No. 05-1120

In the Supreme Court of the United States

COMMONWEALTH OF MASSACHUSETTS, *et al.*

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,

Respondent.

On Petition For A Writ of Certiorari To The United States Court of Appeals For The District of Columbia Circuit

BRIEF IN OPPOSITION FOR THE RESPONDENT STATES OF MICHIGAN, TEXAS, IDAHO, NORTH DAKOTA, UTAH, SOUTH DAKOTA, ALASKA, KANSAS, NEBRASKA, AND OHIO

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QUESTION PRESENTED

The State Respondents intervened below in support of the United States Environmental Protection Agency ("EPA"). The arguments the State Respondents presented to the Court of Appeals were tailored to their interests and were intended only to supplement EPA's arguments.

The issue the State Respondents addressed before the Court of Appeals was whether EPA lacks the authority under the Clean Air Act ("CAA" or "Act") to regulate the emission of carbon dioxide and other greenhouse gases to address global climate change. The question presented by the State Respondents to this Court is whether the Petition for a Writ of Certiorari should be denied for two independent reasons: (1) the Court of Appeals correctly dismissed the petitions for review given the fact that EPA lacks such authority, and (2) the Court of Appeals' decision is not binding precedent.

PARTIES TO THE PROCEEDING

Petitioners, who were petitioners in the United States Court of Appeals for the District of Columbia Circuit, are the Commonwealth of Massachusetts, the states of California, Connecticut, Illinois, Maine, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Washington, the District of Columbia, American Samoa Government, New York City, Mayor and City Council of Baltimore, Center for Biological Diversity, Center for Food Safety, Conservation Law Foundation, Environmental Advocates, Environmental Defense, Friends of the Earth, Greenpeace, International Center for Technology Assessment, National Environmental Trust, Natural Resources Defense Council, Sierra Club, Union of Concerned Scientists, and U.S. Public Interest Research Group.

Respondents are EPA (the respondent below); the Alliance of Automobile Manufacturers; National Automobile Dealers Association; Engine Manufacturers Association; Truck Manufacturers Association; CO_2 Litigation Group; Utility Air Regulatory Group; and the States of Michigan, Texas, Idaho, North Dakota, Utah, South Dakota, Alaska, Kansas, Nebraska, and Ohio (collectively, the "State Respondents"). All of the Respondents other than EPA were intervenors below.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes

Regulations

OPINIONS BELOW

The decision of the Court of Appeals is reported at 415 F.3d 50 (D.C. Cir. 2005) and is reproduced in the Petitioners' Appendix (Pet. App. 1-58). The Court of Appeals' order denying Petitioners' petition for rehearing *en banc* is reported at 433 F.3d 66 (D.C. Cir. 2005) and is reproduced in the Petitioners' Appendix (Pet. App. 94-97).

JURISDICTION

The judgment of the Court of Appeals was entered on August 15, 2005. The Court of Appeals' order denying the petition for rehearing *en banc* was entered on December 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved in the case are Sections 108(a), 109(a) and (b), 110(a), and 202(a)(1) of the Act.[1] The pertinent statutory text is set out in the State Respondents' Appendix (State Resp. App. 1b – 14b).

STATEMENT

Petitioners challenge the denial by EPA of a petition for rulemaking that sought the regulation of emissions of carbon dioxide ("CO_2") and other greenhouse gases from new motor vehicles and engines under Section 202 of the CAA, 42 U.S.C. § 7521.

EPA's denial of the petition was based on the agency's position that the CAA "does not authorize EPA to regulate for global climate change purposes[.]"[2] EPA therefore determined

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[1] 42 U.S.C. §§ 7408(a), 7409(a) and (b), 7410(a), 7521(a)(1).

[2] 68 Fed. Reg. 52,922; 52,925 (Sept. 8, 2003).

that CO_2 and other greenhouse gases cannot be considered "air pollutants" subject to the CAA's regulatory provisions for any contribution they may make to global climate change.[3] EPA also concluded that even if it did have such authority, it would not exercise it at this time because of uncertainties about the causes and effects of climate change and additional policy considerations.[4]

Petitioners filed petitions for review in the U.S. Court of Appeals for the District of Columbia Circuit challenging EPA's denial of their petition for rulemaking. The three-member panel issued three separate opinions. Two of the opinions (the lead opinion by Judge Randolph and an opinion concurring in the judgment by Judge Sentelle) concluded that the petitions for review should be denied, but for different reasons. Importantly, none of the opinions commanded a majority of the panel members. The panel's decision therefore has no binding precedential effect.

