

IMLA Involved as *Amicus* in *California v. EPA*

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In 2007, the U.S. Supreme Court issued its opinion in *Massachusetts v. EPA*,[1] in which the Court determined that the Environmental Protection Agency (EPA) had the authority to regulate greenhouse gas emissions under Section 202 of the Clean Air Act (CAA).[2] While environmentalists and climatologists hail the case as a watershed, lawyers, generally, have been more cautious and recognize that this case is just the tip of a melting legal iceberg. One such "cold" case is *California v. EPA*[3] before the U.S. Court of Appeals for the D.C. Circuit, in which IMLA is participating as an *amicus*.[4]

The rules in question were approved by California's Office of Administrative Law in 2005, and require automakers to reduce greenhouse gas emissions from new passenger cars and light trucks.[5] In any other state, these provisions would be preempted by the CAA, which provides that "[n]o state…shall adopt or attempt to enforce any standard relating to the control of emissions from new motor vehicles or motor vehicles engines…".[6] However, the next section contains the well-known waiver provision for California, which states that the Administrator of the EPA "shall … waive application … for the control of emissions … if the State determines that the State standards will be, in the aggregate, at least as protective of public health and welfare as applicable Federal standards."[7] However, the provision adds that a waiver will not be granted if (a) the determination of the State is arbitrary and capricious, (b) such State does not need such State standards to meet compelling and extraordinary conditions, or (c) the State standards and accompanying enforcement procedures are not consistent with Section 7521(a) of the Act.[8] California has applied for, and received, a number of waivers from the EPA concerning stricter emissions regulations, such as regulations to curb air pollutants that contribute to smog. In December 2007, however, EPA Administrator Stephen Johnson wrote to California Governor Arnold Schwarzenegger, denying California's application for a waiver for its greenhouse gas emission restrictions.[9] The Administrator rationalized that previously-approved waiver applications were possible due to a focus on a local or regional threat to health or public welfare. In the case of greenhouse gases, however, the focus is apparently not the same, with the Administrator taking the position that:

> the emissions of motor vehicles in California do not affect California's air pollution problem in any way different from emissions from vehicles and other pollution sources all around the world. Similarly, the emissions from California's cars do not just affect the atmosphere in California, but in fact become one part of the global pool of [greenhouse gas] emissions that affect the atmosphere globally and are distributed throughout the world, resulting in basically a uniform global atmospheric concentration.[10]

The Administrator ultimately concluded that California did not face an "extraordinary or compelling" threat from global warming. California filed a complaint in the U.S. Court of Appeals for the Ninth Circuit. In July 2008, the Ninth Circuit released an order dismissing the case for lack of jurisdiction, as the letter from the Administrator to Governor Schwarzenegger was not a "reviewable action," as defined under the CAA.[11]

The case is now before the D.C. Circuit Court of Appeals. IMLA's joint *amicus* brief was submitted on November 24, 2008.[12] The brief presents three main arguments: (1) that the waiver provision in the CAA was intended to preserve state innovation and regulatory flexibility, and the denial of this frustrates Congressional intent; (2) the CAA does not preempt California's greenhouse gas emissions standards; and (3) that EPA's denial conflicts with a "growing global consensus," as represented by the participation of the Canadian province, British Columbia, in the brief.

The first argument is presented through the CAA's legislative and judicial history. According to the brief, the EPA has admitted, in a prior case, "that it must not substitute its own judgment for that of California, and that it must leave decisions on controversial or ambiguous matters of public policy to California's regulators."[13] Moving back in time farther reveals the legislative history showing that California would "serve as a laboratory of innovation and develop motor vehicle standards that could benefit the Nation as a whole."[14] The second argument focuses on preemption. IMLA takes the position that the Administrator's decision "ignores the fundamental fact that California's power to enact public health measures does not derive from the federal government." In his letter, Administrator Johnson stated that the CAA "provides California with authority it would not otherwise have…".[15] IMLA argues that California's authority to enact regulations does not come from the CAA but, rather, from its police powers, and that the waiver provisions in the CAA recognize this

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The district court accepted the magistrate's recommendation to grant summary judgment for the other officers, and as to the finding that Murray did not use excessive force and that the seizure was reasonable, but denied the motion with respect to Deputy Murray. He appealed, arguing that he was entitled to qualified immunity because it was objectively reasonable to believe that he was arresting Engleman in Arkansas.

