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JUSTICES MUST HEAR LATEST GREENHOUSE-GAS CASE

Forum Column

By Timothy J. Dowling

In a 1998 lecture called "The Interdependence of Science and Law," Justice Stephen Breyer told an audience of distinguished scientists at the American Association for the Advancement of Science that "the law must seek decisions that fall within the boundaries of scientifically sound knowledge and approximately reflect the scientific state of the art."

This month, Justice Breyer and his colleagues will have an opportunity to live up to this ideal. Scientists across the country have reached a near-unanimous consensus on questions at the heart of a petition for certiorari pending before the court. The justices should be especially heedful of the scientists' position because the petition concerns global warming, an issue of monumental importance.

The case is *Massachusetts v. U.S. Environmental Protection Agency*, No. 05-1120, a challenge to EPA's decision not to regulate greenhouse gas emissions from new motor vehicles under section 202 of the federal Clean Air Act. This provision requires EPA to regulate auto emissions of any "air pollutant" that, in EPA's judgment, "may reasonably be anticipated to endanger public health or welfare."

In 1999, nineteen groups pressed EPA to regulate carbon dioxide and other greenhouse gas emissions from new cars and trucks under section 202. When EPA refused, California, eleven other states, and many others challenged the decision in the U.S. Court of Appeals for the District of Columbia Circuit. The appeals court produced a deeply fractured ruling, with two judges issuing separate opinions upholding EPA's decision on different grounds, and a third authoring a lengthy and scholarly dissent. This splintered panel decision was capped with a rehearing denial by a 4-3 vote, the barest of margins.

In March 2006, California and its allies petitioned the U.S. Supreme Court to review the matter. A large coalition of climate scientists, municipal and planning groups, and native Alaskans have filed three *amicus* briefs supporting the request. The Court will consider the petition on June 15.

The near-unanimous scientific consensus is that global warming is occurring, the primary cause is fossil fuel consumption, and if we don't act now to reduce greenhouse gases, the problem will worsen. One recent survey of the literature found that of 928 peer-reviewed papers published on climate change between 1993 and 2003, none disagreed with this consensus position. Another survey concluded that this position is shared by "all major scientific bodies in the United States whose members' expertise bears directly on the matter," including Justice Breyer's audience at the American Association for the Advancement of Science.

In her penetrating new book, *Field Notes from a Catastrophe*, Elizabeth Kolbert quotes one climate scientist as saying: "In most of the cases, it's the lay community that is more exercised, more anxious. But in the climate case, the experts -- the people who work with climate models every day, the people who do ice cores -- they are *more* concerned. They are going out of their way to say, 'Wake up!'"

How much worse will things get? In the words of section 202, are greenhouse gases reasonably anticipated to endanger public health and welfare?

There can be no doubt that they endanger public welfare on a monumental scale. Greenhouse gases threaten a catastrophe that could bring melting ice caps, rising sea levels, more severe hurricanes and other storms, epidemic increases in cholera, malaria, dengue fever, and other diseases, increased deaths from heat waves, more frequent floods and droughts, crop damage with resulting starvation, and devastating harm to wildlife and the natural environment. It could be disaster of Biblical proportions.

Global warming is not merely a future threat, but a present deadly reality. The World Health Organization estimates that human-produced global warming already is killing up to 150,000 people each year due to malnutrition, malaria, and other maladies. Global warming also is causing immediate harm to endangered species and the natural environment.

Although one appellate judge who affirmed EPA relied on a 2001 report by the National Research Council to argue that climate science is unclear and global warming models inaccurate, several of the scientists who wrote that report joined the scientists' *amicus* brief to make clear that the appeals court "significantly misrepresented" their findings. According to the experts, it is "very likely" that continued global warming will be so large and fast that it will be "without precedent in the past 10,000 years." They stressed that "time is of the essence" because delay will only accelerate harmful climate change. They emphatically concluded that the level of scientific certainty is "more than strong enough" to meet the Clean Air Act standard requiring regulation.

The local officials and planners who filed an *amicus* brief highlighted the exceptional importance of the legal issues raised by the case, explaining that they will be the first responders for the disasters that climate change will bring. As has been made tragically clear in the wake of recent disasters, municipal governments are responsible for orderly evacuations from fires and floods, and local officials must plan and reconstruct neighborhoods or entire cities afterwards. Local governments also will be forced to grapple with the daily effects of climate change, such as unreliable municipal water supplies because of droughts or flash floods.

As D.C. Circuit Judge David Tatel put it, "if global warming is not a matter of exceptional importance, then those words have no meaning." It is difficult to imagine issues of federal statutory law of greater importance, or more deserving of the Court's review, than the questions presented in this case.

Why did EPA refuse to regulate? It never applied the statutory standard to determine whether greenhouse gas emissions put public health or welfare at risk. Instead, it offered two badly flawed justifications. First, the agency concluded that the term "air pollutant" as used in the Clean Air Act does not include greenhouse gases. But the statute's definition of "air pollutant" is exceedingly broad, and includes any physical or chemical "substance or matter which is emitted into or otherwise enters the ambient air." Moreover, section 103(g) of the Act expressly refers to carbon dioxide as an "air pollutant."

Second, EPA cited various policy considerations to justify its refusal to regulate greenhouse gas emissions from cars and trucks, including its preference for voluntary measures, and the absence of absolute scientific certainty regarding the precise impacts of global warming. The Clean Air Act, however, does not allow for reliance on these factors where emissions "may reasonably be anticipated to endanger public health or welfare," a standard easily met here. The statute directs the agency to consider compliance costs and available technology in deciding *how* to regulate, but not in deciding whether to regulate.

As an added kicker, the federal government recently asserted that a different federal law preempts state and local officials from regulating greenhouse gas emissions from motor vehicles. Consequently, unlike the usual situation in which a federal agency disavows legal authority, which typically would leave the matter to the states, EPA's reading of the Clean Air Act leaves greenhouse gas emissions without direct control by any level of government. How very convenient for industry.

Public concern with global warming is enormous, with citizens submitting almost 50,000 comments to EPA on the original request to regulate greenhouse gases. Some thirty parties -- including twelve states with a total population exceeding 100 million people -- sought review of EPA's decision in the D.C. Circuit. Although ten states have weighed in on the other side, this only serves to confirm that the case involves a critically important legal dispute between two large state coalitions, a legal clash that cries out for high court intervention.

In the face of this monumental public concern, where have the agency and the appeals court left us? EPA produced an utterly incoherent explanation for why it refuses even to decide whether greenhouse gases endanger public health or welfare. In the words of Judge Tatel, it is "difficult even to grasp the basis for EPA's action." On appeal, the legal issues were squarely and cleanly presented, but the D.C. Circuit rendered a badly splintered ruling. After all this, we have no definitive judicial ruling on the critical legal issue of whether EPA may regulate greenhouse gases from motor vehicles under the Act. The American people deserve better.

If the court is serious about ensuring that the rule of law is rooted in sound science, it will grant certiorari and set the case for full briefing on the merits.

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