1. Statutory Framework

The Act, 42 U.S.C. §§ 7401-7671q, establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution."[5] Under the Act, EPA establishes national ambient air quality standards ("NAAQS") for certain air pollutants, and states must then develop state implementation plans to implement, maintain and enforce the NAAQS.[6]

More specifically, Section 108(a) directs EPA to create a list of air pollutants that "in the Administrator's judgment, cause or

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[3] *Id.*

[4] *Id.*, at 52,929-33.

[5] *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

[6] *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64-65 (1975).

contribute to air pollution which may reasonably be anticipated to endanger public health or welfare[.]"[7] Section 109 of the Act directs EPA to promulgate NAAQS to protect against adverse health and welfare effects for each pollutant identified under Section 108.[8]

States have "primary responsibility" for assuring that air quality within their borders meets the national standards.[9] States satisfy this burden by submitting to EPA state implementation plans ("SIPs") that provide for the attainment of the NAAQS.[10] SIPs must include enforceable emissions limitations for air pollution sources within a state and other control measures that are "necessary or appropriate" to meet the NAAQS, as well as a program for enforcing such measures.[11]

Taken together, Sections 109 and 110 are the cornerstone for much of the Act. As this Court has observed, EPA's setting of the NAAQS under Section 109(b) is "the engine that drives nearly all of Title I of the CAA[.]"[12] Similarly, the states' development of SIPs under Section 110 is "one of the key provisions of the Act."[13]

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[7] 42 U.S.C. § 7408(a)(1).

[8] 42 U.S.C. § 7409(a) and (b).

[9] 42 U.S.C. § 7407(a).

[10] 42 U.S.C. § 7410(a).

[11] 42 U.S.C. § 7410(a)(2)(A).

[12] *Whitman v. American Trucking Ass'n, Inc.*, 531 U.S. 457, 468 (2001). Title I of the Act, 42 U.S.C. §§ 7401-7515, includes provisions regarding standards of performance for new stationary sources, regulation of hazardous air pollutants, preventing the significant deterioration of air quality in attainment areas, and improving air quality in nonattainment areas. 42 U.S.C. §§ 7411, 7412, 7470-92, 7501-15.

[13] *Virginia v. EPA*, 108 F.3d 1397, 1406 (D.C. Cir. 1997).

The states achieve the NAAQS "chiefly by regulating stationary sources, such as factories and power plants" through their SIPs.[14] In contrast to the states control over stationary sources, regulation of motor vehicle emissions is primarily a federal responsibility. Only the United States and California can establish emission standards for new motor vehicles and new motor vehicle engines.[15]

Although much air pollution is a local or regional problem, some pollution that results in the nonattainment of a NAAQS "is caused or augmented by emissions" from sources beyond a state's borders.[16] The CAA contains certain provisions to address emissions from 'upwind' states that pollute 'downwind' states.

For example, Section 110 requires a state's SIP to contain provisions to prohibit emissions within the state which "contribute significantly" to another state's nonattainment of a NAAQS.[17] Under Section 126, a downwind state can petition EPA to regulate upwind sources of air pollution that contribute significantly to a downwind state's nonattainment.[18] In addition, a state can sue an upwind source directly when the source is contributing to the downwind state's nonattainment of a NAAQS due to, among other things, the violation of an emission limitation.[19]

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[14] *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1078-79 (D.C. Cir. 1996).

[15] 42 U.S.C. §§ 7511(a), 7543(a) and (b); *see Engine Mfrs.*, 88 F.3d at 1079-80. The Act requires the states to implement, among other things, clean-fuel vehicles programs and motor vehicle inspection and maintenance programs in areas that have not attained the NAAQS. *See* 42 U.S.C. §§ 7511a(c)(3) and (4)(requiring such programs in "serious" nonattainment areas). The "thrust of state compliance efforts" is, however, reducing emissions from stationary sources. *Engine Mfrs.*, 88 F.3d at 1080.

[16] *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1037 (D.C. Cir. 2001).

[17] 42 U.S.C. § 7410(a)(2)(D)(i)(I).

[18] 42 U.S.C. § 7426(b).

[19] 42 U.S.C. § 7604(a).

The Act, however, does not contain *any* provision for states to reduce air pollution from sources outside of the United States. Therefore, if international sources of air pollution are contributing to a state's inability to meet a NAAQS, the states have no authority under the Act to limit emissions from such sources.

