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NATURAL RESOURCES DEFENSE COUNCIL

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Hearing on "The Implications of the Supreme Court's Decision Regarding EPA's Authorities with Respect to Greenhouse Gases Under the Clean Air Act"

Committee on Environment and Public Works
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Madame Chairman, members of the Committee, thank you for the opportunity to testify today on *Massachusetts v. EPA,* the Supreme Court's decision upholding the Environmental Protection Agency's authority to regulate global warming pollution under the Clean Air Act. I am policy director and senior attorney for the Natural Resources Defense Council's Climate Center. I represent NRDC and its 1.2 million members and supporters in the *Massachusetts* case and in related global warming litigation. I work closely with the broad coalition of states, cities, and environmental organizations engaged in these cases. In the 1990s, I served as director of climate change policy in the EPA air office, under Carol Browner.

We began this case during the coldest part of the Little Ice Age in global warming policy in Washington. The President had broken his campaign pledge to control carbon dioxide. The Congress was inactive. The states were not yet moving. Yet the science was growing ever clearer on the dangers of global warming, and the nation's Clean Air Act already empowered the government to react to that science. When the Bush Administration tried to nail this door permanently closed, our coalition of states, cities, and environmental organizations took the last step available, appealing to the independent third branch to uphold our nation's laws.

The Supreme Court's April 2nd decision in *Massachusetts v. EPA* repudiates the Bush Administration's legal strategy for doing nothing on global warming. The nation's highest court set the White House straight: Carbon dioxide is an air pollutant. EPA has – and has always had – the power and responsibility to start cutting the pollution that is wreaking havoc with our climate. We need EPA to act *now*.

The Court's decision has four immediate game-changing consequences:

First, Administrator Johnson now must decide afresh whether to set greenhouse gas emission standards for new motor vehicles under Section 202 of the Clean Air Act. The Court clearly stated that this decision must be based on the science, and the science only:

> Under the clear terms of the Clean Air Act, EPA can avoid taking further action only if it determines that greenhouse gases do not contribute to climate change or if it provides some reasonable explanation as to why it cannot or will not exercise its discretion to determine whether they do.[1]

The Court rejected all of the Administration's "laundry list of reasons not to regulate" – preferences for voluntary action, concerns about piecemeal regulation, claimed interference with foreign policy. No, the Court said, the decision must be made on the science only: "To the extent that this constrains agency discretion to pursue other priorities of the Administrator or the President, this is the congressional design."[2]

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[1] 127 S.Ct. 1438, 1462 (2007).
[2] *Id.*

The Court was especially clear that "while the President has broad authority in foreign affairs, that authority does not extend to the refusal to execute domestic laws."[3] The Court also observed that while economic considerations figure into the level and timing of standards under the Clean Air Act, they are not relevant to determining the *need* for such standards.[4]

The Court found that "EPA has not identified any congressional action that conflicts in any way with the regulation of greenhouse gases from new motor vehicles."[5] Specifically, the Court found no conflict with the Energy Policy and Conservation Act, under which the Corporate Average Fuel Economy (CAFE) standards are set: "[T]hat DOT sets mileage standards in no way licenses EPA to shirk its environmental responsibilities. EPA has been charged with protecting the public's "health" and "welfare," . . . a statutory obligation wholly independent of DOT's mandate to promote energy efficiency."[6]

Given the Administration's embrace of the Intergovernmental Panel on Climate Change (IPCC) – more than 90 percent certainty that anthropogenic emissions are causing global warming – it is difficult to imagine how Administrator Johnson could not now conclude that vehicular emissions of these pollutants are contributing to climate change. He must act, and now.

Since the Supreme Court's decision, however, the Administration has made statements that give reason for concern about their intentions to comply with the Court's decision. On April 3rd, while acknowledging that the Court's decision is "the new law of the land," President Bush himself went right back to the well of extraneous considerations that the Court one day before had declared illegal: research, voluntary action, waiting for other countries to act.[7] Administrator Johnson sounded the same notes at a press conference on April 10th. And Council on Environmental Quality Chairman James Connaughton declared the Court's decision "somewhat moot" and "inconsequential" because "the President is already committed to regulatory action" – by which he meant that the Administration had *asked Congress for new laws* on fuel economy and alternative fuels.[8]

This Committee will no doubt hear about a long list of voluntary programs and initiatives. Some of EPA's programs, such as EnergySTAR labeling, have brought about real changes in the energy-consuming products we purchase. Other programs, such as the Asia-Pacific Partnership (on which I have testified before), are utterly ineffective efforts just to look busy.

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[3] *Id*. at 1462-63.
[4] *Id.* at 1461.
[5] *Id.* at 1461.
[6] *Id.* at 1462.
[7] http://www.whitehouse.gov/news/releases/2007/04/20070403.html.
[8] Jeff Bernard (AP), "Rulings Go Against Bush Administration," *Casper Star-Tribune* (Apr. 18, 2007) (attached).

Altogether, these voluntary efforts have failed to stop the steady growth in U.S. emissions, which has continued during the Bush years at the same rate as in the prior decade – about 14 percent per decade. The Administration cloaks its statistics in the deceptive metric of "emissions intensity." Celebrating improvements in emissions intensity is like a dieter's claiming victory when he succeeds only in slowing his weight gain.

