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CLIENT ALERT

Supreme Court's "Major Question Doctrine" Challenges Administrative Agencies

JULY 1, 2022

KEY TAKEAWAYS

- The Supreme Court served notice to federal administrative agencies that novel new regulatory programs will need a "clear statement" of authorization from Congress.
- The "major questions doctrine" provides a framework for federal courts to apply when interpreting statutes before granting *Chevron*
- Regulated entities are certain to rely on the major questions doctrine in coming challenges to new regulations proposed by agencies across the Biden Administration—including not just the EPA, but the SEC, CFTC, OSHA, FERC, and others.

The Supreme Court has long been skeptical of novel proposals by federal agencies to address issues of vast economic and political significance. And this week, in *West Virginia v. EPA*, the Court made clear that its past cases reviewing novel applications and interpretations of agency powers do constitute an identifiable "doctrine" for application by courts going forward. When an administrative agency makes a "major policy decision," it must have "clear congressional authorization" to do so. This case may represent one of the Supreme Court's most significant administrative law decisions since *NRDC v. Chevron* in 1984.

The Supreme Court recently cited case law underlying the "major questions doctrine" to set aside other agency actions—the CDC's nationwide eviction moratorium, and OSHA's mandate that large employers require testing or vaccines for COVID-19. While *West Virginia v. EPA* follows these decisions, *West Virginia* is the first clear statement from a majority opinion of the Court applying the "doctrine." It also collects the primary factors the Court has applied when using this doctrine to review any agency regulation.

Section 111(d) of the Clean Air Act and The Clean Power Plan

The *West Virginia* decision specifically addresses Section 111(d) of the Clean Air Act. This authorizes the EPA to set a "standard of performance" for pollutant emissions from existing sources. Under the statute, the EPA bases these

rates on the “best system of emission reduction” that it has shown to be “adequately demonstrated” for the specific category of emission sources.

In 2015, President Obama’s EPA adopted the Clean Power Plan under Section 111(d). That plan sought to reduce carbon emissions by moving away from requiring measures for individual power plants, such as equipment upgrades and modification of operating practices. The Clean Power Plan included a national plan of what the EPA reasoned would be an optimum mix of coal, gas, nuclear, wind, solar, and other renewable power generation for the nation to reduce aggregate greenhouse gas emissions and maintain grid reliability at a reasonable cost. From this power plan, the EPA then calculated individual greenhouse gas emissions caps for states. The EPA also set performance rates for existing coal- and gas-fired plants to encourage shifting of power generation, particularly to wind or solar generators. To meet these standards of performance, coal-fired generators (in particular) would need to either reduce production or subsidize increased generation from natural gas, wind, or solar competitors by purchasing credits from those sources.

The Clean Power Plan never went into effect. The Supreme Court stayed its implantation in 2016. After the election, the Trump Administration repealed the Clean Power Plan, reasoning that the Clean Power Plan was beyond the EPA’s statutorily granted authority in Section 111(d). The EPA simultaneously adopted the Affordable Clean Energy (ACE) Rule. The ACE Rule authorized states to set performance standards based on candidate technologies and techniques that can be applied at the source, but it did not provide for generation-shifting.

West Virginia v. EPA

The agency’s repeal and replacement rules were challenged by certain states and private parties. Several other states, including West Virginia, and private parties intervened to defend the EPA’s actions. The oral argument before the D.C. Circuit lasted an unprecedented—for the modern era—nine and a half hours.

The D.C. Circuit issued its decision the day before President Biden’s inauguration. It held that the EPA misunderstood the scope of its authority and that the Clean Power Plan was not beyond the agency’s power under the Clean Air Act. Because generation-shifting measures could be included under Section 111(d) and the EPA justified the repeal and replacement with the ACE Rule on grounds that generation-shifting was unlawful, the Court vacated the ACE Rule and the EPA’s repeal of the Clean Power Plan. President Biden’s EPA then asked the circuit court to partially stay its mandate while the EPA considered a new rule under Section 111(d). West Virginia and other intervenors, however, petitioned to the Supreme Court.

