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U.S. Supreme Court Opens Door to EPA Regulation of Greenhouse Gas Emissions

On April 2, 2007, the United States Supreme Court issued its decision in *Massachusetts v. Environmental Protection Agency,* No. 05-1120. This decision could have a significant and broad impact on the regulation of greenhouse gas ("GHG") emissions in the United States, potentially requiring the regulation of such gases as "air pollutants" under the Clean Air Act ("CAA" or "Act").

The Court's decision addressed three primary issues. First, the Court determined that the Commonwealth of Massachusetts had standing to challenge the Environmental Protection Agency's ("EPA" or "the agency") decision not to regulate GHG emissions. Second, the Court determined that EPA is statutorily authorized to regulate GHG emissions under the Act, *i.e.*, that GHGs are "air pollutants" under the Act. Third, the Court determined that EPA ***must*** regulate GHG emissions ***if*** it determines that they cause or contribute to air pollution in a manner that may reasonably be anticipated to endanger the public health and welfare. On this final point, the Court stated that "EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."[1] If EPA determines upon remand that scientific uncertainty precludes EPA from determining whether GHG emissions contribute to global warming, "EPA must say so" rather than simply relying on other policy considerations to avoid regulating in the area.[2]

Background to the Case

This action arose out of a petition filed by the International Center for Technology Assessment ("ICTA") in 1999, requesting that EPA regulate GHG emissions from new motor vehicles and engines under Section 202(a)(1) of the CAA.[3] ICTA specifically sought EPA regulation of carbon dioxide (CO_2), methane (CH_4), nitrous oxide (N_2O), and hydrofluorocarbon (HFCs) emissions.[4] Despite an extensive public comment period,[5] EPA declined to regulate GHG emissions from motor vehicles,[6] relying upon several legal and policy explanations, including: (1) further study and technology development is necessary to address climate change, (2) the President favors adopting a global climate policy that emphasizes voluntary measures, (3) adopting a "piecemeal" approach to global climate change will weaken the United States' ability "to persuade key developing countries to reduce the GHG intensity of their economies," and (4) regulating GHG emissions from motor vehicles is the province of

1 Massachusetts v. Envtl. Prot. Agency, No. 05-1120, slip. op. at 30 (U.S. Apr. 2, 2007).
2 *Id.* at 31.
3 Control of Emissions from New Highway Vehicles and Engines, 68 Fed. Reg. 52,922 (Sept. 8, 2003) (hereinafter "68 Fed. Reg. 52,922").
4 68 Fed. Reg. at 52,923.
5 68 Fed. Reg. at 52,924.
6 68 Fed. Reg. at 52,925.

the Department of Transportation ("DOT"), the agency that sets motor vehicle fuel economy standards.[7]

In response to EPA's denial, petitions for review were filed in the D.C. Circuit by "twelve states, three cities, an American territory, and numerous environmental organizations."[8] After consolidating the cases, a divided panel of the D.C. Circuit denied petitioners' challenge to EPA's decision.[9] Notably, the judges had difficulty arriving at a consensus. Judge Randolph filed the opinion of the court, holding that the EPA properly exercised discretion in denying the petition.[10] Judge Sentelle dissented in part because he would have found that petitioners suffered no particularized harm establishing standing; however, in order to allow the court to resolve the case, he concurred with Judge Randolph, whose view was closest to Judge Sentelle's own.[11] Judge Tatel dissented, finding that petitioners had standing, EPA had statutory authority to regulate GHG emissions, and the EPA Administrator lacked discretion to withhold regulation for policy reasons other than whether the emissions endangered the public health.[12] The panel denied a rehearing by a vote of 2-1 and the full court denied rehearing *en banc* by a vote of 4-3.[13]

Arguments Before the Court

Three issues were presented to the Supreme Court: (1) whether the states and municipalities had standing to challenge EPA's decision, (2) whether EPA has authority to regulate GHG emissions under the Act, and (3) whether the reasons EPA gave provided appropriate justification for its decision not to regulate GHG emissions. The arguments relating to each of these issues are discussed briefly below.

