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# The Major Questions Doctrine Reigns Supreme in *West Virginia v. Environmental Protection Agency* — Implications for Climate Policy and Impact Investing

06 July 2022

On June 30, 2022, the U.S. Supreme Court (the "Court") held, in a 6-3 decision, that the U. S. Environmental Protection Agency ("EPA") lacked authority under the Clean Air Act to regulate greenhouse gas ("GHG") emissions from existing power plants through the proposed "generation shifting" approach — intended to shift electricity generation at the grid level from higher-emitting to lower-emitting energy producers — in the Obama administration's never-implemented[1] Clean Power Plan.[2] Relying on the "major questions" doctrine,[3] the Court held that, given the "history and the breadth of the authority that the agency has asserted and the economic and political significance of that assertion," the agency must point to "clear congressional authorization" for the authority it claimed to limit emissions by shifting the grid to lower-emitting sources.[4] The Court concluded that Congress did not grant EPA such authorization under Section 111(d) of the Clean Air Act. This article analyzes implications of the Court's opinion for the Biden administration's climate regulatory agenda and for climate impact investing more broadly.

## Clean Power Plan Invalidated under the Major Questions Doctrine

In 2015, EPA promulgated the Clean Power Plan, relying on Section 111(d) of the Clean Air Act for authority. Section 111(d) authorizes EPA to regulate existing power plants by setting performance standards to reduce pollutant emissions.[5] Such performance

standards must reflect the "best system of emission reduction" ("BSER") that the agency has determined to be "adequately demonstrated."[6] As the Court explains:

> Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources. The question before [the Court] is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.[7]

EPA specifically selected a BSER for existing power plants that included three types of measures (or "building blocks"):[8] (1) heat rate improvements, i.e., practices to more efficiently burn coal;[9] (2) a shift in electricity production from coal-fired plants to natural gas-fired plants;[10] and (3) a shift from coal- and gas-fired plants to renewable energy, primarily wind and solar sources.[11] EPA described the second and third building blocks as "generation shifting" to cleaner sources and identified three ways by which this could be achieved: (i) an operator could reduce its own plant's electricity production; (ii) an operator could build or invest in a natural gas plant, or wind or solar project; or (iii) operators could purchase emissions credits under a cap-and-trade regime.[12]

The Court explained that the sector-wide shift in electricity generation from coal to natural gas and renewables required by the Clean Power Plan would result in billions of dollars in compliance costs paid in the form of higher energy prices; retirement of dozens of coal-fired plants; and elimination of tens of thousands of jobs across various sectors.[13]

Relying on the "major questions" doctrine, the Court found that a "clear statement" from Congress is necessary in order for a court to conclude that Congress intended to delegate authority to EPA to establish carbon emissions caps based on a generation shifting approach and promulgate a regulation of such "vast economic and political significance."[14] The Court held that EPA had not shown "more than a merely plausible textual basis" for its expansive regulatory action and could not "point to clear congressional authorization for the power it claims."[15]

In reaching its conclusion that the Clean Power Plan was not within the agency's authority under Section 111(d), the Court highlighted the following factors that it

concluded had resulted in a "transformative expansion of [EPA's] regulatory authority" and made this "a major questions case:"[16]

- The Clean Power Plan represented a "novel" approach to implementing Section 111, and EPA acknowledged its departure from its own historical approach;[17]
- This view of EPA's authority effected a "fundamental revision of the statute, changing it from one sort of a scheme of regulation to an entirely different kind;"[18]
- The issues implicated by the Clean Power Plan (such as electricity transmission, distribution, and storage) required "technical and policy expertise not traditionally needed in EPA regulatory development;"[19]
- Congress is unlikely to have left to agency discretion the "consequential" decision of "how much coal-based generation there should be over the coming decades;[20]
- EPA "essentially adopted a cap-and-trade scheme…for carbon" that "Congress had considered and rejected multiple times."[21]

Justice Kavanaugh stressed the latter point during oral argument, noting that "there were bills pending in Congress to do cap-and-trade for CO2 emissions. Ultimately, those did not pass. And then what happened is the executive branch, as executive branches are, unhappy with the pace of what's going on in Congress, tried to do a cap-and-trade regime through an old and somewhat ill-fitting regulation."[22]

The Court emphasized that its ruling only addressed the narrow question before it, stating that it was not ruling on whether EPA had the authority to address climate change or even adopt a broader interpretation of its authority to regulate existing power plants than in the past.[23] The Court also did not broadly address whether EPA had the authority to regulate GHG emissions.

