The Supreme Court Takes a Global Warming Case: *Commonwealth of Massachusetts v. EPA*

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July 12, 2006

Congressional Research Service
7-....
www.crs.gov
RS22472

CRS Report for Congress
Prepared for Members and Committees of Congress

Summary

On June 26, 2006, the Supreme Court agreed to review *Commonwealth of Massachusetts v. EPA*, a global warming-related case. In the decision below, the D.C. Circuit rejected 2-1 a challenge to EPA's denial of a petition under the Clean Air Act requesting the agency to limit four pollutants emitted by new motor vehicles, owing to their alleged contribution to global warming. In resolving the case, the Court might address, among other things, Article III standing doctrine; whether the Clean Air Act reaches the global warming impacts of motor vehicle emissions; and the latitude allowed an agency to inject policy considerations into its decisions when the governing statute makes no mention of them. It is unlikely, even should petitioners in the Supreme Court gain a favorable ruling, that the case will result in a direct order by the Court that EPA regulate the global warming impacts of auto emissions.

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On June 26, 2006, the Supreme Court agreed to review *Commonwealth of Massachusetts v. EPA*,[1] setting the stage for the Court's first pronouncements in a global warming case. In the decision below, the D.C. Circuit rejected a challenge to EPA's denial of a rulemaking petition under the Clean Air Act (CAA). The denied petition, filed by numerous states and environmental groups, requested EPA to impose limits on four pollutants emitted by new motor vehicles, owing to the alleged contributions of those emissions to global warming. In resolving the case, the Court might address, among other things, Article III standing doctrine;[2] whether the CAA reaches the global warming impacts of motor vehicle emissions; and the latitude allowed an agency to inject policy considerations into its decisions when the governing statute makes no mention of them.[3]

Background

In 1999, some 20 non-profit groups petitioned EPA to regulate emissions of "greenhouse gasses" (GHGs)—specifically, CO2, methane, nitrous oxide, and hydrofluorocarbons—from new motor vehicles. The petition cited the agency's alleged mandatory duty to do so under CAA section 202(a)(1),[4] which directs the EPA Administrator to prescribe emission standards for "any air pollutant" from new motor vehicles "which, in his judgment cause[s], or contribute[s] to air pollution which may reasonably be anticipated to endanger public health or welfare." Petitioners argued that the GHGs above are "air pollutants" within the meaning of the CAA, citing the EPA General Counsel's opinion to that effect from 1998. In addition, they contended, EPA already has made findings that GHGs from motor vehicles "may reasonably be anticipated to endanger public health and welfare," a standard that does not require complete certainty. Further, the CAA's definition of "welfare" includes effects on "weather" and "climate."[5] Thus, they concluded, EPA not only may, but *must*, regulate GHG emissions from new motor vehicles under section 202(a)(1).

In 2003, after receiving almost 50,000 comments, EPA denied the petition.[6] Much of its rationale followed a new EPA General Counsel opinion, issued the same day, reversing the 1998 General Counsel opinion by *denying* that GHGs are "air pollutants" under the CAA. In support of non-coverage, the new opinion made arguments drawing on both the CAA and other sources. As for

[1] 415 F.3d 50 (D.C. Cir. 2005), *cert. granted*, 74 U.S.L.W. 3713 (June 26, 2006) (No. 05-1120). The name of the case in the Supreme Court will be unchanged.

[2] Article III of the Constitution limits the jurisdiction of federal courts created under that article, such as the district courts, to certain plaintiffs. As articulated by the Supreme Court, only those plaintiffs have "standing to sue" in Article III courts whose claims involve (1) injury in fact to the plaintiff that is concrete and particularized, and actual or imminent; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood, as opposed to mere speculation, that the injury will be redressed by a favorable decision ("redressability").In addition to these constitutional preconditions for standing, the courts have established certain *prudential* standing hurdles, embodying judicially self-imposed limits on the exercise of federal jurisdiction. Among the prudential hurdles articulated thus far, one in particular seems relevant to global warming claims—that Article III courts not adjudicate generalized grievances more appropriately addressed by the representative branches.

