In late 2009, EPA made a formal finding — often called the Endangerment Finding —that greenhouse gases may endanger human health and welfare. Undaunted by the overwhelming scientific evidence in favor of that finding, the Trump EPA plans to reconsider it. Few independent observers believe EPA will succeed, but the issues are important enough to warrant a close look.

In this post, I'll explain the 2009 finding, its significance, the specific arguments EPA is making, and why they are likely to fail.

A. Understanding the Endangerment Finding

Two requirements must be met before a substance can be regulated under the Clean Air Act. First, it has to qualify as an "air pollutant." The Bush Administration argued that greenhouse gases don't meet that requirement. The Supreme Court rejected that argument in 2007 in a historic case called *Massachusetts v. EPA*.

Second, the substance has to cause harm or at least a risk of harm. Congress has specifically identified some pollutants that meet that standard. Others have to be designated by EPA under various provisions of the statute, depending on the type of substance and regulation at issue.

The 2009 Endangerment Finding was an outgrowth of the *Massachusetts* case, which involved emissions from motor vehicles. Under section 201 of the Clean Air Act, EPA is required to set vehicle emission standards for any air pollutant that "may reasonably be anticipated to endanger public health or welfare." Besides arguing that greenhouse gases aren't "air pollutants," the Bush Administration made some policy judgments against regulating greenhouse gases under the Clean Air Act. The Supreme Court held that those policy arguments were irrelevant. The only question , the Court said, was the scientific evidence about the harmfulness of greenhouse gases.

EPA's 2009 Endangerment Finding was a response to that ruling, Its immediate effect was to require EPA to set emission standards for motor vehicles. Under EPA's longtime interpretation of the statute, the 2009 finding also triggered other provisions of the statute dealing with stationary sources like power plants and factories.

The Endangerment Finding was challenged in court and upheld by the D.C. Circuit in a 2012 decision, *Citizens for Responsible Regulation [CARE] v. EPA*. Some of the

arguments that EPA now plans to make were specifically rejected in the *CARE* case. The Supreme Court reversed another portion of the D.C. Circuit's opinion but rejected requests that it review the part about the Endangerment Finding.

B. Arguments Against the Endangerment Finding

With that background in mind, let's turn to the four specific arguments that Trump's EPA is floating as reasons to repeal the Endangerment Finding.

1. **Failure to Consider Cost**

The Trump EPA argues that the Endangerment Finding is invalid because it failed to consider the costs of regulating greenhouse gases. This argument was squarely rejected in the *CARE* case. The D.C. Circuit pointed out that this argument is incompatible with the words of the statute itself and with *Massachusetts v. EPA.* Both the text of the statute and that ruling make it clear that EPA can only consider scientific evidence about the risk of harm in making an endangerment finding. If Congress had wanted EPA to consider cost, it would have used entirely different language. such as "unreasonably endanger." It didn't.

I expect that EPA will rely on a newer Supreme Court case, *Michigan v. EPA,* to argue that consideration of costs is required. But that case was very different. There, the Court said that EPA had to consider cost when EPA applied a law that authorized EPA to issue "appropriate" regulations. The portion of section 201 dealing with endangerment doesn't contain any remotely similar language.

A case that is more clearly relevant is *Whitman v. American Trucking Associations*. In that case, Justice Scalia wrote an opinion holding that EPA cannot consider cost in setting air quality standards, which must be based purely on evidence about the risks caused by air pollutants. The process of deciding what levels of a pollutant would endanger health seems to involve the same considerations used in deciding whether it endangers health at all.

2. Lumping Greenhouse Gases Together.

In making the Endangerment Finding, EPA put six types of substances, most notably carbon dioxide and methane, into a single category of "well-mixed greenhouse gases." EPA then treated that as a single pollutant. The Trump EPA now floats this as a reason for invalidating the finding.

The same claim was made in the *CARE* case, but the court never decided the issue. Instead, it concluded that none of the plaintiffs had standing. The reason was that they could not show how lumping the six kinds of substances together made any practical difference. It's still unclear why splitting up the pollutants would matter, After all, each of them undoubtedly "causes or contributes to" harm to human health and welfare.

The argument also looks less than compelling on the merits. The Clean Air Act defines an air pollutant to be "any air pollution agent or combination of such agents," including any precursor chemicals. There is also precedent for combining multiple pollutants that have similar effects into a single category. The category of "volatile chemicals" includes a number of different chemicals that cause ozone pollution.

