Six months ago, the D.C. Circuit upheld EPA's finding that greenhouse gases endanger human health and welfare, triggering coverage under the Clean Air Act. Today, the full court denied rehearing to the three-judge panel's decision. There were only two dissents, which obviously were hoping to set the stage for a cert. petition to the Supreme Court. The dissents provide a preview of the kinds of arguments that will be made to the Supreme Court.

One key point is that neither dissent questioned the scientific basis for EPA's finding. It is clear that the climate skeptic positions advanced by the state of Texas have no traction even with very conservative judges.

The strongest arguments raised by the dissents involve a technical statutory issue. The case involves provisions of the Clean Air Act that apply to "any air pollutant." The dissent argues that this means "any criterion air pollutant" (meaning the six pollutants that are most extensively regulated by the statute." I discussed this issue extensively in a post about the original decision, so I won't go into the details here, but I think EPA's position on this issue is sound. It's notable than only two of the conservatives on the D.C. Circuit were willing to endorse the attack on the EPA's interpretation.

The dissenters also offer a hodgepodge of other arguments:

- Judge Brown offers a lengthy argument that the Supreme Court's decision in the *Massachusetts v. EPA* was wrong. She seems to have failed to notice that six Justices reaffirmed *Massachusetts v. EPA* in a later decision, *American Electric Power v. Connecticut.*
- Brown argues that industry had standing to challenge a part of EPA's rule (the "tailoring" rule) that benefitted them by exempting small emitters from coverage. Her argument is presented very confusingly, but it seems to be that if that part of the EPA rule were struck down, the result would be such an economic and regulatory disaster that Congress would be forced to jump in, and that it would then pass a law overturning *Massachusetts v. EPA*.
- Both dissenting judges rely heavily on arguments based on the allegedly unacceptable or momentous results produced by EPA's interpretation of the statute. These arguments portray this as an exceptional case that falls outside the normal rules of statutory interpretation. This "exceptionalism" arguments can sometimes work, as evidenced by the Obamacare case last year — but they face the additional obstacle in this case that the Supreme Court rejected similar arguments in *Massachusetts v. EPA.*

- The dissenters suggest that the link between greenhouse gases and human impacts may be too indirect to satisfy the Clean Air Act's requirement of reasonably anticipated harm. That's a very strained reading of the statutory language and also seems precluded by *Massachusetts v. EPA.*

Looking ahead to the Supreme Court, it's hard to see five votes to overrule *Massachusetts v. EPA,* especially since that decision was reaffirmed in *American Electric Power*. Judge Brown's standing argument also seems unlikely to get much support.

As I indicated in my earlier post, I think the statutory interpretation question is fairly debatable. But if the "tailoring rule" stands, the statutory interpretation argument has fairly limited significance — it affects only sources that emit very large amounts of greenhouse gas but *not* significant amounts of any of the criterion pollutants. Thus, the vast majority of sources that are now covered by the EPA rules would still be covered anyway. The statutory interpretation issue itself is complicated and has little broader significance outside of this case itself. So the odds seem good that the Supreme Court will refuse to hear the case, even though climate change is a high-profile issue.