

The Supreme Court will be hearing argument next week in *Utility Air Regulatory Group v. EPA*. It's basically a very simple statutory interpretation case, except for two things. First, it's about climate change, and nothing about climate change ever seems to be simple and straightforward. Second, although the language of the statute, prior Supreme Court precedent, and decades of administrative practice support EPA's position, there's a very awkward side-effect that EPA has struggled to resolve. That gives the agency's opponents a hook for their arguments.

The language of the statute could hardly be clearer, given that the Supreme Court has already held in two separate opinions (one of them 6-2), that the term "air pollutant" covers greenhouse gases. The provision at issue in the case covers any "major emitting facility", which is explicitly defined as any source emitting more than certain amounts of an "air pollutant." Such sources have to use best available technology to deal with "any air pollutant regulated under this chapter." That phrase includes the entire Clean Air Act, including provisions that the Supreme Court has already applied to greenhouse gases. So it seems obvious that greenhouse gases are fully covered by the provision.

In other contexts, the Supreme Court would never have bothered to review this case. But the issue does relate to climate change, and as I suggested earlier, there is an awkward consequence of EPA's interpretation. The statute defines major sources in terms of quantities that make sense of most pollutants but are a mismatch with carbon dioxide, so the result would be to cover a vast and unmanageable number of small facilities. EPA dealt with the problem by saying it would start with very large sources and gradually phase in smaller ones, but this was a creative approach that the Court may be reluctant to enforce.

However, the challengers have an awkwardness of their own. They directly challenged EPA's phase-in plan. The court of appeals held that they lacked standing to raise that challenge. The reason is that the phase-in rule is actually to their benefit, since otherwise even more sources would be covered. So now they are forced to make a backdoor argument to come up with a narrow interpretation of references to "any air pollutant" in this particular context.

It's conceivable that the challengers will win big, perhaps even getting the Court to overturn its previous climate change rulings. But that seems very unlikely. Their best chance is a ruling that a source has to be a major emitter of some conventional pollutant like SO<sub>2</sub> to be covered, but that once the source is covered in this way it also has to control greenhouse gases. That would be a setback for EPA, but not a disastrous one. As usual in the Supreme Court these days, the result may very well turn on Justice Kennedy's vote.

The advantage of EPA's interpretation is that it serves the core environmental purpose of the statute as well as possible under the circumstances. Time will tell how much weight that carries with the Supreme Court.