

High Court Clean Air Fight May Transform Administrative Law

By **Matthew Sinkman and Andrew Alessandro** (March 4, 2022)

Things are heating up in terms of climate change and administrative law. On Feb. 28, the U.S. Supreme Court heard oral argument in *West Virginia v. U.S. Environmental Protection Agency*.^[1]

The court's decision in the case could significantly limit the federal government's efforts to address climate change, limit agencies' abilities generally to address far-reaching national problems, and reshape administrative law and the separation of powers.

The case concerns the scope of the EPA's authority under Section 111 of the Clean Air Act^[2] to address emissions at existing power plants. Power plants that use fossil fuels — mostly coal and natural gas — account for about 25% of the nation's emission of greenhouse gases.^[3]

This is not the first time that climate change and GHGs have come before the Supreme Court. In 2007, the court held in *Massachusetts v. EPA* that the EPA has the authority under the CAA to regulate carbon dioxide and other GHGs as air pollutants, and must determine whether they "endanger public health or welfare."^[4]

The EPA made such a finding in 2009.^[5] Because CO₂ from existing power plants was not otherwise regulated under the CAA, the EPA was required to regulate those emissions.^[6]

In 2015, the Obama administration promulgated the Clean Power Plan.^[7] The CPP required existing power plants to cut carbon emissions by 32% from 2005 levels by 2030.^[8] A key component of the CPP was generation shifting, or the reductions of emissions via shifting to fuels that generate less CO₂.^[9]

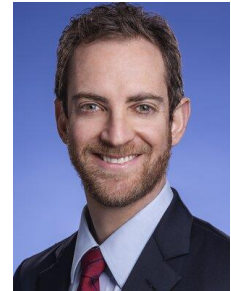
Procedural History

In October 2015, in *West Virginia v. EPA*, several states and others challenged the CPP in the U.S. Court of Appeals for the District of Columbia Circuit, arguing, among other things, that it exceeded the EPA's authority under Section 111 of the Clean Air Act.^[10] In February 2016, in an unprecedented move, the Supreme Court stayed the CPP, even before the D.C. Circuit had issued its decision.^[11]

In 2019, under the Trump administration, the EPA issued the CPP repeal rule,^[12] concluding that the CPP exceeded the agency's Section 111 authority, which the EPA said "is limited to measures that can be applied to and at the level of the individual source."^[13]

That restriction is referred to in the litigation as a power plant's "fenceline."^[14] The Trump administration also issued the Affordable Clean Energy Rule,^[15] which sought much smaller reductions of GHG power plant emissions than the CPP, and used only measures within the fenceline of a power plant.^[16]

In January 2021, in *American Lung Association v. EPA*, the D.C. Circuit held that the Trump administration's rules "hinged on a fundamental misconstruction" of Section 111,^[17] and it



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vacated the rules and remanded the matter to the EPA for further action.[18]

The D.C. Circuit later granted the EPA's unopposed motion for a stay in American Lung Association, so that the CPP would not spring back to life, and the EPA could pursue a new rulemaking.[19] At that point, the emissions goals of the CPP had already been achieved through market changes, even without the CPP being in effect.[20]

West Virginia and other parties petitioned for certiorari, which the Supreme Court granted in October 2021.[21]

Standing

A threshold question in this case is whether the petitioners have standing, since there is no EPA rule in effect, and the EPA is working on a new rule that could be challenged later on.

The Supreme Court's grant of certiorari in what some view as the absence of a readily identifiable "case or controversy" — a fundamental jurisdictional requirement under Article III of the Constitution — has raised eyebrows.[22]

At oral argument, the court and counsel spent relatively little time on the standing issue. But a finding that standing is lacking might enable a majority of justices to avoid more difficult issues in the case, as discussed below.

