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Storm Warning

An EPA decision to ignore global warming calls for Supreme Court attention.

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For Seattle Mayor Greg Nickels, global warming is a local problem. The city's water and electricity both depend on melting snow in the Cascade Mountains, which fills the city's reservoirs and drives its hydroelectric power systems. But the annual average snowpack in the Cascades has dropped by half since 1950, a drop Nickels attributes to global warming. Global warming threatens to reduce the snow accumulation even more in the future.

Seattle is doing what it can to reduce its own emissions of global-warming pollutants, in particular carbon dioxide. So are 236 other cities whose mayors agree with Nickels and have signed on to his U.S. Mayors Climate Protection Agreement, pledging to try to reduce their greenhouse-gas emissions to the levels set by the Kyoto Protocol. But the mayors recognize there are limits to local action: "Our ultimate goal is to make it impossible for the federal government to continue ignoring this issue," Nickels told the *Los Angeles Times* last year.

Soon the Supreme Court will decide whether it will address global warming by granting certiorari in the case of *Massachusetts v. Environmental Protection Agency*. Or will it ignore the reality and consequences of climate change, as the executive branch already has?

The way the EPA has chosen to deal—or not deal—with global-warming pollutants raises important questions of separation of powers. The EPA has ignored the plain language of the Clean Air Act, seizing power that Congress did not give it in order to substitute its policy preferences for the statutory standards. This is clearly a case in which a judicial umpire needs to step in and call foul—something the U.S. Court of Appeals for the D.C. Circuit failed to do.

In the past, the Supreme Court has agreed to hear many cases because they raised issues of "extraordinary importance." It is clear that global warming more than meets that standard.

MISREADING THE LAW

Last July, the D.C. Circuit, ruling in *Massachusetts v. EPA*, supported the agency's decision not to regulate tailpipe emissions of greenhouse gases. The plaintiffs in the case—12 states, three cities, one U.S. territory, and several environmental groups—have turned to the Supreme Court for review. A coalition of organizations, including the U.S. Conference of Mayors, the National Association of Counties, the American Planning Association, and the city of Seattle, has filed an amicus brief in support of the plaintiffs. Several prominent climate scientists and native Alaskan groups also have urged the Court to take the case.

The case began seven years ago, when several groups petitioned the EPA to regulate carbon dioxide and other greenhouse-gas emissions from new motor vehicles under the Clean Air Act. In 2003, the EPA denied the petition, claiming that it lacked authority to regulate those emissions because the emissions were not air pollutants under the act. The agency also cited various policy considerations, including scientific uncertainty regarding the precise impact of global warming, the inefficiency of tackling just one source of global-warming emissions, and a general preference for voluntary measures to lower emissions.

But the EPA's statutory justification depends on a rather tortured reading of the Clean Air Act. Section 202 mandates that the EPA regulate tailpipe emissions of any "air pollutant" that "may reasonably be anticipated to endanger public health or welfare." The statute's definition of "air pollutant" is exceedingly broad, including any physical or chemical "substance or matter which is emitted into or otherwise enters the ambient air."

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And the act expressly refers to carbon dioxide as an air pollutant in another section.

Moreover, the Clean Air Act does not allow the EPA to weigh policy considerations in deciding whether to regulate. The only question that the agency may consider is whether the specific tailpipe emissions "may reasonably be anticipated to endanger public health or welfare." Policy considerations such as the costs and benefits of regulation or the existence of alternative methods more to the current administration's liking are far outside those statutory boundaries. Indeed, a previous effort to adulterate the Clean Air Act's health-based standards with economic policy considerations was sharply checked by the Supreme Court in *Whitman v. American Trucking Associations* (2001).

Thus, in making its global-warming emissions decision, the EPA has ignored both its legislative mandate and a key Supreme Court precedent. As it did in the earlier case, the Court should take the case to make clear that the Clean Air Act means what it says.

THIS IS TOP PRIORITY

Besides law and precedent, *Massachusetts v. EPA* calls for Supreme Court review for another reason: This is a case of "extraordinary importance" in the environmental arena. That argument has carried weight with the justices before. Just two years ago, the Court granted cert in *Alaska Department of Environmental Conservation v. EPA* in order to resolve "an important question of federal law, i.e., the scope of EPA's authority" under the Clean Air Act.

