Court watchers are still waiting to learn whether the U.S. Supreme Court will hear the second most important federal case involving greenhouse gas emissions, *Coalition for Responsible Regulation v. EPA.* The Court is closed today for a federal holiday (not because of the shutdown) but any day we should hear about whether it will take up the case involving a series of Clean Air Act (CAA) rules that regulate greenhouse gas emissions from big industrial plants, known under the CAA as stationary sources. EPA issued the rules after the Supreme Court ruled in its most important case involving greenhouse gases, *Massachusetts v. EPA,* that greenhouse gases are air pollutants under the CAA. We've explained previously that the D.C. Circuit Court of Appeals upheld the rules in a unanimous ruling last June. Now the Court has in front of it nine petitions for certiorari from various interest groups and states asking it to overturn the D.C. Circuit.

If the Court takes up the case, my bet — as I said last June — is that the big issue it will tackle is whether the business groups and states that challenged the rule had standing to do so. The issues of standing involves whether a party is properly in front of the Court to raise a claim. The party must show — under Article III of the Constitution — that it has been "injured" by the rules it is challenging. The D.C. Circuit in the *Responsible Regulation* case held that the businesses and states that challenged the rule had not been injured and therefore could not challenge a part of the rule known as the "tailoring" rule (for an explanation of the tailoring rule, *see here).* The tailoring rule exempts small, stationary sources from the greenhouse gas emissions rules even though the Clean Air Act seems, on its face, to cover those business. The court of appeals found that the businesses challenging the rule weren't injured by a rule that *exempts* small sources from regulation even if the larger businesses themselves will be subject to regulation. The State of Texas also challenged the rule, and the lower court denied it standing as well. Here's the explanation for why from my previous post on the standing portion of the case:

> Texas argued that the EPA should not regulate climate change at all under the Clean Air Act but that if the agency is going to regulate any stationary sources it should not exempt small sources from permitting requirements because such an exemption is inconsistent with the plain language of the CAA. The court found, however, that the exemption helps states like Texas, who will be involved in the administration of the permitting program, by lessening their administrative burden and therefore the state lacks standing to challenge the rule becasue the state isn't injured.

The Court decisions on standing rarely hold that regulated parties like the businesses that challenged the tailoring rule can't have their day in court. Instead, the standing decisions that throw parties out of court almost always involve environmental groups, not businesses. So the *Coalition for Responsible Regulation* case goes against the typical case.

It's also important to note that, by finding that business groups and states did not have standing to sue to invalidate the tailoring rule, the court of appeals avoiding deciding what is the most vulnerable part of EPA's series of greenhouse gas rules. EPA decided, smartly, that it couldn't (and didn't want to either politically or administratively) regulate greenhouse gases from every single business technically subject to the language of the CAA, which requires regulation for any "source" emitting 100 tons of a single pollutant. The problem 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. But the big question is whether EPA could do so lawfully when the statute says that sources emitting 100 tons per year or more must be regulated. EPA says the tailoring rule is only the first step in regulating more sources so that it isn't categorically exempting smaller sources. But whether it can do so is a big open legal question that the standing decision allowed the lower court to avoid. If the Supreme Court grants cert and finds that businesses have standing, then the big open legal question will have to be addressed.

It's also possible that the Supreme Court could take aim at another big question the greenhouse gas rules raise, and that is whether the statutory provision EPA used to regulate stationary sources, known as Prevention of Significant Deterioration, even applies to greenhouse gases. The argument is a complicated one but deals with whether the PSD provisions apply to all pollutants regulated under the CAA or only to those pollutants that are regulated as criteria pollutants under the National Ambient Air Quality Standards section of the Act. Greenhouse gases are not currently regulated as criteria pollutants. So if the Court were to find that the PSD provisions only apply to pollutants regulated under the NAAQS sections, then the tailoring rule would be invalid. The court of appeals rejected this argument,

agreeing with EPA that greenhouse gases should be subject to regulation under the PSD provisions. In my view the court of appeals got this portion of its opinion right and that the statutory language is pretty clear that greenhouse gases have to be regulated under the PSD provisions. But the Court could, obviously, disagree, or at least five members of it could.