Credit: Wikipedia

This past week, the U.S. Supreme Court issued important orders in two closely-related environmental cases previously decided by the U.S. Court of Appeals for the District of Columbia. Last Friday the justices granted review in Diamond Alternative Energy v. Environmental Protection Agency, agreeing to decide whether fossil fuel manufacturers have legal standing to challenge an EPA decision under the federal Clean Air Act (CAA). On Monday, the Court denied review in a separate but related case, Ohio v. EPA, brought by a group of conservative/"red" states that challenge EPA's approval of California's request to adopt air pollution emission limits for motor vehicles more stringent than those issued nationally by EPA.

The Supreme Court's disparate actions in these two cases–both of critical interest to the State of California–provide a most interesting juxtaposition. That's because the two lawsuits arise out of the same EPA regulatory action, and constitute closely-coordinated legal challenges brought by fossil fuel producers and the coalition of red states against EPA.

Both lawsuits asked the federal courts to strike down EPA's approval of a "waiver" under section 209(b) of the Clean Air Act allowing California to adopt and enforce motor vehicle greenhouse gas (GHG) emission standards more stringent than those EPA itself sets for the rest of the nation. Both lawsuits were originally filed in the U.S. Court of Appeals for the District of Columbia, which consolidated and resolved them in a single opinion issued last April.

The D.C. Circuit ruled in favor of EPA and a coalition of intervening "blue" states led by the State of California. That court concluded that the fossil fuel company plaintiffs had failed to establish their legal authority (i.e., "standing") to bring their lawsuit. While the Court of Appeals found that the red state plaintiffs had standing

to challenge EPA's grant of the waiver to California–and by extension the constitutionality of Clean Air Act section 209(b)–the court rejected the red states' constitutional claim on its merits.

Both sets of plaintiffs sought Supreme Court review of the adverse D.C. Circuit decision. The justices acted on those petitions this past week.

This legal battle has both a long history and enormous implications for California's aggressive air pollution control and climate change policies. When Congress enacted the Clean Air Act in 1970, it recognized that California had already pioneered its own effective air pollution control programs for motor vehicles in the 1960's. So while section 209(a) of the CAA precludes the other 49 states from adopting their own auto emission standards for motor vehicles in favor of a uniform federal standard, Congress added section 209**(b)** that permits California to request–and EPA to grant–a "waiver" allowing California regulators to adopt auto emission standards more stringent than EPA's nationwide standards. This delegation of CAA authority proved so popular that in 1977 Congress amended the CAA to add a new section 177 allowing other states to "opt into" the more stringent California vehicular emission standards. Currently, sixteen other states and the District of Columbia have done just that; together with California, those jurisdictions account for over 40% of all automobiles and light trucks sold in the U.S.

The "California waiver" process worked smoothly and well for over 30 years. Both Democratic and Republican presidential administrations routinely granted over 100 California waiver requests during this period. It was not until: 1) California began to aggressively regulate GHG emissions from motor vehicles in 2004; the Supreme Court ruled in its landmark 2007 *Massachusetts v. EPA* decision that GHG is a "pollutant" subject to regulation under the CAA; and California sought EPA approval of its proposed limits on GHG from motor vehicles that the waiver process became controversial and politicized. Near the end of his term in office in 2008, President George W. Bush's EPA issued the first-ever rejection of a California waiver request sought under CAA section 209(b). That began a two-decade, back-and-forth pendulum swing between Republican presidents denying California's waiver requests to aggressively limit GHG emissions from motor vehicles sold in that state, and Democratic administrations reversing course and granting California's requested waivers.

In recent years, the issue of whether California should be able to regulate GHG emissions from motor vehicles has become one of the most contentious and

politicized aspects of CAA enforcement and climate change regulation. Hard political and legal battle lines have formed, with Democratic presidential administrations, California, other blue states and environmental interests on one side, and Republican administrations, red states and the fossil fuel industry on the other. (Significantly–and somewhat surprisingly–domestic and foreign automakers are almost evenly divided on the question of California's waiver authority.)

Which brings us back to the two cases on which the U.S. Supreme Court acted this week, the latest chapter in this longstanding legal and political saga.

For California, its blue state allies, the outgoing Biden administration and environmental interests, the Supreme Court's refusal to hear and decide the merits of the red states' constitutional challenge to California's CAA waiver authority in Ohio v. EPA is good news indeed. It means that–at least for the moment–California's ability to pivot from fossil fuel-powered motor vehicles to electric vehicles sold in the Golden State is secure. (The incoming Trump administration will doubtless move to revoke the waiver authority approved by the outgoing Biden administration, but that will take time.)

On the other hand, the justices' decision to hear and decide the Diamond Alternative Energy v. EPA should be of considerable concern to California, other blue states and environmental organizations. To be sure, the Supreme Court will only be deciding whether the fossil fuel plaintiffs have legal standing to pursue their constitutional claims on the merits. But if the industry challengers prevail before the justices on the standing question, it will inevitably lead to a reconsideration of the constitutionality of California's longstanding waiver authority under the CAA. And with a staunchly conservative Supreme Court majority and a federal judiciary that continues to edge rightward, the result on the merits–and the future of California's waiver authority–are uncertain at best.

And there's another dark cloud on the legal/environmental horizon: over the past half century, the Supreme Court has grown increasingly skeptical and one-sided in its application of federal court standing rules in environmental cases. At the same time an increasingly conservative Supreme Court is making those rules a more formidable barrier for environmental plaintiffs, the Court is going out of its way to *relax* standing rules for industry plaintiffs bringing environmental cases. (The late Justice Antonin Scalia and current Justices Samuel Alito and Clarence Thomas have all advanced this notion of "standing asymmetry" in the past.) The justices' decision in the Diamond Alternative Energy case will reveal if that disparate

standing treatment towards parties seeking to bring lawsuits in environmental cases will continue or become even more pronounced.

Oral arguments in the Diamond Alternative Energy case will be held this spring, with the Court issuing its decision by early July.

All in all, last week's Supreme Court developments represent considerably more bad news for the State of California, climate change regulation and environmental interests than good news.

(Thanks to longtime academic colleague and Harvard Law School environmental law Professor Richard Lazarus for his insights regarding the Ohio and Diamond Alternative Energy litigation that have informed this post.)