

The Supreme Court Limits EPA's Authority to Regulate Greenhouse Gases

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In a decision issued the final day of the Supreme Court's 2022 term, the Court sided with West Virginia and other States that had challenged the Environmental Protection Agency's ("EPA's" or "the Agency's") ability to regulate greenhouse gases. The Court's decision limits EPA's authority pursuant to the Clean Air Act ("CAA"), which as discussed below, may implicate changes to executive branch agencies' ability to regulate more broadly.

Preliminary Challenges in the District Courts Regarding the EPA's Authority Pursuant to the Clean Air Act

This case arises from differing interpretations of a section of the Clean Air Act—Standards of Performance for Existing Sources—that gives the EPA the authority to adopt regulations "under which each State or tribe shall submit to the [EPA] a plan which," in part "establishes standards of performance for any existing source[s]" that "contribute[] significantly to . . . air pollution which may reasonably be anticipated to endanger public health or welfare."^[1]

Pursuant to this section of the CAA, in 2015 the Obama Administration issued the Clean Power Plan ("CPP"), which established national carbon-dioxide emission rate requirements for coal- and gas-fired plants.^[2] These limits could only be met through the use of outside-the-fenceline emissions reductions measures, such as transitioning to renewable energy. The CPP then gave States and tribes some flexibility to create their own plans for adopting enforceable emissions limits so long as State-wide emissions complied with the CPP's State-specific emission caps.

In October of 2015, West Virginia filed suit in the U.S. Court of Appeals for the D.C. Circuit ("D.C. Circuit") against the EPA to halt implementation of the plan.^[3] In February of 2016, in a very rare move, the Supreme Court stayed the implementation of the CPP while it was still under review by the D.C. Circuit.^[4] Then, in 2018, while the challenges to the CPP were still pending, the Trump Administration adopted the Affordable Clean Energy Act ("ACE"), which effectively repealed the CPP.^[5] ACE required less stringent emissions reduction ranges than the CPP. These limits were based on inside-the-fenceline controls which were usually already being met by plants through market-based switches from coal to natural gas. ACE also extended the deadlines for State compliance with emissions' standards.

Between 2020 and 2021, environmental groups, States, power utilities, trade associations for renewable energies, and coal mine operators challenged ACE in the D.C. Circuit.^[6] Petitioners that included environmental groups challenged ACE's failure to enact more stringent emissions limits based on outside-the-fenceline emissions reductions and trading. Industry groups and States—including West Virginia and 18 other States—questioned whether Congress, through this provision of the CAA, had given EPA the authority to issue rules "capable of reshaping the nation's electricity grids and unilaterally decarbonize[e] virtually any sector in the economy."^[7] On January 19, 2021, the day before President Biden's inauguration, the D.C. Circuit vacated the ACE rule and remanded the rule to the Agency. The court held that the CPP was permissible under the CAA because the outside-the-fence controls only informed the stringency of the CPP's emissions limits but did not restrict States from adopting alternate approaches to meet the CPP's proscribed limits. Moreover, the court found that ACE's longer deadlines for federal and state compliance were "arbitrary and capricious," and therefore, unlawful pursuant to the Administrative Procedure Act.

Arguments Before the Supreme Court

West Virginia and others petitioned the Supreme Court for certiorari of the D.C. Circuit's decision in April 2021, and on October 29, 2021 – in the midst of the Biden EPA's efforts to promulgate a replacement for the ACE and CPP rules – the Court granted certiorari. Among West Virginia's arguments, was that the CPP's approach amounted to an improper assertion of EPA jurisdiction over power generation and transmission policy, and that EPA's ability to control the nation's energy policy through GHG gas regulations would have vast economic and political impacts that implicate a legal doctrine known as the "major questions doctrine."^[8]

The EPA argued that the CPP did not require outside-the-fenceline controls, it merely based the stringency of the State emissions limits on those controls.^[9] Per the Agency, even though emissions trading is common in the power sector, States were free to adopt whatever compliance methods they wanted to ensure compliance with the CPP's proscribed limits. In other words, the agency was not requiring a certain method of operation. The flexibility given to the States, the EPA argued, meant that the Court's review was not governed by the major questions doctrine. The Agency further pointed out that in 2019, the power sector largely achieved the emissions limitations included in the CPP on their own without enacting major industrial changes. Therefore, EPA reasoned, the CPP's limitations did not have large practical consequences that would trigger the major questions

doctrine.