The question before the Supreme Court was whether the Clean Air Act gave the EPA the authority to adopt this novel “cap and trade” type generation-shifting program. Petitioners argued that Section 111(d) only permitted the EPA to set standards of performance based on systems that could be applied to or at the individual source. The EPA argued that using the cap-and-trade system to encourage generation shifting was the “best system of emission reduction” available under Section 111(d).

In its decision, the Supreme Court first addressed the issue of standing and mootness. The EPA and respondent-intervenors argued there was no longer any rule in place to review. The Court found standing for the intervening states because the restoration of the Clean Power Plan would require those states to regulate emissions more stringently. And the EPA’s voluntary decision not to enforce the Clean Power Plan while it considers a new rule was insufficient to moot the case.

As for the EPA’s authority under Section 111(d), the Court held that Congress did not authorize the use of generation-shifting to reduce emissions under the Clean Air Act. Based on a series of precedents, the Court explained that the “major questions doctrine” provides that in certain “extraordinary cases,” where an agency seeks to expand its authority to regulate in new ways over issues of economic and political significance, courts must “hesitate before concluding that Congress meant to confer such authority.” The Court also explained that it will “presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies.” Thus, if an agency seeks to assert authority over a major question, it “must point to a clear congressional authorization for the power it claims.”

The Court's majority opinion did not provide a specific test for what constitutes an extraordinary case for a major question. It nevertheless referenced application to decisions of vast "economic and political significance." In assessing the EPA's authority under Section 111(d), the Court also addressed several factors that support application of the major questions doctrine:

- when an agency relies on "vague terms" or "modest words" in the text of a statute to claim a significant expansion of regulatory power;
- when there is language elsewhere in a statute granting an agency the power in question;
- when an agency's assertion of authority conflicts with the established practice of agency implementation;
- when Congress considered enacting legislation to provide the agency authority to undertake a similar program but failed to do so;
- when an agency lacks expertise specific to the particular issue it seeks to regulate;
- when an agency's interpretation lacks a clear statutory or technical constraint on the new power claimed by the agency; and
- when an agency or agency head has conceded that the new program moves beyond its traditional authority.

With respect to the EPA's attempt to regulate the mix of power sources and effectively cap carbon emissions, the Court found that these factors showed that it was a major question. Among the reasons, the Court said the EPA relied on vague language located in an ancillary, gap-filling, and rarely used provision that the EPA had never used in this way. Moreover, other provisions of the Clean Air Act have language specifically authorizing the type of emissions trading that Section 111(d) lacks. Congress had also repeatedly considered, but declined to enact, legislation to create a cap-and-trade program like the Clean Power Plan. The Court also observed that the EPA did not possess expertise to implement the plan. The Federal Energy Regulatory Commission, interstate Independent System Operators, and state public utility commissions are typically responsible for ensuring a reliable and cost-effective mix of electrical power generation.

Because the major question doctrine applied, the EPA was required to point to a "clear congressional authorization" that allowed it to use generation-shifting in the Clean Power Plan as a "best system of emission reduction." Finding no such clear statement, the Court held that the EPA lacked the authority under Section 111(d) to adopt the Clean Power Plan.

What This Means

The impact of the Court's decision on the EPA's overall ability to regulate greenhouse gas emissions is unclear. Greenhouse gases remain a "pollutant" subject to regulation under the Clean Air Act. The Petitioners challenging the Clean Power Plan agreed that the EPA has authority to regulate greenhouse gas emissions under Section 111. And the EPA continues to regulate greenhouse gas emissions under other section of the Clean Air Act, including from mobile sources under Title II. The EPA also has express authority to regulate certain greenhouse gas emissions under the AIM Act of 2020.

The *West Virginia* decision will, however, reach well beyond environmental regulations. The Court has established the "major questions doctrine" as a threshold question when reviewing a significant expansion of claimed agency authority. New agency programs that seek to regulate major social or policy issues that affect a large portion of the American economy, that require large expenditures from regulated parties, or that are of vast political significance, must point to clear congressional authorization language. Beyond the EPA, many other federal administrative agencies have proposed significant new regulatory programs, including the SEC, CFTC, FCC, OSHA, FERC, FDA, and many others. Regulated entities will certainly rely on the major questions doctrine to challenge novel regulatory programs being enacted by these and other federal agencies.

Olivia Wogon, a summer associate in Winston's Houston office, assisted with this briefing.

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