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U.S. SUPREME COURT UPENDS FEDERAL CLIMATE REGULATION, AND MUCH MORE

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On June 30, 2022, the United States Supreme Court handed down its opinion in *West Virginia v. Environmental Protection Agency*, holding by a 6-3 majority that the U.S. Environmental Protection Agency ("EPA") overstepped its statutory authority during the Obama Administration in adopting the Clean Power Plan ("CPP"), a regulation to reduce greenhouse gas and other emissions from existing power plants.

The decision will require the Biden Administration to take a whole new approach if it is to reign in emissions from these facilities. Of even greater importance, in coming to its decision the Court applied the "major questions doctrine" in a manner that will reverberate throughout the world of administrative law.

I. Background

Congress has failed to enact legislation authorizing EPA to adopt a regulations aimed specifically reducing carbon dioxide ("$C0_2$") and other greenhouse gases ("GHG") emissions in the United States. In the absence of Congressional action, the Executive Branch has been left to come up with ways to reduce such emissions based on existing statutory authority, in an effort to avoid the most serious impacts of climate change.

More than 15 years ago, in *Massachusetts v. EPA*, the Supreme Court held that CO_2 and other GHGs are "air pollutants" as that term defined in the Clean Air Act ("CAA"). Yet, the stationary source provisions of the statute are ill-suited to addressing an ubiquitous pollutant like CO_2. As a result, regulations designed by EPA under the CAA to limit CO_2 emissions from existing power plants have bounced back and forth between EPA (under different administrations with diametrically opposed views on climate regulation) and the courts, with no resulting progress.

In 2015, EPA under President Obama adopted the CPP, a comprehensive regulatory program designed to lower CO_2 emissions from power plants, under Section 111(d) of the CAA. That provision calls for facilities to reduce emissions as needed to achieve "standards of performance"

established by EPA at levels reflecting the "best system of emission reduction which has been adequately demonstrated."

In coming up with a permissible CO_2 emission rate for power plants under the CPP, EPA determined that the "best system of emission reduction" by looking not only to measures (like fuel shifting and heat rate improvements) within the "fence line" of a regulated facility, but to the wider "system" of reduction measures available outside facility boundaries in the interconnected grid. In particular, EPA accounted for the reductions that could be achieved by the owner or operator of a power plant by shifting a portion of the power generated from the facility itself to cleaner energy facilities like wind and solar (by building its own clean power facility, investing in a facility built by some other party or purchasing emission allowances or credits as part of a cap-and-trade regime). The CPP left it up to the states to devise plans allowing for such options in achieving the federally-required emission reductions.

The CPP was immediately challenged, promptly stayed by the U.S. Supreme Court and then rescinded and replaced by the Trump Administration's Affordable Clean Energy ("ACE") program. In adopting those regulations the Trump-era EPA looked only to measures that could be taken at the facilities themselves, under an interpretation of the statutory phrase "best system of emission reduction" that did not stray beyond the fence line. Those regulations, in turn, were challenged in the D.C. Circuit, which vacated both the rescission of the CPP and adoption of the ACE, finding that the Trump Administration's statutory interpretation was in error. The plaintiffs sought to appeal that decision and the Supreme Court granted *certiorari*, even though the Biden Administration had advised the D.C. Circuit that it had no intention of resuscitating the CPP.

II. The Court's Holding

The Court ruled that EPA had exceeded its authority under Section 111(d) by going beyond the fence line in determining the "best system of emission reduction" for power plants. In reaching this conclusion, the Court first determined that EPA's interpretation of Section 111(d) presented an "extraordinary case" of "economic and political significance." It did so because EPA's statutory interpretation was unprecedented (never before had EPA determined the "best system of emission reduction" by looking beyond the fence line), and because it would empower the organization to "restructur[e] the Nation's overall mix of electricity generation" rather than limit emissions at individual power plants.

The Court observed that such "extravagant" assertions of statutory power should be viewed with "skepticism." It considered the language of Section 111(d) in its statutory context and, finding it to be ambiguous, ruled that in an extraordinary case such as the one before it "something more than a merely plausible textual basis" was required to support the Agency's interpretation. The Court ruled that under such circumstances the "agency instead must point to 'clear congressional authorization' for the power it claims." Finding no such clarity in Section 111(d) the Court applied this "major questions doctrine" to reverse the D.C. Circuit and remand the case for further proceedings.

III. Significance of the Court's Decision

As Justice Kagan pointed out in her dissent, for decades the Court has considered the validity of agencies' statutory interpretations by considering the legislative language in context: examining the words used by Congress and reading them in light of other provisions in the statute and the overall statutory scheme, as well as factors like the powers and mission of the agency and its prior course of conduct.