Standing

The threshold issue before the Supreme Court was whether petitioners had standing under Article III of the Constitution to challenge EPA's denial of the rulemaking petition. In order to have standing, one must have suffered an injury in fact, which is fairly traceable to the challenged action, and which is likely to be redressed by a favorable decision.[14]

EPA argued that petitioners failed to demonstrate the causation and redressability elements of Article III standing. On causation, EPA argued that there was no direct connection between its decision not to regulate GHG emissions from new U.S. motor vehicles and petitioners' alleged injuries from the consequences of global warming because global warming is a phenomenon that necessarily results from multiple sources and countries.[15] With regard to redressability, EPA claimed that petitioners failed to establish that reducing GHG emissions from new motor vehicles in the U.S. alone would eliminate or reduce petitioners' alleged injuries from global warming.[16] EPA further argued that petitioners' theory of redress depended upon whether other countries limit greenhouse gas emissions and that such third-party action was too speculative to support standing.[17]

At oral argument, petitioners responded to EPA's arguments by noting that a significant portion of total worldwide GHG emissions, six percent, is attributable to U.S. vehicles; therefore, petitioners asserted that the harm resulting from EPA's decision not to regulate GHG emissions was traceable because petitioners are harmed by the overall amount of greenhouse gases in the air.[18] With regard to redressability, petitioners responded that EPA regulations would achieve a 2.5% reduction in GHG emissions in the time that it takes to turn the vehicle fleet over;[19] accordingly, such a reduction alone, even without reductions by other countries, would reduce the accumulation of atmospheric GHG concentrations and delay or moderate many of the

7 68 Fed. Reg. at 52,930-31.
8 Massachusetts v. Environmental Protection Agency, 15 F.3d 50, 53 (D.C. Cir. 2005).
9 *Id.* at 53.
10 *Id.* at 58.
11 *Id. at* 59-61 (Sentelle, J., dissenting in part and concurring in judgment).
12 *Id.* at 61-62 (Tatel, J., dissenting).
13 Massachusetts v. Envtl. Prot. Agency, 433 F.3d 66 (D.C. Cir. 2005).
14 Massachusetts v. Envtl. Prot. Agency., 415 F.3d 50, 54 (D.C. Cir. 2005) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)).
15 Brief of Federal Respondent at 11-13, Massachusetts v. Envtl. Prot. Agency, No. 05-1120 (U.S. 2006) [hereinafter Brief of Respondent].
16 *Id.* at 13-15.
17 *Id.* at 14-15.
18 Transcript of Record at 5-6, 11, 18-22, Massachusetts v. Envtl. Prot. Agency, No. 05-1120 (U.S. 2006) [hereinafter Oral Argument].
19 Oral Argument at 11-13.

adverse impacts of global warming and, thus, minimize their injury.[20]

Authority to Regulate

The second issue before the Court was whether EPA has the authority under the CAA to regulate GHG emissions. Section 202 of the CAA[21] requires the Administrator to issue regulations prescribing standards applicable to emissions of any "air pollutant" from new motor vehicles which, in his judgment, cause or contribute to air pollution that "may reasonably be anticipated to endanger public health or welfare." The Act defines "air pollutant" as "any air pollution agent or combination of such agents, including any physical, chemical . . . substance or matter which is emitted into or otherwise enters the ambient air. . . ."[22] The Act further specifies that statutory language referring to effects on "welfare" includes effects on "weather" and "climate."[23]

The petitioners argued that the CAA provides a broad delegation of authority to address climate issues and that GHGs are unambiguously "air pollutants" subject to regulation under Section 202 because they are "chemical substances" that are emitted into the ambient air. The petitioners bolstered their argument by noting that Congress would not have concluded that climate and weather are important components of human welfare without giving EPA the authority to do something about the pollutants affecting climate and weather.

