Although *King v. Burwell* (the Affordable Care Act case) and *Obergefell v. Hodges* (the same sex marriage case) are garnering more attention, sometime between tomorrow and Monday the Supreme Court will also hand down its decision in *Michigan v. EPA*. In the *Michigan* case, the Court will decide whether EPA's Clean Air Act rules to regulate hazardous air pollutants from power plants are valid. Observers are speculating that EPA will lose the case because Justice Scalia is the only Justice who has not written a majority opinion in any of the cases argued in March. Apparently court tradition suggests that he will therefore write the opinion in the *Michigan* case and, not surprisingly, he displayed little sympathy with EPA during oral argument.

The question in *Michigan v. EPA* is relatively straightforward: did EPA, in deciding to regulate toxics from power plants, inappropriately refuse to consider costs at the time it decided to regulate rather than at the time it actually decided what the regulations would be? Or as one commentator put the question, "when, in pursuing its sweeping anti-pollution goal for power plants, must [EPA] take their costs of compliance into account?"

The issue in front of the Court in *Michigan v. EPA* is hugely important. It involves the regulation of toxic chemicals emitted by the nation's hundreds of coal and oil fired power plants. One astonishing fact about the regulations is that these are the first regulations EPA has ever issued under Section 112 to regulate mercury, arsenic, heavy metals and other chemicals belched out by coal and oil-fired power plants. This is true even though EPA was

supposed to begin regulating Hazardous Air Pollutants (HAPS, as they're known) after the passage of the modern Clean Air Act in 1970. When EPA failed to list and regulate a sufficient number of toxic chemicals, Congress stepped in in 1990 and simply listed the toxics that needed regulating. The 1990 amendments also ordered EPA to issue a study of whether and how to regulate toxic emissions from electric generating units (power plants). The study, which was supposed to be issued by November 15, 1993, was then supposed to be used by the EPA administrator to "regulate electric utility steam generating units under this section [Section 112], if the Administrator finds such regulation is appropriate and necessary after considering the results of the study…."

The study was not released until 1998, 5 years after it was due. In 2000, based on the study, EPA concluded that it was "appropriate and necessary" to regulate toxic emissions from power plants. In 2005, EPA under President George W. Bush reversed the "appropriate and necessary finding," a decision then vacated by the U.S. Court of Appeal for the D.C. Circuit. The Obama Administration, in 2011, confirmed the 2000 "appropriate and necessary" finding. It then issued the regulations at issue in the *Michigan* case, known as the MATS rule (for Mercury and Air Toxics). Thus 41 years after the passage of the Clean Air Act and 21 years after the 1990 amendments EPA issued rules governing toxic emissions from power plants.

The MATS rule applies to the country's large fleet of coal and oil fired power plants. The dirtiest plants tend to be the oldest ones and a huge percentage of the country's power plants — more than 50% — were built *before the Clean Air Act passed in 1970.* Some of the fleet is more than 80 years old. About 40 percent of coal and oil fired plants have no advanced emissions controls. The rules regulate a number of toxic pollutants emitted by these power plants, including mercury, arsenic, benzene, and hydrochloric acid. Power plants are the largest stationary emitters of mercury, arsenic and hydrochloric acid in the country. They emit 84 hazardous air pollutants that, according to EPA, pose a threat to human health and the environment. Mercury is a particularly heinous example: it causes birth defects from in utero exposure and wreaks havoc on the brain, kidneys, nervous system and liver. The regulations would cut mercury emissions by about 90 percent. EPA estimates that the rule would prevent 11,000 premature deaths and protect against IQ loss in children.

Not surprisingly, opponents of the MATS rule argue that it is too expensive. Their legal argument is based on the language above that requires EPA to "regulate electric utility steam generating units … if the Administrator finds such regulation is appropriate and necessary after considering the results of the study…." They argue that EPA, in deciding whether to regulate toxics from power plants, was required to consider the costs of such

regulation when determining whether regulating is "appropriate and necessary." EPA, by contrast, is arguing that it did not need to consider costs in deciding *whether* to regulate but only needed to take cost into account in deciding what the content of the regulations would be after it made the appropriate and necessary finding. If the Court rules against EPA, the argument will be that EPA's interpretation of the words "appropriate and necessary" was unreasonable in failing to consider costs. Dan has a discussion of the technical legal point being considered here. One point worth stressing is that a victory for industry in the *Michigan* case is hardly the end of toxics regulations. To the contrary, EPA is very likely simply to make a finding that toxics regulations for power plants are appropriate and necessary even after taking costs into account. After all, EPA has made clear that cost-effective technology exists to control emissions and, indeed, a large number of power plants have already installed it. So a victory for industry (and a number of states) would likely simply postpone the full implementation of the rule.

One additional point about Justice Scalia is worth making. Although he was apparently hostile at the oral argument in *Michigan*, he has upheld an earlier challenge to ambitious EPA regulations under the Clean Air Act that did not take into account cost. In *Whitman v. American Trucking,* the Court in an opinion written by Scalia held that EPA was prohibited from considering costs in setting air quality standards for ozone and particulate matter. Thus it is possible — though unlikely — that Scalia could write an opinion upholding EPA's MATS rules.

Finally, an obvious question that will follow from the Court's decision is what it will tell us about the fate of the Obama Administration's Clean Power Plan, issued under a different section of the Clean Air Act than the MATS rules. The Clean Power Plan is the centerpiece of the President's climate policy and requires ambitious reductions in greenhouse gases emitted by the electricity sector. My own view is that, as with many environmental cases, whatever the Court rules in *Michigan* is likely to tell us very little about the legality of the Clean Power Plan because the cases are so bound up with very specific and separate statutory provisions that contain different language and are thus subject to very different interpretation. In fact if EPA loses in the M*ichigan* case, it will be the first anti-environmental ruling in the four Clean Air Act cases that the Court has considered since 2007 when it decided the landmark *Massachusetts v. EPA*. Thus the three cases upholding aggressive environmental regulation under the Clean Air Act — *Mass v. EPA* (finding that greenhouse gases are pollutants under the Clean Air Act and ordering EPA to consider regulating them from cars); *Utility Air Regulatory Group v. EPA* (largely upholding the agency's rules governing emissions from new facilities); and *EPA v. EME Homer City Generation*,(upholding rules governing air pollution that crosses state borders) — will have

meant little in the outcome of the *Michigan* case. The Clean Power Plan will rise or fall based on statutory language included in a section of the Clean Air Act, Section 111d, that the Court simply hasn't considered before. *Michigan v. EPA,* in other words, will tell us very little about what the Court thinks Section 111d means in deciding whether the Clean Power Plan is legal.