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GLOBAL WARMING IN THE COURTS: THE *MASSACHUSETTS V. EPA* DECISION AND ITS IMPLICATIONS

Justin R. Pidot

INTRODUCTION

On April 2, 2007, the United States Supreme Court decided *Massachusetts v. EPA*,[1] marking the first time the Justices have opined about a case involving global warming. The decision hands the petitioners a major victory, vacating a decision by the U.S. Court of Appeals for the District of Columbia Circuit and ordering EPA to reconsider whether or not to regulate greenhouse gas emissions from motor vehicles.

This update examines the *Massachusetts v. EPA* case, explains its outcome, and suggests ways that the decision may impact other global warming litigation.

BACKGROUND

The Supreme Court granted *certiorari* on two questions: first, whether the Clean Air Act provides EPA with the authority to regulate greenhouse gas emissions from motor vehicles; second, if EPA does have regulatory authority over such emissions, did the agency properly justify its decision not to regulate. While the Court did not grant *certiorari* on the question of the petitioners' standing, this issue featured significantly in EPA's briefs and in oral argument.[2] The Supreme Court addressed all three of these issues, ruling 5 to 4 in favor of petitioners on each. Chief Justice Roberts authored a dissent focusing on the issue of standing joined by Justices Alito, Scalia, and Thomas. Justice Scalia authored a second dissent focusing on the issues of authority and discretion joined by the Chief Justice and Justices Alito and Thomas.

While the Court provides a detailed analysis of each issue, the overall tone of the opinion may be of equal significance. Justice Stevens, writing for the majority, opens with a discussion of the science of global warming, noting that "[r]espected" scientists believe that human activities are contributing to climate change.[3] He then quotes petitioners describing global warming as "the most pressing environmental challenge of our time" and goes on to say that, despite the fact that the case presented serious jurisdictional issues and involved no split among the federal circuit

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[1] 127 S. Ct. 1438 (2007).
[2] For a full discussion of the issues presented to the Court, see GLOBAL WARMING IN THE COURTS: AN OVERVIEW OF CURRENT LITIGATION AND COMMON LEGAL QUESTIONS 6-11 (2006).
[3] 127 S. Ct. at 1446.

courts, "the unusual importance of the underlying issue" necessitated Supreme Court review.[4] This prefatory language is particularly striking because, in presenting their case, petitioners emphasized that it could be resolved based on run-of-the-mill doctrines of administrative law and the Court did not need to address global warming itself.

Lower courts could take the Court's strong language about the importance of the issue of global warming as a signal that they should be particularly attentive to other global warming cases and suspicious of efforts by the federal government to postpone action.

PETITIONERS HAVE STANDING

The majority definitively finds that petitioners have standing to bring their challenge. The Court adopts a relatively lenient framework for constitutional standing, drawing heavily from Justice Kennedy's concurrence in *Lujan v. Defenders of Wildlife*.[5] The Court states that the judiciary should defer to Congress when it authorizes judicial review if it identifies "the injury it seeks to vindicate and relate[s] the injury to the class of persons entitled to bring suit."[6] Because the Clean Air Act authorizes judicial review in this type of case, the Court reasoned, petitioners did not need to meet "the normal standards for redressability and immediacy." [7]

Because only one petitioner needs to satisfy the requirement of standing, the Supreme Court limits its analysis to the named petitioner, the Commonwealth of Massachusetts. The Court states that, as a sovereign state, Massachusetts is differently situated from a private litigant in terms of standing and has an "independent interest" in seeking to protect its territory.[8] In addition, because Massachusetts is a sovereign seeking to vindicate a congressionally authorized procedural right, the Court concludes that it should grant the state "special solicitude" in its analysis of standing.[9]

After providing this context, the Court proceeds to conduct a seemingly traditional, three-prong standing analysis. The Court concludes that, based Massachusetts's uncontested allegations, the state has a particularized injury, "in its capacity as a landowner," because of current and potential losses to state owned coastal property from sea level rise.[10] The Court concludes that the causation requirement is satisfied because motor vehicle emissions are a meaningful amount of human-emitted greenhouse gases and EPA does not dispute that such gases lead to global warming and sea level rise.[11] Finally, the Court finds that if EPA promulgates regulations as petitioners have requested, the rate of global warming would "slow," thus redressing plaintiffs' injuries.[12]

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[4] *Id.* at 1447.
[5] 504 U.S. 555 (1992) (Kennedy, J., concurring in part and concurring in the judgment).
[6] 127 S. Ct. at 1453 (quoting Justice Kennedy's *Lujan* concurrence).
[7] *Id.* (quoting Justice Kennedy's *Lujan* concurrence).
[8] *Id.* at 1454.
[9] *Id.* at 1454-55.
[10] *Id.* at 1455-1456.
[11] *Id.* at 1457-58.
[12] *Id.* at 1458.