EPA disputed the petitioners' characterization of the Act's language as unambiguous. EPA argued that the Court in *FDA v. Brown & Williamson Tobacco Corporation* cautioned agencies against using broadly worded statutory authority to regulate in areas raising unusually significant economic and political issues whenever Congress has specifically addressed those areas in other statutes.[24] EPA also noted that the Court has ordered courts to apply common sense in determining whether Congress is likely to delegate a policy decision of such economic and political magnitude.[25] Accordingly, EPA determined that it lacked authority to address the threat of global warming by regulating GHG emissions from new motor vehicles. EPA also argued that the only practical way to reduce GHG emissions from new motor vehicles would be to improve fuel economy; but, EPA was required to refrain from regulating GHG emissions because Congress had already delegated authority to regulate fuel economy to the DOT.[26]

EPA cited to a variety of statutory provisions within the CAA and recent legislation addressing the subjects of CO_2 emissions and global climate change as indications of congressional intent not to regulate GHGs.[27] EPA construed three provisions within the 1990 CAA amendments referring to either CO_2 or global warming as evidence of a congressional preference that EPA not regulate GHG emissions.[28] EPA also referred to stratospheric ozone depletion and the Senate's opposition to the Kyoto Protocol as examples of congressional intent to defer the regulation of GHG emissions.[29]

The Policy Issue

Petitioners also questioned whether EPA could rely upon policy arguments other than the considerations articulated in section 202(a)(1) of the Act itself. Section 202(a)(1) requires the EPA Administrator to make an "endangerment finding" by determining whether, "in his judgment," emissions "cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare."[30] If the Administrator makes an endangerment finding then he "shall by regulation prescribe . . . standards" to regulate those polluting emissions from motor vehicles.[31] Because the plain language of the statute does not expressly recognize other policy considerations, such as foreign policy concerns, or the impact of such a determination upon other agencies or the economy,

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20 Oral Argument at 9, 11-15; Final Reply Brief For the Petitioners in Consolidated Cases at 3, Massachusetts v. Envtl. Prot. Agency, 433 F.3d 66 (D.C. Cir. 2005).

21 42 U.S.C. § 7521.

22 42 U.S.C. § 7602(g).

23 42 U.S.C. § 7602(h).

24 529 U.S. 120, 132-33 (2000).

25 *Id.*

26 *See* 49 U.S.C. §§ 32901–32919 (authorizing the Department of Transportation to implement a detailed set of mandatory standards governing the fuel economy of cars and light duty trucks).

27 Brief of Respondent at 26-31.

28 *Id.* at 26.

29 *Id.* at 29-31.

30 42 U.S.C. § 7521(a)(1).

31 42 U.S.C. § 7521(a)(1).

petitioners argued that EPA used inappropriate bases in denying the request to regulate GHG emissions,[32] and that inclusion of these considerations "taint[ed]" EPA's analysis of scientific uncertainty.[33]

EPA argued in its brief that section 202(a)(1) did not constrain the Administrator in deciding which factors to consider in making an endangerment determination, because the Administrator was free to use his "judgment,"[34] and also that the agency may "defer making an endangerment determination while it waits for additional scientific and technical studies to be completed."[35] EPA highlighted a National Research Council report stating that a causal link between human activities and the increase in global surface air temperatures "cannot be unequivocally established."[36] EPA argued that it was not *required* to move forward in the face of scientific uncertainty[37] and urged the Court to defer to the agency's judgment regarding how to use its own limited resources.[38]

The Decision

Justice Stevens issued the opinion of the Court on behalf of the five justices in the majority. The Court held first that petitioners had standing to challenge EPA's denial to regulate GHGs because the harm to Massachusetts's coastline was both "actual" and "imminent" and "there is a 'substantial likelihood that the judicial relief requested' will prompt EPA to take steps to reduce that risk."[39] The Court emphasized Massachusetts' role as a sovereign state rather than a private individual and stated that Massachusetts was entitled to "special solicitude" in the standing analysis.[40] According to the Court, Massachusetts has a stake in preserving its sovereign interests because the right to force GHG emissions reductions has been given to the federal government.[41]

