Environmental and Workplace Health & Safety Law

West Virginia v. EPA: The Major Questions Doctrine Arrives to Rein in Administrative Power

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On the final day of its 2022 term, the Supreme Court issued its highly-anticipated opinion in the case of *West Virginia v. EPA*, 579 U.S. __ (2022), addressing EPA's authority to regulate greenhouse gases (GHGs) under the Clean Air Act (CAA), but having much broader implications for the authority of all administrative agencies. The opinion signals a significant shift in the standards used to review administrative actions. Chief Justice Roberts wrote the opinion for the Court, joined by Justices Thomas, Alito, Gorsuch, Kavanaugh and Barrett. Justice Gorsuch filed a concurring opinion, in which Justice Alito joined, and Justice Kagan filed a dissenting opinion, in which Justices Breyer and Sotomayor joined.

Major Questions Doctrine Has Its Day in the Sun

In a significant yet long-predicted move, the six-to-three opinion rejected EPA's approach to regulating GHG emissions under the Obama Administration's Clean Power Plan (CPP), under which EPA intended to regulate existing coal- and natural-gas-fired power plants pursuant to Section 111(d) of the CAA.[1] Of greater significance, however, the Court took the opportunity to fully embrace the "major questions doctrine," a standard several Justices had endorsed but which had not yet been fully unveiled by the Court. The doctrine now requires agencies, in instances in which a regulation will have major economic and political consequences, to point to clear statutory language showing congressional authorization for the power claimed by the agency. In particular, in "extraordinary cases" in which "the history and the breadth of the authority that the agency has asserted and the economic and political significance of that assertion" is significant or major, courts have "a reason to hesitate before concluding that Congress meant to confer such authority." Slip op. at 17. In such extraordinary cases, the Court will not read into ambiguous statutory text authority that is not clearly spelled out. Instead, "something more than a merely plausible textual basis for the agency action is necessary"; specifically, "[t]he agency instead must point to clear congressional authorization for the power it claims." Slip op. at 19.

As support for the adoption and application of the major questions doctrine, the Court cited numerous cases in which agency authority was curtailed because of extraordinary circumstances that it determined required a clear congressional directive. The cases included the FDA's attempt to regulate tobacco (*FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the CDC's effort to issue an eviction moratorium during the COVID-19 pandemic (*Alabama Assn. of Realtors v. Dept. of Health & Human Servs.*, 594 U.S. __ (2021)), EPA's assertion of permitting authority over millions of small sources like hotels and office buildings (*Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014)), and OSHA's endeavor to require 84 million Americans either obtain a COVID-19 vaccine or undergo weekly testing (*National Federation of Independent Business v. OSHA*, 595 U.S. __ (2021)), all of which, according to the Court, involved an agency overstepping its authority to act in situations not dissimilar from the extraordinary circumstances presented in *West Virginia v. EPA*. The dissent, on the other hand, regarded the majority's use of the major questions doctrine to be without precedent, observing that "[t]he Court has never even used the term 'major questions doctrine' before." Dissent at 15.

As discussed below, when the Court determines that the major questions doctrine applies, even if the administrative action arguably fits within what may seem like a broad grant of statutory authority, it is not necessarily enough to authorize the agency to act. Rather, if the court finds that the administrative rule is an "extraordinary case," *i.e.*, will have a significant economic or political impact, the agency must base its action on very clear congressional authorization to justify the power it is attempting to assert.

Clean Power Plan Is Out but Regulating GHGs Still OK

Turning back to the regulation at issue in *West Virginia*, the Court reviewed the Clean Power Plan, which dates back to the Obama Administration's EPA. At that time, EPA promulgated the CPP pursuant to its authority under the New Source Performance Standards (NSPS) in Section 111(d) of the CAA. The Court's review thus centered on Section 111(d), which gives EPA authority to select the "best system of emission reduction" for existing sources of pollution, like power plants. 42 U.S.C. § 7411(d). Under the CPP, the Obama Administration's EPA used the NSPS to set GHG emission standards for existing power plants which would require many operators to shut down older coal-fired units and/or shift generation to lower-emitting natural gas units or renewable sources of electricity. The Court viewed EPA's CPP, which would have required power producers to significantly change the generation mix, as an "extraordinary case" because it would have a major impact on the economy and was a "transformative expansion in [EPA's] regulatory authority" based on "vague language" in the CAA. Slip op. at 20. In addition, the Court noted that EPA was using an "ancillary provision" in the CAA to regulate GHGs and stated that "the Agency's discovery [of Section 111(d)]"—which the Court described as a "gap filler"—"allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself." Slip op. at 20.