The Court has also granted review in cases implicating a single natural resource of special importance. It agreed to hear *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency* (2002) "because of the importance of the case" concerning a "uniquely beautiful" natural resource, Lake Tahoe. Surely a case about global warming, which threatens countless "uniquely beautiful" resources (not to mention public welfare and human lives), warrants the justices' consideration as well.

Just ask the state, county, and city officials who are clamoring for the Supreme Court to hear this case. These men and women will be the first responders in the whole range of disasters that global warming threatens.

Consider the fate of America's eastern seaboard, one of most populated parts of the country. A warmer planet is likely to mean rising sea levels, more intense hurricanes, and higher storm surges crashing into the coastline. As a result of the increasing sea levels, weaker storms in the future will likely do more damage than powerful storms do today. By the turn of the next century, for example, New York City's 100-year floods will be arriving every 19 years, probably overwhelming the city's airports, highways, subways, and tunnels. A Category 3 hurricane could send 20-foot surges to inundate Kennedy Airport and the Lincoln Tunnel. Unsurprisingly, the state and city of New York were among the early challengers of the EPA's decision not to regulate global-warming pollutants.

In a decision poignant in retrospect, New Orleans Mayor Ray Nagin decided in April 2005 to join the Mayors Climate Protection Agreement because, he said, "the rise of the Earth's temperature, causing sea-level increases that could add up to one foot over the next 30 years, threatens the very existence of New Orleans." Though scientists do not claim that global warming in particular caused Hurricane Katrina, the storm reminds us that natural disasters can devastate cities and that local officials like Nagin and his staff have the duty to respond, rescue, and rebuild.

Cities, particularly large ones, also must grapple with the less cataclysmic challenges of global warming, such as higher temperatures that lead to more smog and more federal sanctions for violating clean-air standards; ferocious rainstorms that pollute municipal water supplies and overwhelm transportation networks; and droughts that disrupt hydropower transmission and deplete local reservoirs. Urban areas will be hit especially hard by the coming heat waves because cities house especially vulnerable populations and because their acres of streets and parking lots trap heat. Under one scenario, the EPA has estimated that by 2050 "excess weather-related mortality" will lead annually to 1,250 deaths in New York City, 600 in St. Louis, and 200 to 300 each in Atlanta, Dallas, and Los Angeles.

As Judge David Tatel of the D.C. Circuit wrote in dissent from his colleagues' decision not to grant an *en banc* rehearing of *Massachusetts v. EPA*, "if global warming is not a matter of exceptional importance, then those words have no meaning."

HELP NEEDED

State and local officials can reduce greenhouse gases dramatically, but they can't do enough. Our federal government exists to solve pressing national problems that states and cities cannot solve on their own—in other words, problems like global warming.

The nationwide implications of *Massachusetts v. EPA* heighten the need for Supreme Court review. The D.C. Circuit has exclusive jurisdiction over these kinds of Clean Air Act challenges, so its ruling has nationwide effect. And that effect is one of utter confusion. The appeals court decision was badly fractured, with one judge affirming on standing grounds, one judge affirming on policy grounds that (as noted) go beyond what the statute allows, and one judge dissenting. As a result, there is no definitive judicial ruling on the critical legal issue of whether the EPA may regulate global-warming pollution emitted by new cars and trucks under the Clean Air Act.

This uncertainty is all the more troubling because of a recent National Highway Traffic and Safety Administration statement that federal law pre-empts state and local efforts to regulate tailpipe emissions of greenhouse gases. Regulatory efforts to control global-warming pollution from cars are now in limbo: The federal government refuses to regulate and won't allow the states to do so.

There is little that will be more critical to the nation in the coming years than dealing with the consequences of global warming—the storms, the droughts, the heat waves, and the loss of life and property. Hundreds of local leaders are doing everything they can to avert these disasters or, at least, mitigate their harms, but they need help. As Mayor Nickels said recently, "None of us as individuals or even individual communities feel we have the power to change it. . . . If I were simply to say Seattle is going to do what it can in a vacuum, it would be a very frustrating exercise."

The Supreme Court has every reason to listen to their pleas and hear *Massachusetts v. EPA* on the merits.

Jennifer Bradley and Timothy J. Dowling are attorneys at the D.C.-based Community Rights Counsel. They are co-authors of the amicus brief in this case filed on behalf of the U.S. Conference of Mayors, the National Association of Counties, the American Planning Association, and the city of Seattle.

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