Moreover, under a doctrine first articulated in *Chevron v. Natural Resources Defense Council,* when the statutory language is ambiguous, a court may not substitute its own construction for that of the responsible agency, so long as the agency's interpretation is reasonable and permissible under the statute. Recently, the Court has been moving away from the "Chevron Doctrine," but with *West Virginia v. EPA* it has made a clean and unmistakable break with *Chevron* deference, at least in cases of major economic and political significance. This shift will have profound effects on (and will hinder) the Biden Administration's efforts to address and mitigate climate change, on other environmental programs, and on administrative law generally. To give just a few examples:

- The Biden Administration will have to come up with a wholly different approach if it wishes to reduce GHG emissions from existing stationary sources under the CAA. Notwithstanding *Massachusetts v. EPA*, there is little if any "clear congressional authorization" in the statute that would empower EPA to create major new programs to regulate emission sources contributing to climate change. However, because the statute *does* clearly authorize EPA (in partnership with the States) to regulate the emission of "criteria pollutants," EPA could seek to so designate CO_2 and other GHGs. It might also seek to adopt more stringent National Ambient Air Quality Standards for *existing* criteria pollutants to achieve indirectly the GHG emission reductions it could not achieve directly through a revived CPP, because criteria pollutants like NO_X and mercury are emitted along with GHGs from coal-fired power plants. The Agency might also look to Section 115 of the CAA, and seek to designate GHGs as air pollutants endangering the health and welfare in foreign countries. However, there are multiple hurdles EPA would have to overcome to effectively reduce GHGs under either of these programs, and it would be impossible to do so without many years of intensive rule making, political jockeying and litigation.

- Claims based on *West Virginia v. EPA* are likely to be asserted to challenge other significant climate-related initiatives of the Biden Administration. To give just three recent examples:

  - SEC. In March of 2022, the Securities Exchange Commission ("SEC") proposed a rule that would require companies to report detailed information on significant climate risks, their direct and indirect greenhouse gas emissions, their climate planning, and other matters not traditionally covered by SEC's disclosure rules;

- FERC. In February of 2022, the Federal Energy Regulatory Commission ("FERC") issued a new "interim" policy whereby it will consider direct, upstream, and downstream GHG emissions in determining whether to issue and/or impose mitigation conditions on Certificates of Public Convenience and Necessity for natural gas pipeline projects under the Natural Gas Act ("NGA") and NEPA. Two of the dissenting commissioners argued that the interim policy exceeded FERC's authority under the NGA; and
- FHWA. In April of 2022, the Federal Highway Administration ("FHWA") proposed a new regulation that would call for states to track road-based CO_2 emissions and develop targets aimed at reducing such emissions to net zero by 2050.

Other major environmental initiatives such as those seeking to promote environmental justice may also be in the cross-hairs.

More broadly, the reasoning underlying the Court's decision is likely to be brought to bear in challenges to a wide variety of federal initiatives aimed at addressing cutting edge issues that have not (and may never be) squarely addressed by Congress, such as genetically modified foods, emerging diseases, and cryptocurrency. In fact, the major questions doctrine explicitly endorsed in *West Virginia v. EPA* was presaged in recent decisions of the Supreme Court to vacate the eviction moratorium put into place by the Center for Disease Control during the COVID pandemic and to vacate the Occupational Safety and Health Administration's COVID vaccine mandate.

The Court's decision has even more fundamental implications. Throughout modern history, Congress – having a deep awareness of what it can and cannot do – has crafted statutory language to give agencies broad discretion in addressing complex technical issues, emerging issues and developing circumstances falling within their statutory spheres. Such language, being purposefully broad, could also be construed as vague or ambiguous, and thereby failing to provide the "clear congressional authorization" required by the Court for matters of major "economic and political significance."

Since our deadlocked Congress seems unable to enact significant new legislation, such matters may remain unaddressed by anyone due to the Court's decision in *West Virginia v. EPA.* One commenter has suggested that "the Supreme Court set out to shift the balance of power, away from the executive and back to Congress. In fact, it's asked Congress to do what it can't (or won't) do. It's told administrators that they can't do what they often must do. And that ends up inevitably parking these issues at the court's doorstep."

From another perspective, however, the Supreme Court has disempowered Congress from enacting legislation that grants agencies the authority to adopt regulations addressing pressing problems

(such as air pollution or occupational safety) unless Congress itself can anticipate future issues that may arise and spell out the contours of the agency's authority to address those issues in specific detail.

Thus, the ground-shaking impact of *West Virginia v. EPA* is that it has made the Court – not the Executive Branch or Congress – the arbiters of whether the federal government may take action to address the most pressing problems of our time.

For additional information, or if you have any questions regarding *West Virginia v. EPA*, please contact Bryan Keyt (312-602-5036).

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