

# For the Supreme Court, a Case Poses a Puzzle on the E.P.A.'s Authority

By [ADAM LIPTAK](#) FEB. 24, 2014 [from <http://nyti.ms/1k5FI0I>]



“I learned I’m not a net emitter of carbon dioxide,” Justice Stephen G. Breyer declared on Monday during arguments on the E.P.A.’s authority on emissions from sources like power plants. Credit Matt Brown/Associated Press

WASHINGTON — In trying to decide whether the Environmental Protection Agency has the authority under two programs to regulate greenhouse gas emissions from stationary sources like power plants, [the Supreme Court on Monday faced](#) what Justice Elena Kagan called “the conundrum here.”

One part of the Clean Air Act, she said, seemed to require that such emissions be regulated. But another part set the emission thresholds so low that even schools and small businesses would be covered.

The agency’s solution was to raise those thresholds, and the resulting standards covered far fewer sources. That move was at the center of Monday’s arguments, and the justices seemed divided along ideological lines over whether it was a sensible accommodation or an impermissible exercise of executive authority.

Justice Anthony M. Kennedy, who may hold the decisive vote, made a point that did not bode well for the agency.

“I couldn’t find a single precedent that strongly supports your position,” he told the agency’s lawyer, Donald B. Verrilli Jr., the United States solicitor general.



Justice Breyer Credit Brendan Hoffman/Getty Images

Mr. Verrilli said the solution to the conundrum was to allow the agency to exercise some discretion.

“The choice,” he said, “is between throwing up your hands with respect to what E.P.A. considers to be the most serious air pollution problem we have, or trying to deal with the implementation problem.”

But Justice Samuel A. Alito Jr. suggested that the agency’s revision of numerical standards in a statute was without precedent in “the entire history of federal regulation.”

Even as the justices differed on the scope of the agency’s authority, though, they seemed to agree that the case before them was not particularly significant, for two reasons.

First, the narrow issue the Supreme Court agreed to address left in place the agency’s determinations that greenhouse gases present an urgent threat and that emissions from motor vehicles may be regulated.

Those determinations were based on the Supreme Court’s 5-to-4 decision in 2007 in [Massachusetts v. Environmental Protection Agency](#), which required the agency to regulate emissions of greenhouse gases from new motor vehicles if it found that they endangered public health or welfare.

At Monday’s argument, the justices did not seem inclined to re-examine that decision. Indeed, Justice Kennedy, who was in the majority, said, “We’re bound by both the result and the reasoning of *Massachusetts v. E.P.A.*”

Second, there seemed to be a consensus that the agency would retain other means to address emissions from stationary sources if the programs challenged in the case before the justices was struck down.

That last point made the case far less important than it might have been, Justice Stephen G. Breyer told Peter Keisler, a lawyer representing industry groups challenging the regulations.

“I don’t know what this case is about,” Justice Breyer said. “I mean, it’s a question of whether they do exactly the same thing under one provision or another provision. You agree with them that they could do it under the other one and we’d end up at exactly the same place.”

Mr. Keisler said the two approaches were not identical, as the challenged one relied on state and local authorities while the other would set a national standard.

The immediate question in the case, *Utility Air Regulatory Group v. Environmental Protection Agency*, No. 12-1146, was what to do about parts of the Clean Air Act that require permits for all sources that can annually emit 100 or 250 tons of the relevant pollutant, a threshold that works for conventional air pollutants like lead and carbon monoxide.

But applying those thresholds to greenhouse gases like carbon dioxide, which are emitted in far greater amounts, would require the regulation of millions of sources of pollution.

The agency said Congress could not have intended such an “absurd result.” Its solution was to raise the statutory emissions threshold to 75,000 to 100,000 tons per year, thus reaching far fewer facilities. This was, Mr. Verrilli told the justices, “a transition, not a rewrite.”

He added, though, that “the goal of the transition is not to gradually expand the permitting requirement until they’ve got all the Dunkin’ Donuts in America under it.”

But Jonathan F. Mitchell, the solicitor general of Texas, which challenged the regulations along with other states, said a faithful interpretation of the statute would require that its permit requirements be imposed “on the corner deli or the Chinese restaurant or a high school building.”

“Congress does not establish round holes for square pegs,” he said.

Justice Breyer and Chief Justice John G. Roberts Jr. wondered if the law might reach high school football games.

Mr. Verrilli drew the line there. “Just an aside on the high school football game,” he said. “Human beings are actually net neutral on carbon emissions, and you will need a chemist to explain that to you.”

That seemed to hearten Justice Breyer. “This has been very helpful,” he said. “I learned I’m not a net emitter of carbon dioxide. Believe me, because that means I’m a part of sustainable development.”

Mr. Keisler said the revised thresholds amounted to rogue activity by an agency that had granted itself “an exceptional and troubling degree of discretion to design its own climate change program.”

But Justice Kagan said the agency’s approach was true to the law’s larger purpose, which was, she said, “only to distinguish between major and minor emitters.”

In addition to Texas, the state challenges to the legislation come from Alabama, Florida, Georgia, Indiana, Louisiana, Michigan, Nebraska, North Dakota, Oklahoma, South Carolina, and South Dakota, and the Louisiana Department of Environmental Quality.

The argument was scheduled for 90 minutes instead of the usual hour and lasted even longer, as Chief Justice Roberts granted the main lawyers in the case an extra five minutes each.

In Mr. Verrilli’s case, this came as a not entirely welcome surprise.

He had just concluded his presentation with a description of the “urgent problem” and “threat to future generations” posed by climate change.

When told he could continue, Mr. Verrilli smiled ruefully. “You should have told me that before my summation,” he told the chief justice.

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