The U.S. Court of Appeals for the Eighth Circuit reversed the denial of summary judgment. Engleman was required to proffer sufficient evidence to raise a genuine issue of material fact about whether a reasonable officer would have known that Deputy Murray's conduct violated a clearly established right. There were no material issues of fact, and, in the circumstances, notwithstanding the prohibition on executing an arrest warrant outside of the arresting officer's jurisdiction, it was objectively reasonable for an officer in Deputy Murray's position to have believed that he was executing the warrant in Arkansas. The 911 system identified Engleman's call as originating from a telephone number with an Arkansas area code and an Arkansas address and mailing address. The arrest warrant had been issued in Arkansas and stated that Engleman resided at 24512 Van Fleet Road in Arkansas, the same address that the officers were being called to. The fact that Engleman advised the officers they were in Oklahoma was not dispositive, as the "protests of a resisting arrestee generally do not make an objectively reasonable arrest unreasonable." Accordingly, Deputy Murray's actions were objectively reasonable in light of the law and the information he possessed at the time, and he was entitled to qualified immunity. *Engleman v. Murray*, 546 F. 3d 944 (8th Cir. 2008). ML

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of the questions presented does not warrant plenary review here." Opposing the motion to affirm, the utility district noted that the "appeal puts before the Court the most federally invasive law in existence," arguing that the 2006 reenactment of §5 is not a congruent and proportional response to present-day voting-rights circumstances; it was, rather, an improper and unconstitutional extension of a response appropriate to the scope and scale of problems two generations past into a never-ending future." Specifically, it points out that the "America that has elected Barack Obama as its first African-American president is far different than when §5 was first enacted in 1965. Appellees barely acknowledge the deep-rooted societal change, preferring to assume that conditions remain similarly dire despite overwhelming evidence to the contrary. There is no warrant for continuing to presume that jurisdictions first identified four decades ago as needing extraordinary federal oversight through §5 remain uniformly incapable or unwilling to fulfill their obligations to faithfully protect the voting rights of all citizens in those parts of the country."

Clearly, this case has important implications for states and local governments; the question is, how will the Supreme Court weigh in? ML

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inherent authority.[16] The final third of the brief focuses on the Province of British Columbia. In Canada, federal and provincial governments split up the responsibility for environmental policy. British Columbia passed, and received royal assent for, a law that enables the adoption of California's regulations.[17] Unfortunately, the law will not be effective unless California is permitted to utilize its own adopted standards. This action by the Province demonstrated the brief's argument that the problem of climate change is one that requires "international, national, and subnational efforts."

It is anyone's guess as to how far this case will go. During his campaign, President Obama stated that he would have approved California's waiver request, and the new EPA Administrator will certainly start the approval process.[18] As we've seen before, it's another waiting game, but when the issue is global warming, just how long can we wait?

Notes

1. Massachusetts v. EPA, 127 S. Ct. 1438 (2007).
2. Clean Air Act, 42 U.S.C. § 7521 (West 2008).
3. No. 08-1178, 2008 WL 416849 (D.C. Cir., filed on May 5, 2008).
4. IMLA is participating in a brief managed by the Constitutional Accountability Center, along with the National Association of Counties, National League of Cities, National Conference of State Legislatures, National Association of Clean Air Agencies, American Planning Association, City of New York, King County (Washington), and the Canadian Province of British Columbia. *Brief for National Conference of State Legislatures, International Municipal Lawyers Association, et al. as Amici Curiae Supporting Petitioners, California v. EPA*, No. 08-1171, 2008 WL 416849 (D.C. Cir., filed on May 5, 2008).
5. California State Motor Vehicle Standards, 73 Fed. Reg. 12156 (Mar. 06, 2008). Under the law, automakers will have to reduce greenhouse gas emissions by 30% by 2016.
6. 42 U.S.C. § 7543(a) (West 2008).
7. 42 U.S.C. §7543(b) (West 2008).
8. *Id.*
9. California State Motor Vehicle Standards, 73 Fed. Reg. 12,156 (Mar. 06, 2008).
10. *Id.* at 12160.
11. Order re: *California v. EPA*, No 08-70011 (9th Cir. July 25, 2008).
12. The brief is available at http://www.theusconstitution.org.
13. IMLA brief, citing *Motor & Equip. Mfrs. Ass'n, Inc. v. EPA*, 627 F. 2d 1095, 1115 (D.C. Cir. 1979).
14. IMLA brief, citing statement of Sen. Murphy, 113 Cong. Rec. S32,476 (1967).
15. 73 Fed. Reg. 12,163 (Mar. 06, 2008).
16. IMLA brief at 12.
17. *Greenhouse Gas Reduction (Vehicle Emissions Standards) Act*, S.B.C. 2008, c. 21.
18. Zachary Coile, *Obama Expected to Back Auto-Emission Waiver*, San Francisco Chronicle, Nov. 11, 2008, at A1. ML