The Court also noted that Massachusetts' interest in this matter is not lessened by the fact that global warming impacts are felt around the world — federal jurisdiction was not eliminated just because taking steps toward reducing GHG emissions would not reverse global warming altogether.[42] "Agencies, like legislatures, do not generally resolve massive problems in one fell regulatory swoop. They instead whittle away at them over time, refining their preferred approach as circumstances change and as they develop a more nuanced understanding of how best to proceed."[43]

The Court concluded that the actions taken by other countries in curbing their GHG emissions are irrelevant because "[a] reduction in domestic emissions would slow the pace of global emissions increases, no matter what happens elsewhere."[44] Therefore, the Court placed "considerable significance" on EPA's "agree[ment] with the President that 'we must address the issue of global climate change,' and to EPA's ardent support for various voluntary emission-reduction programs."[45] EPA would "not bother with such efforts if it thought emissions reductions would have no discernable impact on future global warming."[46]

After finding that petitioners had standing, the Court had "little trouble concluding" that EPA has authority to regulate GHG emissions from new motor vehicles because the CAA's "sweeping definition of 'air pollutant'" "is "unambiguous."[47] "Carbon dioxide, methane, nitrous oxide, and hydrofluorocarbons are without a doubt" air pollutants.[48] In arguing that the agency did not have statutory authority to regulate GHGs, EPA failed to provide any indication that "Congress meant to curtail its power to treat greenhouse gases as air pollutants."[49] Furthermore, EPA's emphasis on *Brown & Williamson* was misplaced because finding that EPA had been delegated authority

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32 Brief of Petitioner at 38.
33 *Id.* at 41.
34 Brief of Respondent at 20.
35 *Id.* at 17 (citing Her Majesty the Queen, 912 F.2d at 1533-34).
36 Massachusetts v. Envtl. Prot. Agency, 415 F.3d at 56-57.
37 Brief of Respondent at 21-22 (citing Ethyl Corp. v. Envtl. Prot. Agency, 541 F.2d 1, 27-28 (D.C. Cir. 1976)).
38 *Id* at 18.
39 Massachusetts v. Envtl. Prot. Agency, No. 05-1120, slip. op. at 18 (U.S. Apr. 2, 2007).
40 *Id.* at 17.
41 *Id.* at 15-17.
42 *Id.* at 19, 22.
43 *Id.* at 21 (citations omitted).
44 *Id.* at 23.
45 Massachusetts v. Envtl. Prot. Agency, No. 05-1120, slip. op. at 23 (U.S. Apr. 2, 2007).
46 *Id.*
47 *Id.* at 25-26.
48 *Id.* at 26.
49 *Id.* at 27.

to regulate GHG emissions would not be an "extreme measure[]" comparable to banning tobacco products.[50] Moreover, unlike in *Brown & Williamson*,[51] EPA did not "identif[y] any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles"[52] and "EPA had never disavowed the authority to regulate" GHGs.[53] Finally, the fact that regulation of GHG emissions from new motor vehicles may overlap with the duties of the DOT does not give EPA license "to shirk its environmental responsibilit[y]" to protect "the public's 'health' and 'welfare.'"[54]

Finally, the Court answered the third question presented by concluding that EPA's explanation that to regulate carbon dioxide emissions at this time would be unwise "rests on reasoning divorced from the statutory text" of the CAA.[55] The CAA "condition[s] the exercise of EPA's authority on its formation of a 'judgment,'" which "must relate to whether an air pollutant 'cause[s], or contribute[s] to, air pollution which may reasonably be anticipated to endanger public health or welfare.'"[56] EPA can "avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do."[57] Other policy considerations, such as the existence of voluntary programs and concern regarding the impact upon the President's negotiating power with foreign countries, "have nothing to do with whether greenhouse gas emissions contribute to climate change."[58] These explanations simply "do not amount to a reasoned justification for declining to form a scientific judgment."[59] The Court explained that "[i]f the scientific uncertainty [surrounding regulation of greenhouse gases] is so profound that it precludes EPA from making a reasoned judgment, it must say so."[60] Therefore, the Court ordered EPA on remand to "ground its reasons for action or inaction in the statute".[61]