[3] For a broad survey of litigation involving global warming—based on CAA text, common law nuisance, federal preemption, the National Environmental Policy Act, and international law—see CRS Report RL32764, *Climate Change Litigation: A Survey*, by (name redacted).

[4] 42 U.S.C. § 7521(a)(1).

[5] CAA § 302(h); 42 U.S.C. § 7602(h).

[6] 68 Fed. Reg. 52922 (Sept. 8, 2003).

CAA-based arguments, the new opinion points out that although three provisions in the 1990 CAA amendments expressly touch on global warming, none of them authorizes regulation; instead they seek to learn more about the problem. Moreover, the CAA contains a separate program explicitly addressing stratospheric ozone depletion, showing that Congress understands the need for specifically tailored solutions to global atmospheric issues such as global warming, rather than leaving such issues to the general regulatory structure in the CAA.

As for arguments based outside the CAA, the new opinion contends that various congressional enactments from 1978 to 1990 reveal a Congress interested in developing a foundation for considering whether *future* legislative action on global warming was warranted. Also, the conclusion of the 1998 General Counsel memorandum that GHGs are "air pollutants" under the CAA was rendered prior to a key Supreme Court decision in 2000. That decision, *FDA v. Brown & Williamson Tobacco Corp.*,[7] held that when Congress makes facially broad grants of authority to agencies, they must be interpreted in light of the statute's purpose, structure, and history. This decision suggests, argued the new opinion, that the CAA should not be read to delegate an authority of such profound economic significance as the power to address global warming in so cryptic a fashion as CAA section 202.

Beyond the above issues of CAA authority, EPA disagreed as a matter of Bush Administration policy with the mandatory-standards approach urged by petitioners. Not surprisingly, EPA, in rejecting the petition, endorsed President Bush' non-regulatory approach to global warming.

The Court of Appeals Decision

EPA's denial of the section 202 petition in 2003 was challenged in the D.C. Circuit by twelve states (CA, CT, IL, MA, ME, NJ, NM, NY, OR, RI, VT, WA), three cities (New York, Baltimore, and Washington, D.C.), two U.S. territories (American Samoa and Northern Mariana Islands), and several environmental groups. Opposing the suit, besides EPA, were ten state intervenors (AK, ID, KS, MI, ND, NE, OH, SD, TX, UT), plus several automobile- and truck-related trade groups.[8]

In *Commonwealth of Massachusetts v. EPA*, in July 2005, a split panel rejected the challenge.[9] The two judges supporting rejection, however, did so for different reasons. Judge Randolph, author of the lead opinion, bypassed the standing issue and assumed *arguendo* that EPA has CAA authority to regulate GHG emissions. He then proceeded to resolve whether EPA properly *exercised its discretion* in choosing not to wield that authority. As to this discretion issue, recall that CAA section 202(a)(1) directs the EPA Administrator to prescribe standards for any motor vehicle emissions that "*in his judgment*"[10] cause harmful air pollution. Judge Randolph read "in his judgment" broadly to allow EPA consideration of not only "scientific uncertainty" about the effects of GHGs but also "policy considerations" that justified not regulating. Thus, EPA in his view was entitled to rely, as it did, on such factors as the existence of efforts to promote fuel cell and hybrid vehicles, and the fact that new motor vehicles are but one of many sources of GHG

[7] 529 U.S. 120 (2000) (rejecting FDA's assertion of jurisdiction over tobacco products).

[8] In current political terminology, almost all the challenger states are "blue"; almost all the states opposing the challenge are "red."

[9] 415 F.3d 50 (D.C. Cir. 2005).

[10] Emphasis added.

emissions, making regulation of vehicle GHG emissions an inefficient piecemeal approach to global warming. He concluded that EPA had properly exercised its 202(a)(1) discretion in denying the petition for rulemaking.

