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Justices' First Brush With Global Warming

By LINDA GREENHOUSE

WASHINGTON, Nov. 29 — A Supreme Court argument Wednesday on the Bush administration's refusal to regulate carbon dioxide in automobile emissions offered three intertwined plot lines to the audience that had come to watch the court's first encounter with the issue of global climate change.

On one level, the argument was about the meaning of the Clean Air Act, which the Environmental Protection Agency maintains does not treat carbon dioxide and other heat-trapping gases as air pollutants and thus does not give the agency the authority to regulate them.

On another level, the argument was about whether the dozen states, three cities and many environmental groups that went to federal court to challenge the agency's position had legal standing to pursue their lawsuit.

And on still another level, the courtroom action was an episode in a policy debate that began well before this case arrived on the Supreme Court's docket and that will continue, in the political sphere, no matter what the justices decide.

By the end of the argument, that continuing debate appeared the only certain outcome.

The justices seemed deeply divided on the question of standing. Any plaintiff in federal court must establish standing to sue, by proving there is an injury that can be traced to the defendant's behavior and that will be relieved by the action the lawsuit requests.

Chief Justice John G. Roberts Jr., along with Justices Antonin Scalia and Samuel A. Alito Jr., expressed strong doubts that the plaintiffs, represented by Assistant Attorney General James R. Milkey of Massachusetts, could meet those interrelated conditions by showing that global climate change presented a sufficiently tangible and imminent danger that could be adequately addressed by regulating emissions from new cars and trucks.

"You have to show the harm is imminent," Justice Scalia instructed Mr. Milkey, asking, "I mean, when is the cataclysm?"

Mr. Milkey replied, "It's not so much a cataclysm as ongoing harm," arguing that Massachusetts, New York, and other coastal states faced losing "sovereign territory" to rising sea levels. "So the harm is already occurring," he said. "It is ongoing, and it will happen well into the future."

Chief Justice Roberts and Justice Alito both suggested that because motor vehicles account for only about 6 percent of carbon dioxide emissions, even aggressive federal regulation would not be great enough to make a difference, another requirement of the standing doctrine.

When Mr. Milkey replied that over time, “even small reductions can be significant,” Chief Justice Roberts responded: “That assumes everything else is going to remain constant, though, right? It assumes there isn’t going to be a greater contribution of greenhouse gases from economic development in China and other places that’s going to displace whatever marginal benefit you get here.” At another point, the chief justice said the plaintiffs’ evidence “strikes me as sort of spitting out conjecture on conjecture.”

On the other side, Justices Stephen G. Breyer, Ruth Bader Ginsburg, John Paul Stevens and David H. Souter appeared strongly inclined to find that the plaintiffs had met the standing test.

Justice Souter engaged Deputy Solicitor General Gregory G. Garre, the lawyer who was defending the administration’s position, in a long debate. When Mr. Garre said the plaintiffs “haven’t shown specific facts which should provide any comfort to this court that regulation of less than 6 percent or fewer greenhouse emissions worldwide will have any effect on their alleged injuries,” Justice Souter demanded: “Why do they have to show a precise correlation?”

“It is reasonable to suppose,” the justice continued, “that some reduction in the gases will result in some reduction in future loss.” It was “a question of more or less, not a question of either/or,” he said, adding: “They don’t have to stop global warming. Their point is that it will reduce the degree of global warming and likely reduce the degree of loss.”

Mr. Garre replied that given the problem’s global nature, “I’m not aware of any studies available that would suggest that the regulation of that minuscule fraction of greenhouse gas emissions would have any effect whatsoever.”

Then Justice Breyer took on the government lawyer. “Would you be up here saying the same thing if we’re trying to regulate child pornography, and it turns out that anyone with a computer can get pornography elsewhere?” Justice Breyer asked, adding, “I don’t think so.”

By the end of the argument there appeared a strong likelihood that the court would divide 5 to 4 on the standing question, with Justice Anthony M. Kennedy holding the deciding vote. His relatively few comments were ambiguous. Early in the argument he challenged the assertion by Mr. Milkey, the states’ lawyer, that the case “turns on ordinary principles of statutory interpretation and administrative law” and that there was no need for the court “to pass judgment on the science of climate change.”

That was “reassuring,” Justice Kennedy said. But, he added, “Don’t we have to do that in order to decide the standing argument, because there’s no injury if there’s not global warming?”

The justices eventually discussed the substance of the Environmental Protection Agency’s position. Mr. Garre said the agency had “responsibly and prudently” reached the conclusion that “Congress has not authorized it to embark on this regulatory endeavor.”

But the government lawyer seemed defensive when challenged by Justice Scalia on the agency’s view that carbon dioxide was not an air pollutant within the meaning of the

Clean Air Act. Mr. Garre referred several times to “the conclusion the agency reached,” an unusual locution that seemed something short of the full embrace that lawyers from the solicitor general’s office usually offer the agencies whose positions they defend.

The Bush administration’s conclusion that the Clean Air Act does not authorize the E.P.A. to address climate change marked an about-face from the agency’s previous view of its legal authority.

The agency’s current position is that even if it had authority, it would choose for various policy reasons not to exercise it. That position was upheld in a fractured ruling by the federal appeals court here, a decision that led to the Supreme Court appeal, Massachusetts v. Environmental Protection Agency, No. 05-1120.

At this stage, even if the plaintiffs survive the challenge to their standing and the court finds that statutory authority exists, it is highly unlikely that the court would order the agency to undertake regulation. It would be a victory, Mr. Milkey agreed, if the justices went so far as to tell the E.P.A. to reconsider its position.