WINSTON & STRAWN LLP

BLOG

Supreme Court Hears Oral Argument in MATS Case

MARCH 25, 2015

Today, the Supreme Court heard oral arguments in the Mercury and Air Toxics Standards (MATS) case, *Michigan v. EPA*. The Court appeared divided along traditional ideological lines, with Justices Breyer and Kennedy as the likely swing votes.

Justices Ginsburg, Kagan, and Sotomayor were supportive of EPA in their questioning. They appeared satisfied that the term "appropriate" is ambiguous and that EPA reasonably interpreted the term to not require it to consider costs. Justice Ginsburg observed that "the word 'appropriate' ... is commonly used to indicate that the expert agency will do what it finds fit based on its expertise." In response to questioning by Justice Ginsburg, the Michigan Solicitor General was forced to concede that he could not point to a case where the Court had held that EPA is required to consider costs in the absence of an express instruction in the Clean Air Act to do so. Justice Kagan concurred with Justice Ginsburg, remarking that "to get from silence to this notion of a requirement seems to be a pretty big jump."

In contrast, Justices Scalia and Alito were supportive of the state and industry petitioners. Justice Scalia disagreed with the premise that "When Congress says nothing about cost, the Agency is entitled to disregard cost." Rather, he observed that "It's classic arbitrary and capricious agency action for an agency to command something that is outrageously expensive" such that "The expense vastly exceeds whatever public benefit can be . . . achieved." As usual, Justice Thomas was silent during the oral argument but typically votes with the Court's conservative members.

Chief Justice Roberts questioned EPA's decision not to consider costs when making its "appropriate and necessary" determination, noting that it was unusual for the Agency to have "deliberately tied its hands" by concluding that it is "prohibited from considering costs under the phrase 'appropriate'" because "[a]gencies usually like to maintain for themselves as much discretion as they can." The Chief Justice was also pointedly critical of EPA's consideration of the co-benefits of criteria pollutant reductions from MATS in its cost benefit analysis, stating that the "tiny proportion of benefit from the HAP program" compared to the "disproportionate amount of benefit that would normally be addressed under the criteria" pollutant program "raises a red flag." He further accused the Agency of making an "end run around the restrictions" on regulating criteria pollutants under the HAP program.

A significant portion of the argument focused on a hypothetical raised by Justice Breyer regarding whether EPA could use its authority to subcategorize sources "to take into account . . . serious cost problems." Justice Breyer observed that EPA has "to take into account cost somewhere" and "begins to look a little irrational" by refusing to take costs "into account at all." Justice Breyer also wondered what Congress was "thinking of the word 'appropriate' if it wasn't costs?"

Justice Kennedy acknowledged the "capaciousness" of the term "appropriate" and questioned whether the statute implicitly requires EPA to consider costs. Justice Kennedy also wondered whether the term "appropriate" "demands a cost-benefit analysis" whenever the term "is used in a regulatory context in the Clean Air Act," forcing the attorney for the industry petitioners to admit that it does not. Along with Chief Justice Roberts, Justice Kennedy pressed Solicitor General Verrilli to admit that EPA "could reasonably have considered costs" when it made its "appropriate and necessary" determination. Justice Kennedy further remarked that "the game is over" if EPA waits to conduct its cost benefit analysis until after it has made its appropriate and necessary determination because at that point, the Agency is already required to set emissions standards based on the best performing 12% of sources.

The Court's decision will ultimately come down to whether Justices Breyer and Kennedy choose to join the Court's liberals or conservatives. A decision is expected by June.
3 Min Read

Related Locations

Chicago

Related Topics

MATS | Air | Court Decisions

Related Capabilities

Environmental Litigation & Enforcement

Related Regions

North America