By contrast, Judge Sentelle, the other judge supporting rejection of the petition, did not shy away from the standing question. Finding that petitioners had not suffered the requisite injury required for standing, he endorsed rejection of the petition.

Finally, Judge Tatel in dissent asserted that at least one petitioner had standing. Massachusetts, he said, had shown the possibility of harm from global-warming-caused rising sea levels. On the merits, he held first that EPA has authority under section 202(a)(1) to regulate GHG emissions, noting the section's coverage of "*any* air pollutant."[11] Second, he concluded that EPA's 202(a)(1) discretion does not extend to policy considerations, as Judge Randolph held, but relates exclusively to whether the emissions cause harmful air pollution. That being so, he concluded that EPA had not presented a lawful explanation of its decision not to regulate and would have remanded the petition denial to the agency. Judge Tatel, joined by Judge Rogers, also dissented from the court's later rejection (4-3) of the petitioners' request for rehearing en banc.[12]

On June 26, 2006, the Supreme Court agreed to hear the case.[13]

What the Supreme Court Might Do

To divine how the Supreme Court might decide the case, one should start with the petition for certiorari's statement of the questions presented by the case and EPA's version of the questions presented in its brief in opposition.[14]

The standing issue. Standing is a ubiquitous threshold issue in global warming litigation, given the difficulty faced by plaintiffs in showing that their specific injuries were caused by the particular actions of the defendants in the case. *Commonwealth of Massachusetts* fits the mold. Petitioners, EPA argues, cannot establish two of the three elements of Article III standing: causation and redressability.[15] As to causation, EPA describes petitioners' declarations as saying only that GHGs emitted from many different sources all over the world cause global warming. However, it points out, to have standing, petitioners must assert that the subject matter of this case—emissions of GHGs from new motor vehicles in the U.S.—causes or meaningfully contributes to their injuries. As to redressability, EPA argues that petitioners' declarations do not establish that a mere reduction in the specified GHGs will be sufficient to eliminate or reduce the injury they will suffer.

The petitioners do not include standing among the questions presented and thus do not address it.

[11] 415 F.3d at 62 (emphasis added by judge).

[12] 433 F.3d 66 (D.C. 2005).

[13] *See* note 1 *supra*.

[14] A second Brief in Opposition, largely supplementing the United States' brief, was filed by the states intervening on the side of EPA.

[15] *See* note 2 *supra*.

The CAA authority issue. Should the Court get past the standing issue, the opening question on the merits goes to EPA authority: did Congress in section 202(a)(1) empower EPA to regulate new motor vehicle emissions based on their global warming effects? Petitioners argue that the CAA text could hardly be plainer. Section 202(a)(1), they note, requires EPA to promulgate emission standards for "any air pollutant" that causes endangerment. And the CAA definition of "air pollutant" as any "physical" or "chemical" substance that enters the ambient air surely includes GHGs.[16] Finally, there is nothing special, petitioners assert, about the kind of harm GHGs produce that places them beyond the CAA, since section 202(a)(1) is triggered by endangerment of "welfare," a term defined by the act to include effects on "climate."[17] The EPA General Counsel memorandum's effort to avoid this obvious textual mandate on the basis of *FDA v. Brown & Williamson Tobacco Corp*,[18] petitioners say, misreads that decision.

In response, EPA notes that the authority question was not addressed by the majority judges below (nor by any other court) and that the Supreme Court rarely addresses an issue without the benefit of lower court explication. Thus, the agency contends, the Court should resolve this case on either standing grounds or the "in his judgment" issue (below). If the Court reaches the authority question, EPA maintains, *Brown & Williamson* counsels that the CAA be read as a whole, and doing so shows that the act does not confer authority on EPA to regulate emissions for the purpose of reducing global warming.