In his dissent, Chief Justice Roberts objects to each component of the majority's standing analysis, accusing the Court of creating a "novel standing rule."[13] The Chief Justice would have found that states are owed no special consideration.[14] He also would have relied on an argument from Judge Sentelle's opinion in the D.C. Circuit that global warming creates no individualized harm because it "is a phenomenon 'harmful to humanity at large.'"[15] In the Chief's view, Massachusetts' alleged future loss of territory also lacks sufficient immediacy to satisfy the injury requirement.[16] The Chief Justice also opines that petitioners cannot satisfy causation and redressability because the possible emissions reductions at stake in this litigation play a "bit-part" in causing the "150-year global phenomenon" of global warming, and any benefit from the regulation of new, domestic motor vehicles is purely conjectural.[17]

Implications of the Court's Standing Analysis

The Court's standing analysis in *Massachusetts v. EPA* will likely shape many future global warming cases, with litigants seeking to vindicate environmental interests relying on it to demonstrate that they have standing.

The Court's "special solicitude" to states suggests that, after *Massachusetts v. EPA*, lower courts are particularly likely to find that states have standing to pursue global warming cases. This may encourage states to more actively engage in such litigation.

Parties bringing suits under citizen suit provisions will also clearly benefit from *Massachusetts v. EPA*. Because the opinion embraces Justice Kennedy's statement in his *Lujan* concurrence that Congress can soften standing requirements, parties invoking the citizen suit provisions contained in a host of environmental and administrative laws will likely have an easier time establishing standing.

The opinion may have a more ambiguous effect on other private litigants pursuing global warming cases, such as those involved in a class-action nuisance suit against the oil industry.[18] The dissent suggests that the majority's opinion contains an "implicit concession that petitioners cannot establish standing on traditional terms,"[19] and defendants are likely to invoke this language in challenging standing in other global warming suits. However, in conducting its analysis of injury, causation, and redressability, the majority never indicates how either its "special solicitude" to the states, or Congress's explicit creation of a procedural remedy, impacts its analysis. Private litigants will argue that the majority's traditional standing analysis, examining in detail each of the three standing factors, should apply with equal force to any party that has a concrete interest threatened by global warming.

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[13] *Id.* at 1465 (Roberts, C.J., dissenting).
[14] *Id.* at 1464-65 (Roberts, C.J., dissenting)
[15] *Id.* at 1467 (Roberts, C.J., dissenting) (quoting Massachusetts v. EPA, 415 F.3d, 50, 60 (Sentelle, J., dissenting in part and concurring in the judgment (2005)).
[16] *Id.*
[17] *Id.* at 1469-1470.
[18] Comer v. Murphy Oil, 2006 WL 1066645 (S.D. Miss. 2006).
[19] 127 S. Ct. at 1466 (Roberts, C.J., dissenting).

In these ways, *Massachusetts v. EPA* is likely to profoundly impact most future global warming litigation. However, the opinion's standing analysis is unlikely to affect challenges brought by industry groups claiming that state regulation is preempted. Standing has never been an issue in these cases because the industry has a direct financial stake in the rules that govern its activities.

THE CLEAN AIR ACT GRANTS EPA AUTHORITY

The Court finds that the text of the Clean Air Act is "unambiguous" and covers greenhouse gas emissions from motor vehicles because they are chemicals emitted into the ambient air.[20] While the Clean Air Act may not have specifically targeted global warming, the Court suggests that Congress "understood that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete."[21]

In resolving this issue, the majority rejects an argument made by EPA that, under *FDA v. Brown & Williamson Tobacco Corp.*,[22] Congress must speak with particular clarity to authorize regulatory action that could have broad economic consequences. The majority notes that *Brown & Williamson* was based on tobacco regulation's "unique political history" and concludes that this case is irrelevant to its interpretation of the Clean Air Act.[23]

The Court also concludes that EPA's authority to regulate greenhouse gas emissions, even if likely to take the form of a fuel efficiency standard, does not conflict with the Corporate Average Fuel Efficiency (CAFE) regime. The Court states, "[t]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's 'health' and 'welfare' . . . a statutory obligation wholly independent of DOT's mandate to promote energy efficiency."[24]

Unlike the majority, Justice Scalia would have found that the Clean Air Act is ambiguous as to whether it covers greenhouse gases, and would have deferred to EPA's interpretation of the statute.

Implications of the Court's Authority Analysis

The Supreme Court's analysis of EPA's authority will impact a range of global warming cases.

First, the opinion has dramatic implications for *Coke Oven Environmental Taskforce v. EPA*,[25] a case before the D.C. Circuit that was stayed pending the resolution of *Massachusetts v. EPA*. In *Coke Oven*, petitioners challenge a decision by EPA to deny their petition for a rulemaking to regulate greenhouse gas emissions from certain utilities and industrial power plants under Title I of the Clean Air Act. The agency justified its decision on the ground that it lacked authority over greenhouse gases under the Clean Air Act. Now that the Supreme Court has rejected this

[20] *Id.* at 1459-60.
[21] *Id.* at 1462.
[22] 529 U.S. 120 (2000).
[23] 127 S. Ct. 1450.
[24] *Id.* at 1462.
[25] No. 06-1131 (D.C. Cir. filed Apr. 7, 2006).

interpretation of the Clean Air Act, it is likely that the D.C. Circuit will require the agency to reconsider its decision.