The Dissents

Chief Justice Roberts filed a dissenting opinion, joined by Justices Scalia, Thomas, and Alito, in which he concluded that he would have rejected petitioners' challenges as non-justiciable due to plaintiffs' inability to meet the standing requirements of Article III.[62] The Chief Justice took issue with the case law cited by the Court, stating that it failed to "provide any support for the notion that Article III standing somehow implicitly treats public and private litigants differently."[63] "[A] State's right . . . to sue in a representative capacity as *parens patriae*" "raise[s] an additional hurdle for a state litigant: the articulation of a 'quasi-sovereign interest' '*apart* from the interests of particular private parties.'"[64] Therefore, it was improper for the Court to "take[] what has always been regarded as a *necessary* condition for *parens patriae* standing – a quasi-sovereign interest – and convert[] it into a *sufficient* showing for purposes of Article III" by not addressing whether the citizens of the State satisfy Article III requirements.[65]

Justice Scalia filed a separate dissent, joined by Chief Justice Roberts and Justices Thomas and Alito, addressing whether the Administrator could consider other policy considerations in determining whether to deny a rulemaking petition and whether GHGs are, in fact, air pollutants.[66] Justice Scalia explained that the CAA says "*nothing at all* about the reasons for which the Administrator may *defer* making a judgment – the permissible reasons for deciding not to grapple with the issue at the present time."[67] Therefore, "the various 'policy' rationales . . . that the Court criticizes

50 *Id.* at 28.
51 Massachusetts v. Envtl. Prot. Agency, No. 05-1120, slip. op. at 28 (U.S. Apr. 2, 2007).
52 *Id.* at 28-29.
53 *Id.* at 29 (noting that "in 1998, [EPA] in fact affirmed that it *had* such authority).
54 *Id.* at 29.
55 *Id.* at 30.
56 *Id.*
57 Massachusetts v. Envtl. Prot. Agency, No. 05-1120, slip. op. at 30 (U.S. Apr. 2, 2007).
58 *Id.* at 31.
59 *Id.*
60 *Id.*.
61 *Id.* at 32.
62 Massachusetts v. Envtl. Prot. Agency, No. 05-1120, slip. op. at 18 (U.S. Apr. 2, 2007) (Roberts, J., dissenting).
63 *Id.* at 3.
64 *Id.* at 4.
65 *Id.* at 4-5.
66 Massachusetts v. Envtl. Prot. Agency, No. 05-1120, slip. op. at 18 (U.S. Apr. 2, 2007) (Scalia, J., dissenting).
67 *Id.* at 4-5.

are not 'divorced from the statutory text' . . . except in the sense that the statutory text is silent, as texts are often silent about permissible reasons for the exercise of agency discretion."[68]

Implications of Massachusetts v. EPA

The Court's decision in *Massachusetts v. EPA* will likely have effects that reach beyond EPA's action on remand regarding the motor vehicle program. Now that GHG emissions have been declared "air pollutants," EPA must either make a decision on the endangerment issue or explicitly state that "the scientific uncertainty is so profound that it precludes EPA from making a reasoned judgment as to whether greenhouse gases contribute to global warming . . . ."[69] If EPA makes an endangerment finding, a mandatory GHG emission registration program or national emission standards for stationary sources might be on the horizon. However, given the apparent eagerness of the new Congress to address climate change, it is more likely that Congress will weigh in on how to deal with GHG emissions before EPA takes conclusive action. In addition, with the Presidential election only 20 months away, major decisions regarding GHG regulation are likely to be made by the next Administration.

Regardless of how EPA responds to the Court's decision, the Court's determination that GHGs are subject to regulation under the Act places a sharper focus on the disclosure and analysis of GHG issues required of publicly traded companies under US securities laws. The decision is likely to boost efforts by networks of investors, environmental groups and industrial leaders who have been pressing the Securities and Exchange Commission to revise its rules specifically to require disclosure and analysis of GHG emissions and any associated risk or opportunity that may affect a company's bottom line.