The "in his judgment"/policy considerations issue. This question asks whether, as Judge Randolph found below, EPA may decline to issue the emission standards here for policy reasons not enumerated in CAA section 202(a)(1). Petitioners, of course, argue to the contrary. The "in his judgment" phrase in 202(a)(1), they say, refers only to the EPA Administrator's judgment whether public health or welfare may reasonably be anticipated to be endangered by the pollution—not to the many other considerations, many of a policy nature, that EPA cited in rejecting the petition to the agency. Section 202(a)(1)'s narrow focus is made all the more clear, argue petitioners, by the contrast with other provisions in section 202 that do mention factors other than endangerment of public health or welfare. "By allowing EPA to import into section 202(a)(1) policy factors not mentioned there," argue petitioners, "the appeals court has sanctioned a large-scale ... shift of power from Congress ... to the agency."[19]

In response, EPA's brief stressed one particular reason the agency had cited for rejecting the rulemaking petition: the assertedly uncertain state of the scientific record on global warming and EPA's desire to have the benefit of ongoing research. Surely, EPA's brief argues, the "in his judgment" phrase in section 202(a)(1) allows EPA to consider those factors in deciding whether to make an endangerment finding. EPA also points out the particular deference that courts owe agencies as to their decisions whether to grant rulemaking petitions. The federal brief, however, contains little discussion of the several *policy* factors on which the EPA General Counsel memorandum and Judge Randolph relied, and that, arguably, is the nub of the issue.

The D.C. Circuit's decision in *Commonwealth of Massachusetts* was an unusual one for the Supreme Court to accept, given that few of the factors that have traditionally interested the Court in hearing a case are present. There is no split in the circuits, and the decision has little precedent

[16] CAA § 302(g); 42 U.S.C. § 7602(g).

[17] *See* note 5 *supra.*

[18] *See* note 7 *supra* and accompanying text.

[19] Petition for writ of certiorari 12-13.

value in that no rationale commanded the support of a majority of the D.C. Circuit judges. To be sure, however, cases presenting issues of unusual importance, as *Commonwealth of Massachusetts* assuredly does, are more likely to be accepted.

Given that the Court has accepted the case, the three issues above suggest some ways the Court could rule. First, it could find that the petitioners lack standing. Environmental interests and standing doctrine have long had a tumultuous relationship in the Supreme Court, and the nature of global warming exacerbates the difficulties. As in the acid rain and toxic-exposure cases of decades ago, global warming is said to be caused by multiple actors (millions of GHG emitters around the globe) whose actions, possibly combined with natural phenomena, intermix in complex ways to cause adverse effects after a very long time. Linking a particular cause and a particular effect in this context may be quite difficult. Certainly Justice Scalia, the leader of the Court's efforts to narrow standing in a series of 1990s decisions, would be inclined to rule against the *Commonwealth of Massachusetts* petitioners on standing grounds. Alternatively, the Supreme Court might use the case to clarify when a court may, as Judge Randolph did, bypass its general edict that jurisdictional issues such as standing be addressed first, in order to decide the case on an easy merits issue.

If the standing hurdle is surmounted, petitioners' case still could fall on either of the statutory issues raised in the briefs: whether "any air pollutant" includes emissions regulated on the basis of their global warming effects and whether "in his judgment" allows EPA considerations of factors other than those going to whether the pollutant endangers public health or welfare. In addition, there is an issue, sometimes raised in administrative law cases, whether the EPA Administrator has a mandatory duty to issue the "judgment" that triggers section 202(a)(1) regulation once he comes into possession of data allowing him to make it. Because this issue has not been raised by the parties, one suspects the Supreme Court will not address it.

In sum, there are multiple ways the Court could resolve *Commonwealth of Massachusetts* or remand to the D.C. Circuit for that court to resolve. It is highly unlikely that the litigation will result in a direct judicial order to EPA to regulate new-motor-vehicle GHG emissions; at most, if petitioners win, one or another court will require additional determinations by the agency. Should regulation of motor-vehicle GHG emissions be the ultimate result, however, it would increase the pressure on EPA to regulate the GHG emissions of *stationary* sources (powerplants and factories) as well.

A decision by the Supreme Court is expected by June 2007.

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