Section 111 and the Fenceline Question

If the court reaches the merits, it will have to contend with how to interpret the scope of Section 111. The text of Section 111 provides for "the best system of emission reduction,"[23] and the respondents argued that a "system" can exist outside the fenceline of a power plant, and include the electric grid — as with the emissions trading system in the CAA's Acid Rain Program.[24]

The petitioners argued that the provision in Section 111(d)[25] regarding emissions standards "for any existing source" provides a fenceline limitation on the EPA's authority.[26] Oral argument seemed to make clear that the fenceline concept was not particularly relevant, with Justice Clarence Thomas observing that "I don't know how you can draw such clean distinctions." [27]

The Major Questions Doctrine and Nondelegation Doctrine

The case is being closely watched, primarily because of the possibility that the court will resolve the dispute through application of the major questions doctrine, a judicially-created doctrine of statutory construction that the court has relied on in seven cases[28] starting in 1994.[29]

It is not clear what constitutes a "major question,"[30] but the MQD generally grows out of the notion that Congress must clearly authorize agency actions of vast "economic and political significance,"[31] as Congress does not "hide elephants in mouseholes." [32]

The MQD, thus far, has been applied only in exceptional cases where, for example, an agency's action seems to expand its traditional powers and produces "a fundamental revision of the statute." [33] It has most recently been used to curtail the U.S. Occupational Safety and Health Administration's vaccine-or-test mandate,[34] and the eviction moratorium issued by the Centers for Disease Control and Prevention.[35]

The nondelegation doctrine, a close relative of the MQD that has also been raised in this case, holds that, in light of the Constitution's separation of powers — which confers upon Congress all legislative power, and prohibits delegation of such power to the executive branch — a congressional delegation to an agency must have an intelligible principle to guide the exercise of agency discretion.[36]

The NDD has been used only twice to strike down statutes, and was last invoked in 1935. Several amici request that the court revive it,[37] and others think the doctrine is a potential weapon to hobble the so-called administrative state.[38]

Implications of the Case

This case offers opportunities for either narrow or game-changing decisions on standing, the scope of the CAA, and the scope of judicial deference to agency decisions. The administrative law issues appear to be most at play, but this may not be the best case for a groundbreaking decision by the court in those areas, or a ruling that sides with the petitioners based on the MQD.

First, as Justice Amy Coney Barrett observed, regulating GHGs is within the EPA's "wheelhouse," which she contrasted with the CDC's regulation of the landlord/tenant relationship.[39] Further, the power industry appeared on both sides of this case, and, on the respondents' side, they stressed the need for flexibility in complying with the EPA's emissions targets, including by using beyond-the-fenceline measures.[40]

Second, the CPP was never implemented, and its goals were still achieved. And the ACE rule itself noted that the CPP would not have had any economic impact if it had been allowed to stand.[41] So there are likely no exorbitant costs that could be used to invoke the MQD.

A broad ruling by the court, however, could curtail deference under Chevron, since the MQD has been applied to abrogate or alter such deference.[42] This would increase the power of the judiciary and raise separation-of-powers concerns.[43]

That, in turn, could significantly limit federal agencies' abilities generally to address the most pressing national problems, including emerging problems that decades-old statutes may not address with sufficient specificity. If agencies need to wait on specific congressional direction, despite having relevant expertise, that could impede their ability to act quickly — or at all.

However the court rules, we can expect litigants on both sides to continue to raise issues concerning agency authority. The Trump administration frequently invoked the MQD to halt or limit administrative powers, and it is being invoked in the lower courts with some success.[44]

The MQD is a developing area of law that is still largely undefined. The issues that might be addressed under the MQD would likely be national, given its focus on issues of vast "economic and political significance." [45] However, litigants might raise the MQD in discrete disputes that grow out of agency policies that are broadly applicable.

Disclosure: Matthew Sinkman formerly served in the New York Attorney General's office, which represents New York and other state and municipal respondents in West Virginia v. EPA, but had no personal involvement in the case.

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[1] West Virginia et al. v. EPA et al., Nos. 20-1530, 20-1531, 20-1778, 20-1780.

[2] 42 U.S.C. § 7401 et seq.

[3] EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019, at ES-27 (2021), <https://www.epa.gov/sites/default/files/2021-04/documents/us-ghg-inventory-2021-main-text.pdf?VersionId=uuA7i8WoMDBOc0M4ln8WVXMgn1GkujvD>.