The Court's decision also could affect litigation regarding GHG emissions now pending in a variety of courts, some of which have stayed action pending the outcome of this case. For example:

- In *Coke Oven Environmental Task Force v. Environmental Protection Agency*, a suit was brought by a group of states, cities, and environmental groups asserting that EPA is required to impose limits on carbon dioxide emissions from new electric generating power plants and industrial-commercial steam generating units.[70] EPA has declined to issue new source performance standards ("NSPS") for carbon dioxide, which petitioners claim is in contravention of the requirements of Section 111(b) of the CAA.
- In *Connecticut v. American Electric Power Co.*, eight states and three environmental groups have filed suit against five energy companies, alleging that the carbon dioxide emissions from the companies' electric generation facilities constitute a public and private nuisance.[71] Although the plaintiffs did not seek damages, they sought to compel the companies to cap their carbon dioxide emissions and reduce such emissions by a specified percentage over time. The district court granted motions to dismiss on the grounds that the case raised non-justiciable political questions. The court explained that "[c]ases presenting political questions are consigned to the political branches that are accountable to the People, not the Judiciary, and the Judiciary is without power to resolve them. This is one of those cases."[72] The case has been appealed to the Second Circuit Court of Appeals.
- The plaintiffs in *Comer v. Murphy Oil, U.S.A.*[73] sought class action status against defendant classes of oil, coal, chemical, and insurance companies. Plaintiffs allege that the defendants' carbon dioxide emissions are a proximate and direct cause of the increase in the destructive capacity of Hurricane Katrina. The plaintiffs allege causes of action in public and private nuisance, trespass, negligence, and fraudulent misrepresentation. They seek damages for loss of property, loss of business

68 *Id.* at 5 (internal citations omitted).
69 Massachusetts v. Envtl. Prot. Agency, No. 05-1120, slip. op. at 31 (U.S. Apr. 2, 2007).
70 Coke Oven Envtl. Task Force v. Envtl. Prot. Agency, No. 06-1131 (and consolidated cases) (D.C. Cir., filed Apr. 7, 2006).
71 406 F. Supp. 2d. 265 (S.D.N.Y. 2005).
72 *Id.* at 267.
73 Comer v. Murphy Oil, U.S.A., No. 01-436 (S.D. Miss., fourth amended complaint filed Dec. 19, 2006).

income, cleanup expenses, loss of loved ones, and emotional distress.

- Several cases involving GHG emissions have been filed against the auto industry. In California, the Attorney General filed suit against the six largest automobile manufacturers seeking damages from the defendants as compensation for public costs allegedly caused by global warming. The complaint alleges that emissions from the manufacturers' vehicles constitute a public nuisance under California and federal law.[74] In *Green Mountain Chrysler Plymouth Dodge Jeep v. Association of International Automobile Manufacturers*, the District Court of Vermont will be called upon to decide whether the adoption and enforcement of regulations setting limits on GHG emissions are preempted by the Energy Policy and Conservation Act of 1975 because they "amount to a *de facto* fuel economy standard."[75]

These cases suggest that states and environmental groups are taking a creative and expansive approach in litigation to curb carbon dioxide emissions. Energy companies and automobile manufacturers, as well as others, would be wise to monitor these lawsuits closely.

Finally, it is unclear exactly how much emphasis should be placed upon the Court's reference to Massachusetts' interest as a sovereign in the standing analysis. If the Court has created a lower standard for states to satisfy Article III standing, as Chief Justice Roberts' dissent suggests, this preferential treatment potentially could afford opportunity for further state intervention into the area of air quality regulation or other federal environmental programs.

* In future Client Alerts, K&L Gates will provide further analysis and suggested approaches to managing the risks and opportunities associated with GHG regulation, including corporate compliance strategies.

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74 California v. General Motors, No. 06-5755 (N.D. Cal. filed Sept. 20, 2006).
75 Green Mountain Chrysler Plymouth Dodge Jeep v. Ass'n of Int'l Auto. Mfrs., No. 2:05-CV-302 and 304 (consolidated) (D. Vt. 2005).

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