This Committee has a special role and responsibility to hold Administrator Johnson's feet to the fire. Demand that Mr. Johnson give you a specific schedule for determining that vehicles' heat-trapping emissions are in fact contributing to global warming. Do not accept procedural dodges and delays. There is no more legal basis, and no more time, for these lame excuses.

Second, and equally important, the *Massachusetts* decision removes the major obstacle to *state* initiatives, led by California, to cut global warming pollution from vehicles. California and 11 other states – Connecticut, Maine, Maryland, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Washington – have adopted clean car standards to cut heat-trapping emissions by 30 percent by model year 2016. Arizona and New Mexico – and perhaps others – will soon join. Together, these states account for more than a third of the U.S. vehicle market. The Clean Air Act allows California to set its own air pollutant standards, provided only that it gets a routine waiver from EPA. California asked for the waiver nearly 16 months ago, but EPA has been dragging its feet.

I welcome Administrator Johnson's recent commitment to Governor Schwarzenegger that he will now allow the waiver process to start, and that EPA will soon publish a notice scheduling the required hearing. But the Administrator has declined to give California any schedule for making the waiver decision itself. The standards apply starting in the 2009 model year, which is fast approaching. This Committee should demand a clear and near-term deadline from Administrator Johnson for his decision. It is time for the Administration to stop stalling and get out of California's way.

Third, the Supreme Court's decision has implications for other pending global warming litigation. At the top of the list is a parallel case on power plants. A coalition of states and environmental organizations has challenged EPA's refusal to add a CO_2 emission standard to the new source performance standards and emission guidelines for new and existing power plants under Section 111 of the Clean Air Act in a case called *New York v. EPA*.[9] EPA's sole reason for refusing to regulate was the claim that it had no legal authority to control CO_2 – the very issue now settled by *Massachusetts*. The D.C. Circuit stayed that case pending the Supreme Court's decision, and now we intend to seek an immediate reversal of the EPA position.

So Administrator Johnson now will also have to decide whether CO_2 emissions from power plants contribute to global warming. Again, based on the clear scientific

[9] No. 06-1322 (D.C. Cir.)

evidence, we cannot see how he could reach any other conclusion. As with vehicles, Administrator Johnson must act on power plants, and now. We hope this Committee will press him for action here too.

The *Massachusetts* decision will very helpfully affect other cases also. It knocks the legs out from under cases brought by the auto industry in California, Vermont, and Rhode Island, alleging that those states lack Clean Air Act authority to set clean car standards, and alleging conflict with the CAFE standards. *Massachusetts* also strengthens the states' position in *Connecticut v. American Electric Power*, a case pending in the Second Circuit Court of Appeals. In that case, eight states, New York City, and two land conservation trusts allege that the five electric power companies with the highest CO_2 emissions are creating a public nuisance. Their theory stems directly from *Georgia v. Tennessee Copper*,[10] the case relied on by the Supreme Court in *Massachusetts* to buttress states' standing and states' right to go to federal court to abate pollution outside their borders.

Fourth, and most important, the Supreme Court's decision has added new momentum to the legislative process. Even before April 2nd, the legislative kettle was nearing a boil. Since Hurricane Katrina, and since the November elections, public sentiment has shifted dramatically on global warming. Congress's new leaders and committee chairs have expressed the strong commitment to pass comprehensive global warming legislation. Many forward-looking business leaders have come forward to embrace the desirability – or at least the inevitability – of new legislation. Perhaps motivated by the prospect that this Administrator – or the next one – will use his Clean Air Act powers, even more industry leaders are coming to the table now to help hammer out new global warming legislation. As they say, "If you're not at the table, you're on the menu."

NRDC supports placing every ounce of pressure you can on the Administration to faithfully execute the existing law of the land. The actions already within EPA's power would take a big bite out of global warming. At the same time, we also support enactment of new economy-wide legislation to comprehensively address global warming.

In NRDC's view, solving global warming requires three things:

- A mandatory declining cap on national emissions that starts cutting emissions now and reduces them by 80% by 2050.

- Performance standards – for vehicles, fuels, and power plants, as well as buildings, appliances, and other equipment – to quickly deploy today's emission-cutting technology and promote rapid development of tomorrow's.

- Incentives – drawn mainly from the value of emissions allowances – to promote new technology, to protect consumers (especially low-income

[10] 206 U.S. 230 (1907).

citizens), workers, and communities, and to help manage adaptation to climate impacts that we cannot avoid.

There is still time – though only a little time – to avoid the worst effects of global warming. If the United States and other industrial countries commit to action on this scale, and if key developing countries also reduce their emissions growth and follow suit with similar reductions later in the century, then we can still keep greenhouse gas concentrations from exceeding 450 parts per million (CO_2-equivalent) and maintain at least a 50-50 chance of avoiding warming of more than another 2 degrees Fahrenheit. Exceeding this level, more and more scientists tell us, is extremely dangerous.

NRDC looks forward to working with this Committee and with all stakeholders to pass this legislation in this Congress.