The Supreme Court's Decision

In a 6-3 ruling with Justice Roberts writing for the majority, the Supreme Court held that the CAA does not grant EPA authority to set nationwide emissions guidelines for GHGs that would “force a nationwide transition away from the use of coal.” Pointing to the major questions doctrine, the Court reasoned that the EPA, through the CPP, had asserted jurisdiction over national energy policy generally by effectively prescribing the means of power generation rather than setting emissions limits that individual power generating facilities could achieve using inside-the-fenceline measures. This broad reshaping of national energy policy from higher emitting sources to lower-emitting or renewable sources would have large-scale political and economic impacts that were not clearly authorized by Congress in the CAA. Thus, while the CAA confers EPA authority to regulate GHG emissions, it does not grant the EPA authority to reshape national energy policy toward lower-emitting or renewable energy sources. The Court found it unlikely that Congress would leave such a significant decision to the EPA’s discretion through the vague and ambiguous CAA text that the EPA cited as its authority for the CPP. The Court did not rule on whether the EPA can regulate emissions outside-the-fenceline, leaving that question open for debate.

Implications

This decision further establishes the current Court’s skepticism towards agencies citing longstanding statutes as the bases for significant new regulatory authority. Justice Kagan, in dissent, criticized the majority for “announc[ing] the arrival” of the major questions doctrine.^[10] While often implied in decisions rejecting agencies’ jurisdictional claims, this doctrine has never before been explicitly used by the majority to justify a holding. Because so many rules and policy changes – environmental or otherwise – are now undertaken by executive branch agencies using long-existing statutory authority, and not through Congress’ conferral of new statutory authority to agencies, the Court’s reliance on the major questions doctrine could portend further limits on other executive agency rules.

This decision, while limited to the CAA provision on which EPA claimed authority for the CPP, will plainly require the EPA to substantially rework its approach to addressing GHG emissions from power plants, which in 2020 contributed 25% of all national GHG emissions. The decision also poses implications for the Biden-Harris Administration’s climate change agenda more broadly. While the Supreme Court in *Massachusetts v. EPA* confirmed that the CAA gives EPA authority to regulate GHGs, it did not decide that the EPA could do so through any means.^[11] Given that Congress last amended the CAA in 1990 and is unlikely to do so again anytime soon, other GHG regulations that the EPA may attempt to promulgate could raise similar questions about the breadth and scope of authority Congress delegated in the CAA decades ago. Additionally, the Court’s reliance on the “major questions doctrine” may provide a basis for aggressive challenges to any significant federal agency action based on long-held statutory authority.

Summer associate Sophie Miller assisted in the preparation of this post.

[1] 42 U.S.C. § 7411(b)(1)(A), (d).

[2] Env’t Prot. Agency, FACT SHEET: Overview of the Clean Power Plan—Cutting Carbon Pollution from Power Plants, available at: <https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html>.

[3] Petition for Review, *West Virginia v. Env’t Prot. Agency*, (D.C. Cir. Oct. 23, 2015) (No. 15-1363).

[4] EPA: Clean Power Plan for Existing Power Plants: Regulatory Action, available at: <https://archive.epa.gov/epa/cleanpowerplan/clean-power-plan-existing-power-plants-regulatory-actions.html#:~:text=On%20February%209%2C%202016%2C%20the,strong%20scientific%20and%20legal%20foundations>.

[5] EPA, Proposal: Affordable Clean Energy (ACE) Rule, available at: <https://www.epa.gov/stationary-sources-air-pollution/proposal-affordable-clean-energy-ace-rule#:~:text=Advance%20Notice%20of%20Proposed%20Rulemaking&text=On%20August%2021%2C%202018%2C%20the,existing%20>

[6] *Am. Lung Ass’n v. Env’t Prot. Agency*, 985 F.3d 914 (D.C. Cir. 2021).

[7] *West Virginia v. U.S. Env’t Prot. Agency*, Pet. Cert., Apr. 29, 2021.

[8] Brief for Petitioner at 14, 31. *West Virginia v. Env’t Prot. Agency*, (No. 20-1530) (U.S. June 30, 2022).

[9] Brief for the Federal Respondents at 26, 44, 51. *West Virginia v. Env’t Prot. Agency*. (No. 20-1530, 20-1531, 20-1778, and 20-1780) (U.S. June 30, 2022).

[10] Justice Roberts argued that the EPA’s claimed authority in this case was equivalent to the CDC forbidding evictions to stop the spread of diseases: likely to raise concerns about agency authority. *West Virginia v. U.S. Env’t Prot. Agency*, Pet. Cert., Apr. 29, 2021.

[11] See *Massachusetts v. U.S. Env’t Prot. Agency*, 549 U. S. 497 (2007).