Best System of Emission Reduction

Notably, the Court acknowledged that "as a matter of definitional possibilities, generation shifting can be described as a system" (and thus a "best system of emission reduction"), but nevertheless determined that the CAA's grant of authority was too vague. Slip op. at 28. According to the Court, almost anything could be described as a "system," and therefore the CPP was based on a vague grant of authority and did not pass the major questions doctrine test. Slip op. at 28. The majority found such a broad grant of authority questionable, particularly because climate change legislation has been debated in Congress for years with no action, signaling that EPA could not exercise such broad authority when Congress had clearly declined to take such action itself.

By contrast and contrary to the majority's narrow reading of "best system of emission reduction," the dissent argued that the generation shifting prescribed by the CPP was precisely the type of "system" of emission reduction permitted under the CAA. In particular, the dissent contended that the term "system" is not vague (which Justice Kagan defined as unclear, ambiguous or hazy) but intentionally expansive to allow for such system-wide programs. Thus, the crux of the disagreement between the majority and dissent is that the dissent saw the CAA as having bestowed broad authority on EPA to regulate complex and important issues of air pollution—including and especially climate change, particularly considering the severity of the problem—in the manner that EPA determines is most appropriate, while the majority required further scrutiny for large-scale administrative endeavors like the CPP, which it held require very clear and specific authorization.

What's Next?

In terms of the implications of *West Virginia*, what is clear is that the major questions doctrine is here to stay and EPA's ability to regulate GHG's under Section 111(d) of the CAA may be curtailed but has not been rejected. In fact, the Court specifically endorsed EPA's authority to regulate GHGs. So, what does this mean, not only for GHG regulation but also for agency rulemaking in general?

First, while the ruling marks a significant setback for EPA, it does not shut the door on the agency's ability to regulate GHGs. The CPP rules at issue raised the specter of the major questions doctrine because the regulation would have required generation shifting across the entire energy industry—an action viewed by the Court as having a significant impact on the national economy. The Court, however, declined to opine on "how far our opinion constrains EPA," indicating that EPA's authority had not been disallowed. Slip op. at 31, fn5. In fact, the opinion unequivocally states that it is within EPA's purview to set a specific limit on GHG emissions. Slip op. at 6 ("Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved.") Nothing in the opinion suggests that EPA cannot choose to regulate GHGs at power plants

with more traditional technology-based requirements. Indeed, an inside-the-fence-line regulation that requires technology like carbon-capture would likely be within EPA's traditional expertise and less likely to implicate large swaths of the economy like generation switching, and hence not be struck down.

Looking beyond EPA and GHG regulation, additional fallout from the Court's embrace of the major questions doctrine is sure to occur. In addition to the Court's explicit adoption of the major questions doctrine, Justice Gorsuch—a longstanding proponent of the doctrine—used his concurring opinion to lay out what he saw as the appropriate elements to consider when evaluating administrative rules under the doctrine. While Justice Gorsuch's concurrence is not binding, future courts and administrative agencies likely will look to both the Court's majority opinion and the Gorsuch concurrence for guidance. Administrative regulations will face increased challenges and heightened judicial scrutiny thanks to the major questions doctrine, and we can expect to see not only the number of challenges increase but also the number of successful challenges rise. Additionally, administrative agencies may proactively rein in regulatory actions they were planning to promulgate—keeping the rules more modest or tailored in an attempt to avoid challenges based on the major questions doctrine.

Undoubtedly, this will not be the last word on EPA regulation of GHGs or the use of the major questions doctrine. EPA will issue new GHG regulations, which certainly will invite future litigation. The decision will also certainly trigger many more challenges of agency authority under the newly minted major questions doctrine.

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[1] Notably, the CPP was revoked by the Trump EPA, and the Biden EPA has stated that it intends to promulgate new GHG regulations different from the previous rules under past administrations. Nevertheless, the Court held that the parties had standing to proceed and the case was not moot. Slip op. at 14, 16.

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