2. Proceedings before EPA

On October 20, 1999, Petitioner International Center for Technology Assessment and 18 other organizations filed a petition for rulemaking (the "ICTA Petition") asking EPA to regulate certain greenhouse gas emission for new motor vehicles and engines under Section 202(a)(1) of the CAA, 42 U.S.C. § 7521(a)(1). In particular, the petition sought the regulation of CO_2, methane, nitrous oxide and hydroflourocarbon emissions from new motor vehicles and engines.

Section 202(a)(1) of the Act states that EPA shall prescribe standards for emissions of air pollutants from new motor vehicles and engines that "in his judgment cause, or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare."[20] Petitioners claim that CO_2 and other greenhouse gases are air pollutants that contribute significantly to global climate change.[21]

On September 8, 2003, EPA denied the ICTA Petition. EPA concluded that the CAA "does not authorize EPA to regulate for global climate change purposes[.]"[22] The agency therefore determined that CO_2 and other greenhouse gases cannot be considered "air pollutants" subject to the Act's regulatory

[20] 42 U.S.C. § 7521(a)(1).

[21] 68 Fed. Reg. at 52,923.

[22] *Id.*, at 52,925.

provisions, including Sections 108 and 109, for any contribution they may make to global climate change.[23]

In reaching its conclusion, EPA analyzed the text and history of the CAA as well other congressional actions specifically addressing global climate change. EPA emphasized that "the NAAQS system – a key CAA regulatory mechanism – . . . . is fundamentally inadequate when it comes to a substance like CO_2, which is emitted globally and has relatively homogenous concentrations around the world."[24] EPA explained that "any CO_2 standard that might be established would in effect be a worldwide ambient air quality standard, not a national standard – the entire world would be either in compliance or out of compliance."[25] This situation "is inconsistent with a basic underlying premise of the CAA regime for implementation of a NAAQS – that actions taken by individual states and by EPA can generally bring all areas of the U.S. into attainment of a NAAQS."[26] The inadequacy of one of the Act's central regulatory provisions (the NAAQS system) to address global climate change reinforced EPA's conclusion that the CAA as a whole, including section 202, did not authorize the agency to regulate for global climate change purposes.

3. Proceedings before the U.S. Court of Appeals for the District of Columbia Circuit

The Court of Appeals dismissed the petitions for review. It did not, however, address the question of whether EPA has the authority under the Act to regulate greenhouse gas emissions to address global climate change. Instead, Judge Randolph, who authored the lead opinion and whose views were not shared by

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[23] *Id.*, at 52,925; 52,928.

[24] *Id.*, at 52,927.

[25] *Id.*

[26] *Id.*

any of the other panel members, assumed *arguendo* that EPA had such authority. *Massachusetts v. EPA*, 415 F.3d 50, 56 (D.C. Cir. 2005). He determined that the agency correctly exercised its discretion in concluding that regulation of greenhouse gas emissions from motor vehicles was not warranted. According to Judge Randolph, the agency's judgment was properly based on, among other things, the "scientific uncertainty about the causal effects of greenhouse gases on the future climate of the earth" and policy considerations that supported EPA's judgment not to regulate at this time. *Id*., at 58.

Judge Sentelle concurred in the judgment dismissing the petitions for review. He concluded that Petitioners lacked standing because their "claimed injury is common to all members of the public" and is "the sort of general harm" that is insufficient to present a justiciable controversy under Article III of the Constitution. *Id*., at 60. Judge Sentelle did not address the questions of whether EPA has the authority to regulate greenhouse gas emissions or whether EPA properly exercised its discretion in deciding not to regulate.

Judge Tatel dissented. He concluded that at least one Petitioner had standing, that EPA had the authority to regulate greenhouse gas emissions under Section 202 of the Act, and that EPA had not adequately explained its refusal to regulate at this time.

The panel denied a petition for hearing. On December 2, 2005, the panel denied a petition for rehearing *en banc*. (Pet. App. 94-97).

REASONS FOR DENYING THE PETITION

The judgment of the Court of Appeals is correct, and does not present an important federal question because it has no binding precedential effect.

A. The Court of Appeals correctly dismissed the petitions for review because the Act does not authorize EPA to regulate greenhouse gas emissions for purposes of global climate change.