[4] Massachusetts v. EPA, 549 U.S. 497, 532-35 (2007).

[5] Endangerment and Cause or Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

[6] See 42 U.S.C. §§ 7411(d)(1)(A)(i) and (ii).

[7] See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

[8] See Fact Sheet: Overview of the Clean Power Plan, https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan_.html.

[9] See Brief for State of New York and Other State and Municipal Respondents at 9, https://www.supremecourt.gov/DocketPDF/20/20-1530/210634/20220118190138353_20-1530%20Br%20for%20State%20and%20Municipal%20Respondents.pdf.

[10] See Press Release, Office of the West Virginia Attorney General, Proposed EPA Rules for New and Existing Coal-Fired Power Plants (Oct. 19, 2016), <https://ago.wv.gov/publicresources/epa/pages/default.aspx>.

[11] Order, West Virginia v. EPA, No. 15A773 (Feb. 9, 2016). See also Adam Liptak and Coral Davenport, Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions, New York Times (Feb. 9, 2016), <https://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html>.

[12] Brief for Federal Respondents at 7, https://www.supremecourt.gov/DocketPDF/20/20-1530/210639/20220118211953209_20-1530bsUnitedStates.pdf.

[13] Id.

[14] See, e.g., id. at 11.

[15] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations 84 Fed. Reg. 32,520, 35,561 (July 8, 2019).

[16] See Brief for Federal Respondents, *supra* note 12, at 8.

[17] *Am. Lung Assoc. v. EPA*, 985 F.3d 914, 930 (D.C. Cir. 2021).

[18] *Id.*

[19] See Brief for Federal Respondents, *supra* note 12, at 10.

[20] *Id.*

[21] *West Virginia v. EPA*, 142 S. Ct. 420 (2021).

[22] See Karen C. Sokol, *The Supreme Court's Plan to Block Climate Action We Haven't Even Taken Yet*, *Slate* (Jan. 25, 2022), <https://slate.com/news-and-politics/2022/01/supreme-court-wv-epa-climate-doom.html>. See also Brief for U.S. Senators Sheldon Whitehouse, Richard Blumenthal, Bernie Sanders and Elizabeth Warren as Amici Curiae in Support of Respondents at 6 (expressing concerns about "separation-of-powers guardrails provided by Article III justiciability doctrines"), https://www.supremecourt.gov/DocketPDF/20/20-1530/211207/20220124172314535_2022-01-22%20WV%20v.%20EPA%20Amicus%20FINAL.pdf.

[23] 42 U.S.C. § 7411(a).

[24] Brief for Federal Respondents, *supra* note 12, at 31, 39; Transcript of Oral Argument, https://www.supremecourt.gov/oral_arguments/argument_transcripts/2021/20-1530_p8k0.pdf, at 114. Respondents and amici cite other outside-the-fence measures in other CAA provisions. See, e.g., Brief for Richard L. Revesz as Amici Curiae Supporting Federal, Non-Governmental Organization and Trade Association, Power Company, and State and Municipal Respondents at 24-29, https://www.supremecourt.gov/DocketPDF/20/20-1530/211297/20220125143949146_Amicus%20Brief.pdf.

[25] 42 U.S.C. § 7411(d)(1).

[26] Brief for North American Coal Corporation Petitioners at 13, 33-34, https://www.supremecourt.gov/DocketPDF/20/20-1530/204904/20211213163113690_20-1530%20-%20NACCO%20Opening%20Merits%20Brief.pdf; Brief for West Virginia Petitioners at 31, 39, https://www.supremecourt.gov/DocketPDF/20/20-1530/204846/20211213135136223_WV%20v%20EPA%20-%20Opening%20Brief%20for%20WV.pdf.

[27] Transcript of Oral Argument at 41.

[28] Natasha Brunstein and Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 *Administrative Law Review* 317, 319 n.6 (2022), https://administrativelawreview.org/wp-content/uploads/sites/2/2022/02/74.2-Brunstein-Revesz_Final.pdf.

