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Court Must Make EPA Do Its Job on Global Warming

Forum Column
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If the rule of law and judicial restraint mean anything, they mean victory for California, Massachusetts and the other petitioners in Massachusetts v. EPA, 05-1120, the global warming case that will be argued today before the U.S. Supreme Court.

You wouldn't realize this if you listened to the auto industry. In its briefs and media statements, it suggests that California and its allies are asking the court to strike an activist pose - in effect, to anoint itself Global Warming Czar - by entering into a complex policy debate better left to the political branches of government. Don't believe it. In fact, just the opposite is true. The 12 states, three cities and environmental groups that brought the case want nothing more than a straight-up reading of federal law and appropriate deference to policy decisions Congress has made regarding public health and welfare. It's industry that is trying to cloud the legal issues with economic jargon and irrelevant policy spin, as well as a radical theory of standing that flouts established precedent.

The case is a challenge to a 2003 decision by the Environmental Protection Agency declining to regulate greenhouse gas emissions from new cars and trucks under Section 202 of the federal Clean Air Act. Section 202 states that EPA's administrator "shall" regulate any air pollutants from new motor vehicles "which in his judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." Overturning the legal conclusions of two prior agency general counsels, EPA decided that greenhouse gases are not air pollutants under the act and that it therefore lacks legal authority to regulate them.

EPA's reading contravenes the act's plain language. The statutory definition of air pollutant is broad, embracing "any air pollution agent or combination of such agents," including "any substance or matter which is emitted into or otherwise enters the ambient air." Section 103 of the act identifies carbon dioxide, the principal greenhouse gas emitted from cars, as an air pollutant. And the term "welfare," one of the triggers for regulation under Section 202, is defined to include effects on climate and weather.

Because EPA's position cannot be reconciled with the applicable statutory text, it argues that statutory "context" limits the act's application. For example, EPA observes that other provisions require research and monitoring of greenhouse gases without authorizing regulatory controls. But it makes perfect sense for Congress to mandate additional research while requiring EPA to act on that research if it shows that greenhouse gases endanger public health and welfare.
None of the context invoked by EPA detracts from the plain requirements of Section 202. Indeed, if greenhouse gases were not air pollutants, one wonders why Congress would include the research requirements for greenhouse gases in the Clean Air Act, whose express purpose is to prevent air pollution.

As an alternative basis for refusing to regulate, EPA argues that, even if it has legal authority to do so, it would not regulate because of various policy reasons unrelated to public health and welfare. Relying heavily on the phrase "in his judgment" in Section 202, EPA contends that it has well-nigh unreviewable discretion to refuse to regulate, for virtually any reason, including reasons having nothing to do with the health and welfare standard in Section 202. The phrase cannot possibly support this reading. This language means simply that the administrator is responsible for determining whether scientific evidence on health and welfare is sufficient to trigger the imposition of emission controls. On EPA's reading, the agency could refuse to regulate even in

the face of overwhelming evidence of harm to public health. EPA's interpretation improperly transforms a statutory requirement ("shall regulate") into unbridled discretion to refuse to regulate.

Perhaps sensing the weakness of their statutory arguments, EPA and industry contend that the petitioners lack legal standing even to bring the case because they have failed to show injury that could be remedied by winning. The argument is as baseless as it is radical. The petitioners have submitted undisputed affidavits from scientific experts showing that, because of global warming, they have suffered and will continue to suffer serious injuries. They are losing their coastal lands to rising sea levels. Increased temperatures have worsened smog, causing health problems for asthmatics, the elderly and many others. The petitioners have lost and will continue to lose the use and enjoyment of natural resources. In addition to this ample record evidence, our nation also is suffering from increased wildfires, droughts, deadly heat waves, floods and other calamities scientists attribute to global warming. Contrary to the industry's arguments, the petitioners' injuries are not rooted in a speculative worst-case scenario but rather are concrete present-day harms with ongoing health and economic consequences. The manufacturers also argue that these injuries are too generalized to support standing. It's a theory only industry could love, for it basically says that, if global warming harmed only a few people, they all could sue, but because it harms many people, no one can sue.

Under established precedent, the critical inquiry is not whether the injury is widespread but whether it is concrete. In FEC v. Akins, 524 U.S. 11 (1998), the court allowed a group of voters to challenge a decision by the Federal Election Commission because the decision deprived them of information relating to campaign contributions. This injury, though widely shared, was concrete enough to distinguish the case from prior rulings that denied standing where the plaintiff alleged only an abstract or indeterminate interest. So too here.

Industry also argues that the petitioners lack standing because a win won't bring them adequate redress. Emissions from U.S. cars and trucks, the argument goes, account for only a relatively small portion of global greenhouse gas emissions. But motor vehicles spew 23 percent of all U.S. greenhouse gas emissions, hundreds of millions of metric tons annually. Because carbon dioxide lingers in the atmosphere for many decades, reduction of any significant portion of these emissions yields significant benefits over time. A ruling that these emissions are air pollutants also could allow California and other states to move ahead with their own clean car programs as authorized by Section 209 of the act.

More to the point, standing jurisprudence has never denied injured parties all relief simply because they will obtain, at best, only partial redress. Global warming has no silver bullet solution. Incremental measures are the only way to tackle what an overwhelming scientific consensus describes as the pre-eminent environmental threat of our time.

The petitioners' request here is modest. They are not asking the Supreme Court to order EPA to regulate greenhouse gases but simply to apply existing legal requirements to decide whether they compel new controls in accordance with the congressional policy choices reflected in Section 202.

Massachusetts v. EPA would make a perfect case study for Judicial Restraint 101. If the justices simply follow the law, the petitioners will prevail.

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