Second, *Massachusetts v. EPA* will have several impacts on preemption challenges filed by the motor vehicle industry in California,[26] Vermont,[27] and Rhode Island.[28] These cases involve a California regulatory scheme for motor vehicle emissions of greenhouse gases; Vermont, Rhode Island, and several other states have adopted the California regulations. The industry has alleged that the regulations are preempted by the Clean Air Act, Energy Policy and Conservation Act (EPCA),[29] and the foreign affairs power of the President.

The states acknowledge that they cannot enforce the regulations unless EPA grants California a waiver of the Clean Air Act's preemption provisions. While California has sought such a waiver, EPA has, to date, declined to respond. The Supreme Court's clarification of EPA's Clean Air Act authority in *Massachusetts v. EPA* may prompt the agency to respond to California's waiver application. If waiver is granted, the other preemption issues will clearly be ripe for judicial resolution.

The district courts considering these lawsuits may also look to *Massachusetts v. EPA* on how to resolve the claims. While the Supreme Court did not directly address the preemptive effect of EPCA, its focus on statutory purpose when reconciling EPCA and the Clean Air Act could serve as a guide for the lower courts. If the lower courts rely on similar reasoning, they are likely to uphold the California regulatory regime, which, like the Clean Air Act, is intended to protect the environment rather than conserve energy.

Massachusetts v. EPA may create an additional hurdle for plaintiffs in nuisance suits, which have currently been filed against power companies,[30] automobile manufacturers,[31] and the oil and gas industry.[32] Federal statutes, like the Clean Air Act, can displace the state and federal common law of nuisance. Defendants in these cases may argue that the fact that the Clean Air Act covers greenhouse gas emissions precludes any nuisance remedy.

EPA DID NOT PROPERLY EXERCISE ITS DISCRETION

The Supreme Court rejects EPA's argument that, even if it had authority to regulate greenhouse gases, it properly declined to do so based on 1) concerns over piecemeal regulation, 2) foreign affairs considerations, 3) scientific uncertainty, and 4) a preference for alternative policy options. In the Court's view, "once EPA has responded to a petition for rulemaking, its reasons for action or inaction must conform to the authorizing statute."[33] This is presumably what distinguishes

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[26] Central Valley Chrysler-Jeep v. Witherspoon, 2006 WL 2734359 (E.D. Cal. 2006).
[27] Green Mountain Chrysler-Plymouth-Dodge v. Torti, No. 2:05CV00302 (D.V.T. filed Nov. 18, 2005).
[28] Lincoln Dodge, Inc. v. Sullivan, No. 1:06CV00070 (D.R.I. filed Feb. 13, 2006).
[29] 49 U.S.C. § 32919 (1994).
[30] Connecticut v. American Electric Power, 406 F.Supp.2d 265 (S.D.N.Y. 2005) (currently on appeal before the Second Circuit).
[31] California v. General Motors Corp., No. 3:06CV05755 (N.D. Cal. filed Sept. 20, 2006).
[32] Comer v. Murphy Oil, 2006 WL 1066645 (S.D. Miss. 2006).
[33] 127 S. Ct. at 1463.

Massachusetts v. EPA from other situations where the Supreme Court has refused to second guess agencies when they fail to act.[34]

In the majority's view, the Clean Air Act only authorizes EPA, in responding to the rulemaking petition at issue, to determine whether greenhouse gas emissions from motor vehicles are reasonably likely to endanger human health and welfare. The Court concludes that, of the issues EPA raises, only scientific uncertainty is germane to this inquiry. However, in the majority's view, EPA misapplied even this factor because it merely stated that it "would prefer not to regulate greenhouse gases because of some residual uncertainty" rather than indicating that it lacked sufficient information to make a judgment about endangerment.[35] Because EPA considered impermissible factors, and did not tie scientific uncertainty to the statutory criteria, its decision not to regulate was arbitrary and capricious.

Justice Scalia, on the other hand, would have allowed the agency to consider all of the issues it mentions in determining whether it would proceed with regulating greenhouse gases. In his view, policy considerations can be relied upon when an agency declines to act upon a rulemaking petition.[36]

Implications for the Court's Discretion Analysis

The Court's determination that EPA must exclusively consider statutory factors when responding to a rulemaking petition may have implications for other administrative law cases based on similar petitions. However, the courts are not currently confronted with an analogous situation in the global warming context.

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[34] *See, e.g.*, Norton v. Southern Utah Wilderness Alliance (SUWA), 200 U.S. 321 (2004). Neither the majority or dissent in *Massachusetts v. EPA* directly address the relationship between a failure to act claim and a denial of a petition for a rulemaking.

[35] 127 S. Ct. at 1463.

[36] *Id.* at 1472 (Scalia, J., dissenting)