UARG v. EPA – Question Presented:

Whether EPA permissibly determined that its regulation of greenhouse gas emissions from new motor vehicles [i.e. the "Tailpipe Rule"] triggered permitting requirements under the Clean Air Act for stationary sources that emit greenhouse gases.

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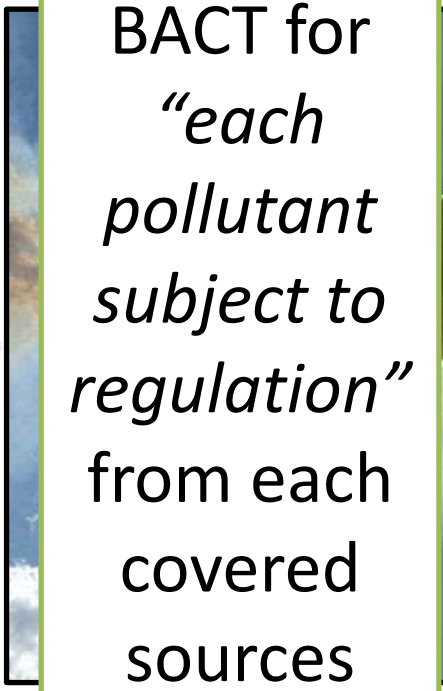
Endangerment Finding

No Trigger → NSPS Only

Tailpipe Rule

PSD TRIGGER?

(*"any pollutant … to which this part applies"*)



BACT for *"each pollutant subject to regulation"* from each covered sources

All GHGs → "Absurd results"

Pics from webweaver.nu, ecowatch.com, csmonitor.com

UARG v. EPA – Question Presented:

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UARG v. EPA – Possible outcomes

- **NO** – EPA had no authority to regulate tailpipe emissions in the first place
- **NO** – PSD only applies to criteria pollutants (ozone, particulate matter, carbon monoxide, nitrogen oxides, sulfur dioxide, lead)
- **YES** – but there remains some question about the scope of the trigger…
- **YES** – and we owe deference to EPA's determination of the trigger (as set out in the Tailoring Rule)

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Relevant Quotes

Mr. Keisler (for industry petitioners):

[T]his case is … unprecedented in at least two respects.

First, EPA agrees that … its interpretation … result[s] in a program … so contrary to Congress's intent that the Agency calls it absurd.

[S]econd, EPA took that … as a basis for rewriting other provisions ... that are clear and unambiguous (the numerical permitting thresholds ...), because the Agency wrongly believes that fixes the problem.

J. Sotomayor:

Well, it hasn't rewritten them. All it has said ... is that [it] can't implement [the statutory thresholds] immediately, because [that] would overburden [the agency] administratively. It hasn't said that over time, with streamlining and with other adjustments, that it can't do this. It's just said [it] can't do it right away.

Mr. Keisler:

That's right, Your Honor, and that actually reflects a deeper problem ... because the reason that Congress wrote those thresholds was because it wanted to exempt small entities from the costs and burdens of the permitting process. … so when EPA says that it hopes eventually to get down to the apartment buildings and large high schools that would be covered if [the statutory] thresholds … applied, it is contravening congressional intent in another way.

The Breyer Hypo!

There are many [situations] … where Congress passes a statute that tells the Agency, do A, B, C and D. And then it turns out … that it just doesn't make sense. … So often … courts read in an exception where it makes no sense. For example, if there were a statute that said you have to throw out all bubble gum that's been around for more than a month. Well, what about bubble gum used in a display case that nobody ever intends to eat? You see?

And so what we do all the time is we say, well, it doesn't mean to apply to that.

J. Kagan:

The conundrum … this cases raises is that everybody is violating a statutory term. EPA is saying, no, we can't do the 100 to 250 with respect to greenhouse gases, but [your interpretation] also violat[es] a statutory term. … [W]hat's happened here is … this new kind of emission … makes these two terms … irreconcilable, and the agency has … picked one. It said: Look, we're not going to just exempt a broad class of pollutants. Instead, we're going to fudge the numbers. And why isn't that the more reasonable of the two things to do?

C.J. Roberts:

Counsel, you began [an argument point] by saying "putting *Massachusetts v. EPA* to one side. ... I was in the dissent in that case, but we still can't do that.

(Laughter.)

Mr. Keisler:

[T]his case is not about whether EPA can regulate GHGs from stationary sources. This Court held that it could under [the NSPS] program in Section 111. This is about whether State and local permitting authorities … are supposed to regulate plant-by-plant under this particular PSD program.

… NSPS permits the EPA to look at reducing the national footprint … through a national uniform emissions standard that the plants can then determine how best to meet, rather than asking 90 state and local permitting authorities … to decide plant by plant what they think each plant in their jurisdiction should do about global warming.

General Verrilli:

GHGs pose the same threat … when they are emitted from a power plant as when they are emitted from the tailpipe of a car. And in *American Electric Power*, this Court said that … EPA has the authority to prescribe general rules limiting greenhouse gas emissions by stationary sources like power plants. ... Yet Petitioners say EPA lacks any authority to use the PSD permitting program to regulate the same emissions, from the same sources, causing the same harms. That's not a reasonable reading of statutory text.

J. Scalia:

Why? Why would it be unreasonable to give EPA authority to regulate mobile sources and not authority to regulate stationary sources, given that stationary sources have to be licensed in this fashion, and it produces all sorts of other problems?

That doesn't seem to me to be irrational at all.

General Verrilli:

... [W]hat [EPA is] supposed to do under [PSD] is use Best Available Control Technology to get above the floor ... that the NSPS program sets. … [T]he point of BACT is to … keep raising the bar during those 8--year intervals.

C.J. Roberts:

[I]f … greenhouse gases may be regulated [through the PSD program] with respect to [anyway-sources], my understanding [is, that] gets you to 83 percent of the greenhouse gas emissions. … Prevailing on [the Tailoring Rule's approach] gets you to 86 percent. …

So this is a fight - …-- about an additional 3 percent, and yet according to the Petitioners that brings in this huge regulatory problem of … regulating the high school football game and -- … what-not.

J. Kagan:

It seems to me it would be … understandable if EPA had said, … the 100 and 250 [thresholds] don't work with respect to this category of pollutant. [What] Congress … was trying to do was to distinguish between major and minor emitters[;] the new numbers [that achieve the same distinction for GHGs] are X and Y. … I understand that EPA may have felt like, oh, gosh, can we really do that? But the solution that EPA came up with actually seems to give it complete discretion to do whatever it wants, whenever it wants to, and to … be much more problematic than if EPA had just said, no, it's not 100 and 250. It's 10 times that.

J. Sotomayor:

I know litigants hate this question. If you were going to lose, what's the best way for you to lose?

General Verrilli:

I knew you were going to ask me that question.

(Laughter.)

The fallback position…

General Verrilli:

[T]he whole problem … is CO2 [not the other 5 GHGs]. [So] if the Court were to say that "any air pollutant" can't be interpreted in the way that EPA has interpreted it ... the answer that ... causes the least risk of collateral consequences with respect to established regulatory programs … ... would be to say that you can't read [the triggering language] to include CO2, because the inclusion of CO2 generates a permitting obligation that is out of accord with what Congress would have expected. …-- I'm not endorsing that, but …

No Trigger → NSPS Only

Remand

NAAQS-Only

All but CO2

Tailoring Rule

All GHGs → "Absurd results"

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