This morning, the Supreme Court announced that it has granted six of the nine petitions challenging the D.C. Circuit Court of Appeals ruling upholding the Environmental Protection Agency's rules regulating greenhouse gases under the Clean Air Act. The Court granted cert on only a single question (petitioners had raised a number of them):

> Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

On the good news front, that means the Supreme Court has let stand some important portions of the lower court ruling, including EPA's finding that greenhouse gases endanger public health and welfare (a finding necessary to support regulation under the Clean Air Act). The lower court also upheld standards regulating emissions from automobiles; that portion of the ruling also remains in tact.

In order to understand the granting of cert, it's worth repeating again the history of what led to the EPA regulations.

First, the Court's decision in *Massachusetts v. EPA* directed the Environmental Protection Agency to decide whether greenhouse gases are pollutants that must be regulated under the federal Clean Air Act. EPA then found that greenhouse gases endanger public health and welfare. The endangerment finding was upheld by the D.C. Circuit and the Supreme Court let stand that portion of the D.C. Circuit's opinion.

EPA's next decision was to issue sthe "tailpipe rule." The tailpipe rule establishes greenhouse gas emissions standards for automobiles under Section 202 of the Clean Air Act. The lower court held that the Clean Air Act required the EPA to regulate greenhouse gas tailpipe emissions – the agency had no choice under the language of the statute. The tailpipe rules, too, remain untouched.

The third and fourth rules are what will be at issue before the Supreme Court. Those rules are known as the "timing" and "tailoring" rules. These rules together work roughly as follows: under EPA's view, the regulation of greenhouse gases for automobiles automatically triggers a different section of the Clean Air Act, what is known as the prevention of significant deterioration section (PSD). That section basically requires the EPA to regulate the emissions of any "major" source of a regulated pollutant. "Major" is defined in the Clean Air Act to regulate any source that emits 100 tons per year of a regulated pollutant.

The problem for the EPA is that the 100 tons per year amount would subject very, very small sources (a single home, perhaps, certainly apartment buildings and small businesses) to the permitting provisions of the Clean Air Act, something that those small sources have never had to comply with and that would be extremely expensive and administratively burdensome. So in the "tailoring" rule, the EPA only subjected large sources — new sources emitting 100,000 tons per year or more and existing sources making modifications that would increase emissions by 75,000 tons per year or more — to its greenhouse gas rules. Industry challenged both the application of the Clean Air Act to stationary sources and the tailoring rule as an impermissive interpretation of the Clean Air Act. The lower court found that the EPA is legally justified — indeed required — to regulate greenhouse gas emissions from stationary sources under the PSD provisions of the act. The Supreme Court will decide whether that ruling — that the PSD provisions must be used to regulate greenhouse gases — is correct.

Industry and state petitioners argued below that the PSD provisions do not apply to greenhouse gas emissions. Their central argument is that the PSD provisions only apply to pollutants that are also regulated under a different provision of the CAA, the National Ambient Air Quality Standards (NAAQS). The NAAQS provisions are what EPA has used to regulate conventional pollutants like ozone, lead and carbon monoxide. Once EPA regulates a pollutant under the NAAQS provision, a complex series of regulatory requirements kicks in. States must issue plans to specify either how they are and will remain in compliance with each NAAQS or how they will come into attainment with the standard. New, stationary sources (like electric power plants, oil refineries and large industrial facilities) in those states that are already in attainment are regulated under the PSD provisions that EPA is also using to regulate new stationary sources of greenhouse gases. As I just described, the provisions require permits for new stationary sources of pollutants.

EPA's view is that the PSD provisions are not limited only to the NAAQS pollutants. Instead, the agency believes that once it has regulated any air pollutant under any other section of the Act it must use the PSD provisions to require states to regulate the same pollutant by requiring permits for new major sources. The Court of Appeals below found that EPA's view is not only reasonable but required by the language in the PSD portion of the statute that says the following:

> the proposed [new] facility is subject to the best available control technology *for each pollutant subject to regulation under this chapter* emitted from, or which results from, such facility

Because greenhouse gases are subject to regulation under the tailpipe rule (see above), EPA concluded that new facilities emitting greenhouse gases must be subject to the best available control technology to control their emissions.

The counterargument to EPA's position is a complex one that relies not on the plain language I just cited, but instead on whether the structure of the statute means that the PSD provisions should be limited only to NAAQS pollutants. The basic idea is that PSD is all about maintaining compliance with the NAAQS; put in plainer language, it's about making states ensure that once they've met the standards for, say, ozone pollution, they don't then authorize the construction of a bunch of new plants that will raise levels of ozone pollution high enough to kick the state out of compliance with the air standard for ozone. This argument suggests that it just doesn't make sense to apply PSD provisions — designed to maintain compliance with the NAAQS — to pollutants that aren't regulated under the NAAQS provisions.

In my view, there are at least two significant problems with the industry position. The most obvious one is the plain language of the statute saying that best available control technologies must be used *for each pollutant subject to regulation under this chapter*. The plain language ought to pose significant problems to Justices like Scalia, Thomas and Roberts, who view themselves as faithful to a textualist approach to statutory interpretation.

The second one is that even if there is some ambiguity about whether the language applies to pollutants other that the NAAQS pollutants, EPA has issued a regulation interpreting the statute to apply to non-NAAQS pollutants. Under Supreme Court doctrine, EPA's interpretation of the statute is entitled to significant deference by the Court. As long as the agency's interpretation is reasonable, the Court should uphold it.

But even in the face of these counterarguments, which I believe are strong, four Justices voted to grant the petition to review the question. We will know by next spring who's right.