[29] See generally *id.* at 325-335 (describing the history of the MQD).

[30] See Brief for The Cato Inst. and Mountain States Legal Found. as Amici Curiae Supporting Petitioners, (setting forth suggested criteria that the court could use to guide its MQD analysis, and arguing that the MQD is need to preserve "reliance interests" and prevent agency flip-flopping with changing administrations), https://www.supremecourt.gov/DocketPDF/20/20-1530/205351/20211216122320892_WV%20v%20EPA%20merits.pdf.

[31] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 136 (2000).

[32] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

[33] *MCI Telecomms. Corp. v. AT&T*, 512 U.S. 218, 231-32 (1994).

[34] *Nat'l Fed'n of Indep. Bus.v. Dep't of Labor, Occupational Safety & Health Admin.*, 142 S. Ct. 661, 669 (2022).

[35] *Alabama Ass'n of Realtors v. Department of Health & Human Servs.*, 141 S. Ct. 2485 (2021).

[36] *Whitman*, 531 U.S. at 474 (internal citation and quotation marks omitted).

[37] *Whitehouse et al.*, *supra* note 22, at 9 n.14 (citing amici briefs requesting the revival of the nondelegation doctrine).

[38] *Whitehouse et al.*, *supra* note 22, at 10.

[39] Transcript of Oral Argument, *supra* note 24, at 61-62; see also *Alabama Ass'n of Realtors*, 141 S. Ct. at 2489 (finding that the government's interpretation of the statute would "intrude ... into an area that is the particular domain of state law" and "would give the CDC a breathtaking amount of authority" without any discernible limit to what "this interpretation would place outside the CDC's reach").

[40] Transcript of Oral Argument, *supra* note 24, at 133.

[41] Repeal of the Clean Power Plan, *supra* note 15.

[42] See *Chevron USA Inc. v. Natural Resources Defense Council Inc.*, 467 U.S. 837 (1984). See also Brief for Am. First Pol'y Inst. as Amici Curiae Supporting Petitioners at 6, 10-11 (noting that the court has applied the MQD at different phases of its Chevron deference analysis or ignores it altogether), https://www.supremecourt.gov/DocketPDF/20/20-1530/205763/20211220145930837_20-1530%20Amicus%20Brief%20of%20The%20America%20First%20Policy%20Institute.pdf.

[43] See Laurence H. Tribe and Jeremy Lewin, *The Rightwing U.S. Supreme Court Has Climate Protection In Its Sights*, *The Guardian* (Feb. 28, 2022), <https://www.theguardian.com/commentisfree/2022/feb/28/us-supreme-court-rightwing-climate-crisis>. Chevron deference has been criticized in recent years. See, e.g., Kristin E. Hickman and Aaron L. Nielson, *Forward: The Future of Chevron Deference*, 70 *Duke L.J.* 1015 (2021). Some commentators see this as a case that could overturn Chevron. See, e.g., Albert C. Lin, *The Supreme Court Could Hamstring Federal Agencies' Regulatory Power in a High-Profile Air Pollution Case*, *The Conversation* (Feb. 17, 2022), <https://theconversation.com/the-supreme-court-could-hamstring-federal-agencies->

regulatory-power-in-a-high-profile-air-pollution-case-171475. An amicus brief in this case expressly requests that result. See Brief for Claremont Inst. Ctr. For Const. Juris. as Amici Curiae Supporting Petitioners, https://www.supremecourt.gov/DocketPDF/20/20-1530/205841/20211220182640761_20-1530%20tsac%20CCJ.pdf.

[44] Brunstein and Revesz, *supra* note 28, at 619 n.6. See Jonathan H. Adler, Federal Court Bars Federal Agencies from Considering the Costs of Climate Change in Rulemakings [Updated], *reason* (Feb. 21, 2022), <https://reason.com/volokh/2022/02/21/federal-court-bars-federal-agencies-from-considering-the-costs-of-climate-change-in-agency-rulemakings/> (discussing a federal court's grant of a preliminary injunction barring agency consideration of the social cost of carbon).

[45] *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 136 (2000).