EPA's determination that the CAA does not provide the agency with the authority to regulate greenhouse gases to address global climate change was based, in part, upon the text and structure of the Act as a whole. Among the Act's provisions that EPA analyzed was "a key CAA regulatory mechanism" – the NAAQS system.[27]

A large percentage of worldwide CO_2 emissions comes from outside of the United States.[28] Concentrations of CO_2 in the atmosphere are relatively homogenous throughout the world. A NAAQS for CO_2 therefore "could not be attained by any area of the U.S. until such a standard were attained by the entire world as a result of emissions controls implemented in countries around the world."[29]

Nothing in the Act, however, gives states the authority to control CO_2 emissions from sources outside of the United States. States can limit emissions from sources within their borders

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[27] 68 Fed. Reg. at 52,927. Although it is instructive to analyze the NAAQS system and Section 108, the State Respondents note that Petitioners seek regulation of greenhouse gas emissions only from new motor vehicles and engines under Section 202. Indeed, the factors to be considered in determining whether EPA has the authority to regulate greenhouse gases under Section 202 are not the same as those under Section 108.

[28] *Id*. at 52,925-29.

[29] *Id.*

through their SIPs. They can also petition EPA under section 126 to address air pollution sources in upwind states that contribute significantly to their nonattainment of a NAAQS, and they can use the citizen suit provision in the Act to sue such sources directly.[30] The Act, however, does not authorize states to limit air pollution from sources outside of the country.

Given the global nature of CO_2 emissions, its homogenous concentrations around the world, and the lack of authority for states to limit international sources of emissions, it would be impossible for states to attain a NAAQS for CO_2 by merely reducing emissions within their borders. As EPA noted, "the NAAQS system is fundamentally inadequate when it comes to a substance like CO_2, which is emitted globally and has relatively homogenous concentrations around the world."[31] An air quality standard for CO_2 would place states in the unworkable situation of having to attain that standard, but lacking the means to achieve it. Such an implausible and futile scenario establishes that Congress did not intend the NAAQS system to authorize regulation of CO_2 to address global climate change.[32]

Moreover, the failure of the NAAQS system– a regulatory provision central to the Act – to address global climate change demonstrates that the whole Act, including Section 202(a)(1), does not authorize regulation for global climate change purposes. Any suggestion that the Act authorizes regulation of greenhouse gases under Section 202(a)(1) but not under the NAAQS system ignores the principal that statutory interpretation requires an examination of not just a single sentence, but "the language and design of the statute as a whole."[33] It also ignores the fact that the

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[30] 42 U.S.C. §§ 7426(b), 7604(a).

[31] 68 Fed. Reg. at 52,927.

[32] *See Food and Drug Admin. v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120, 141 (2000) (rejecting statutory interpretation that would result in an implausible regulatory scheme).

[33] *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988).

NAAQS system is "the engine that drives nearly all of Title I of the CAA[,]" which contains the majority of the statute's provisions.[34] The impossibility of states achieving a NAAQS for CO_2 demonstrates that the entire Act, including Section 202, does not authorize regulation of greenhouse gases for purposes of global climate change. The Court of Appeals therefore correctly dismissed the petitions for review.

B. The judgment of the Court of Appeals does not have any binding precedential effect.

Among Petitioners' arguments for a writ of certiorari is that the D.C. Circuit departed from this Court's precedents on statutory interpretation. Petitioners further assert that the alleged error is compounded by the fact that the D.C. Circuit is the "premier intermediate court for adjudicating issues of agency power and statutory interpretation." Petition for Writ of Certiorari, at 4.

Petitioners, however, fail to acknowledge that the judgment of the Court of Appeals has no binding precedential effect as to principles of statutory interpretation. Judge Randolph's lead opinion was his alone. Judge Sentelle concurred in the judgment but never addressed the issue of statutory interpretation. Instead, he determined that the petitions for review should be dismissed because none of the Petitioners demonstrated they have standing. Judge Tatel, writing in dissent, disagreed with both Judges Randolph and Sentelle.

The judgment of the Court of Appeals therefore is not binding precedent because none of the opinions commanded a majority of the panel.[35] Any purported error in the lead opinion

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[34] *Whitman*, 531 U.S. at 468.

[35] *See Texas v. Brown*, 460 U.S. 730, 737 (1983)(plurality view that does not command majority is not binding precedent); *Hertz v. Woodman*, 218 U.S. 205, 213-14 (1910)("[T]he principles of law involved not having been agreed upon by a majority of the court sitting prevents the case from becoming an authority for the determination of other cases[.]").

concerning statutory interpretation is not an "authoritative determination" for subsequent cases before the D.C. Circuit or other courts.[36] Moreover, the D.C. Circuit correctly dismissed the petitions for review because, as discussed previously, the Act does not authorize the regulation of greenhouse gases for the purpose of addressing global climate change.

[36] *United States v. Pink*, 315 U.S. 203, 216 (1942)("While it was conclusive and binding upon the parties as respect that controversy, the lack of an agreement by a majority of the Court on the principles of law involved prevents it from being an authoritative determination for other cases.")(citation omitted).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

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