclaiming that climate change is not caused by human activity. See, e.g., Lucy McCalmont, *Rubio: Man Is Not Causing Climate Change*, POLITICO (May 11, 2014), [http://www.politico.com/blogs/politico-live/2014/05/rubio-man-is-not-causing-climate-change-188321.html?hp=16\\_b2](http://www.politico.com/blogs/politico-live/2014/05/rubio-man-is-not-causing-climate-change-188321.html?hp=16_b2) (highlighting Senator Marco Rubio’s statement that he “do[es] not believe that human activity is causing these dramatic changes to our climate the way these scientists are portraying it,” and he “do[es] not believe that the laws that they propose we pass will do anything about it . . . [e]xcept . . . destroy our economy”); see also Waldman, *supra* note 146 (detailing how New Jersey Governor Chris Christie is the only potential nominee “willing to say human activity is a significant cause of climate change”).

157. See Doniger, *Supreme Court Rejects Challenges*, *supra* note 85 (highlighting the judicial trend consisting of three distinct occasions when federal courts found executive actions regulating carbon pollution as within the scope of the EPA’s authority).

billionaire Tom Steyer's influence on races throughout the country—will determine the fate of climate change legislation in the coming years.<sup>158</sup> If Republicans take control of the Senate and maintain their majority in the House, the only climate related action to come from Congress will be in the form of legislation, such as the Manchin-Whitfield bill, aimed at undercutting President Obama's climate efforts. Thus, although President Obama appears to be committed to using bold executive actions to combat climate change during his presidency, the fate of his proposals hinges on this year's Supreme Court decision and the November midterm elections.

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158. See Nicholas Confessore, *Financier Plans Big Ad Campaign on Climate Change*, N.Y. TIMES (Feb. 17, 2014), <http://www.nytimes.com/2014/02/18/us/politics/financier-plans-big-ad-campaign-on-environment.html> (featuring Tom Steyer's previous successful campaign efforts in California and his plans for 2014 to target elected officials who discount climate science).