



By Richard Lazarus

The Chances of a High Court Review

A Supreme Court advocate's toughest challenge is persuading the Court to grant review. The High Court receives 10,000 requests each year and grants review about 75 times. Those opposing the petitions seeking review of the D.C. Circuit's decision last June in *Coalition for Responsible Regulation v. EPA*, however, cannot safely rely on those normal odds. Here's why.

First, the most critical factor at the jurisdictional stage is the presence of an important legal issue. Tough for respondents now to recork the champagne bottles. After all, the D.C. Circuit upheld the president's signature environmental achievement: four historic Clean Air Act rulemakings in support of regulation of greenhouse gas emissions. The president, moreover, recently doubled-down on those rulemakings, making clear there are more to come during his second term. Newly minted EPA Administrator Gina McCarthy's mandate covers not only new but existing power plants.

Second, there are heavy hitters supporting the Court's review. There are nine petitions (that's a lot) seeking review on behalf of more than 80 parties. And not just incidental players. They include wide-ranging industries and business associations: agriculture, mining, steel, oil, coal, forestry, home builders, manufacturers.

Even more important, petitioners include 17 states. States favoring climate

change regulation helped persuade the Court to grant the original petition in *Massachusetts v. EPA*, the 2007 Supreme Court decision upon which the D.C. Circuit heavily relied for its ruling. To be sure, these are very different states with a very different pitch, but the justices will likely, as before, give their request added weight. Petitioners are also greatly aided by D.C. Circuit Judge Brett Kavanaugh's opinion dissenting from rehearing en banc, which itself reads like a cert petition. The justices know and respect Kavanaugh and many of his former clerks go on to clerk for the High Court — three this coming term.

Third is the number four. Four is the number of votes necessary to grant certiorari. And four is the number of justices who dissented in *Massachusetts* and therefore seem likely to be more rather than less receptive to arguments that the Court's ruling in that case should be read more narrowly than it was by the D.C. Circuit.

After reviewing the briefs in opposition to the petitions in *Coalition for Responsible Regulation v. EPA*, here is my take. The odds of a cert grant remain significant, mostly because of those superficial trappings of cert-worthiness just described. Only one of the three oppositions is especially effective in cutting beneath that surface. The solicitor general's opposition is, as to be expected, intelligent and authoritative. But it remains largely robotic, in keeping with that office's template for such oppositions, preferring a tone of dismissiveness without taking too seriously the petitions. The opposition filed by the states makes a few good points, but it, too, ultimately places more emphasis on omission rather than engagement. Both government opps reflect standard opp strategy, which is the correct strategy in most instances, but not necessarily optimal here.

Only the opposition filed on behalf of the environmental intervenors makes a serious effort at establishing

the lack of certworthiness and, in particular, of distinguishing between those issues that are of greater and lesser concern. In particular, their opp maximizes the protection from Supreme Court review of EPA's threshold finding that greenhouse gas emissions endanger public health or welfare by identifying more fully petitioners' arguments and explaining why they do not present a truly important "legal" issue. Their opp also takes effective aim at petitioners' broader theories that would limit EPA's ability to address greenhouse gas emissions in parts of the Clean Air Act other than the motor vehicle provisions at issue in *Massachusetts*.

Here is what I will be looking for when the Court acts on these petitions in a few weeks — by the last week of September at the earliest and by mid-October at the latest. A cert denial would be a huge victory for EPA, and against the odds in this unusual case. But, for that same reason, I expect I will be paying less attention to whether the Court grants review, and instead more to, if granted, on which issues.

A grant on a narrow question such as whether GHG emissions can trigger regulation under the Clean Air Act's Prevention of Significant Deterioration Program would not be welcome news to EPA, but neither would it seriously threaten the

agency's ongoing efforts. But a grant on the broader issues whether the endangerment finding was valid, whether the PSD program extends to greenhouse gas emissions at all, or even whether *Massachusetts* remains good law, would threaten a massive blow to the president's climate change program.

The odds of such a sweeping grant for *Coalition for Responsible Regulation v. EPA* still seem very small. But, then again, this is an odd case.

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