If Trump's EPA reconsiders the existing finding, which will require justification, it will then have some discretion over how to group greenhouse gases. It will need a reasoned explanation for why to split them up. And the practical impact of doing so is not immediately obvious.

3. Contesting the science.

According to Trump's EPA, the Endangerment Finding "creatively added multiple leaps, arguing that the combined six gases contribute some mysterious amount above zero to climate change and that climate change creates some mysterious amount of endangerment above zero to public health."

What EPA is calling "creative leaps" are more commonly called "deeply researched scientific knowledge." The chances that a court would uphold contrary scientific findings by EPA are in the range of slim to none.

In the *CARE* case, Texas and other states had asked EPA to reconsider the Endangerment Finding on similar grounds. Here's how the D.C. Circuit responded:

> "State Petitioners have not provided substantial support for their argument that the Endangerment Finding should be revised. State Petitioners point out that some studies the IPCC referenced in its assessment were not peer-reviewed, but they ignore the fact that (1) the IPCC assessment relied on around 18,000 studies that were peer-

> reviewed, and (2) the IPCC's report development procedures expressly permitted the inclusion in the assessment of some non-peer-reviewed studies ('gray' literature). Moreover, as EPA determined, the limited inaccurate information developed from the gray literature does not appear sufficient to undermine the substantial overall evidentiary support for the Endangerment Finding. State Petitioners have not, as they assert, uncovered a 'pattern' of flawed science."

The scientific evidence about climate change has gotten even stronger and more unequivocal since the Endangerment Finding. It is extremely unlikely that a contrary EPA finding today would survive judicial review.

4. Later Supreme Court Decisions

EPA argues that four later Supreme Court rulings have changed the way courts interpret statues and thereby undermine *Massachusetts v. EPA*. I've tried to make this part of the discussion as accessible as possible, but it inevitably does require going a bit into the legal weeds.

Case 1. One of the four decisions is *Michigan v. EPA*, which I've already discussed in connection with EPA's first argument. As discussed there, it has dubious relevance.

Case 2. A second decision overruled *Chevron* and limited the amount of judicial deference to agencies. *Chevron* required strong deference to EPA. In its decision, the Court didn't use *Chevron* in its reasoning. Overruling *Chevron* wouldn't have changed the result in *Massachusetts v. EPA.* Far from deferring to EPA, *Massachusetts v. EPA* reversed the Bush EPA's interpretation of the Clean Air Act.

Cases 3 and 4. The other two cases involved what's now called the Major Questions Doctrine (MQD). The MQD requires particularly clear statutory authority before an agency can issue a regulation with "vast"significance. *Massachusetts v. EPA* held that what we now call the MQD didn't apply to the Endangerment Finding. The two newer cases did apply the MQD to one regulation and part of another, but notably did not apply it to the bulk of the second regulation. Thus, it seems that not all climate regulations are barred by this doctrine.

The MQD argument is weakened by several aspects of the endangerment issue:

(1) The statutory language behind the Endangerment Finding is quite clear;

(2) Such health and welfare determinations are a core part of EPA's mandate and expertise; and

(3) the Supreme Court upheld most of a climate regulation even in one of the cases now cited by EPA.

On the whole, I don't think courts should be impressed by the argument that these later cases requiring overruling *Massachusetts v. EPA*.

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Of the four arguments arguments that EPA makes for reversing the Endangerment Finding, the two weakest seem to be the first one (failure to consider cost) and the third (climate change denial). These arguments lost years ago in the D.C. Circuit and haven't gotten any stronger over time.

The fourth argument (MQD) would require overruling *Massachusetts v. EPA*. The D.C. Circuit, as a lower court, won't consider those arguments. Even if the issue eventually gets to the Supreme Court, I'm doubtful that the Supreme Court will go in that direction. While there were some calls from Justices to overrule the *Massachusetts* case in some subsequent decisions, they seem to have given up on the idea in the most recent climate ruling.

That leaves the second argument (lumping together greenhouse gases) as the most promising for EPA. At least it has the advantage of not having already been rejected by the D.C. Circuit or the Supreme Court. But it's also the least developed argument, and splitting up the six gases might have limited practical significance in terms of preventing regulation of greenhouse gases.

Overall, this effort by the Trump EPA is a long shot that is likely to waste a good deal of its time and energy. Whether that's good or bad is something that I leave to your judgment.