However, the Court's reasoning suggests that there are limits to Executive Branch agencies' authority to adopt regulations that aim to achieve economy-wide reductions of GHG emissions without explicit Congressional authorization, raising questions about the long-term implications this ruling could have on future efforts by the Executive Branch to address climate impacts absent further Congressional action.

## Potential Impact on Future Climate Regulation

One issue to watch is how the Court's decision will impact the Biden administration's broader climate regulatory agenda. The Biden administration has announced an unprecedented set of federal reform efforts with the goal of curbing GHG emissions economy-wide, including through future EPA regulation of GHG emissions from

existing power plants targeted for proposal in spring 2023.[24] In addition, the Securities and Exchange Commission ("SEC") proposed its climate disclosure rule in April 2022.[25]

With respect to the former, the Court specifically noted that its decision did not address the scope of EPA's authority to regulate GHG emissions beyond the narrow issue whether the Clean Power Plan was within EPA's authority. While this leaves room for future EPA regulation of GHG emissions from existing sources, any attempt to use EPA authorities to achieve sweeping economy-wide energy transition would likely face many of the same challenges as the Clean Power Plan.

Whether the "major questions" doctrine could be applied to the SEC's climate disclosure rule, anticipated to be released in final form in the fall of 2022,[26] remains to be seen. The question of the agency's statutory authority to promulgate the rule has already featured prominently in the public comments on the proposed rule. Proponents of the rule, including a group of 30 professors of law who submitted a comment letter to the SEC, have argued that the rule is squarely within the SEC's authority under Section 7 of the 1933 Act, noting that courts have consistently interpreted the authorization to act as "necessary or appropriate in the public interest or for the protection of investors," as granting the SEC broad rulemaking authority.[27] Others, like former SEC Chairman Richard Breeden and four former SEC commissioners, have argued that a rule requiring "disclosure of … vast quantities of immaterial information" oversteps the SEC's congressionally delegated authority and attempts to implement by rulemaking a scheme that Congress has considered and rejected.[28]

While the full extent of the "major questions" doctrine and its applicability to various regulatory agendas of the Executive Branch will not be clear for some time, in the near-term, the Court's ruling could potentially impact the timing of pending rulemakings, as agencies determine how to address the Court's findings. The release of the draft EPA rule for existing power plants has already been delayed several times from the initial July 2022 target for publishing a proposed rule. During oral argument in *West Virginia v. EPA* in February, Solicitor General Elizabeth Prelogar told the Court that EPA expects to issue the proposed rule by the end of 2022, and that target was subsequently further pushed back to March 2023 in the Biden administration's latest Unified Agenda.[29] As the Solicitor General noted during oral argument, EPA in the past has taken about a year after the publication of a proposed rule to issue a final rule,[30] which means that EPA's rule will likely be finalized toward the end of the Biden administration's term.

The Court's decision will also almost certainly create new avenues for challenging final

agency rulemakings, leading to additional regulatory uncertainty and delays. Further, the use of the "major questions" doctrine raises the possibility of several other environmental, health and safety rules facing challenges in the lower courts if litigants can show a lack of clear Congressional authorization for broad authority, including EPA's vehicle GHG emissions rule; EPA's waiver of preemption allowing California to set vehicle rules; pending rules setting the scope of "waters of the United States" under the Clean Water Act;  and other public health and safety-related regulations, including future rulemaking by the Occupational Safety and Health Administration.

Legislative action to clearly articulate agency authorities under the Clean Air Act seems unlikely in the few months remaining prior to the 2022 midterm elections, and such action is anticipated to become even more unlikely if Republicans win one or both chambers this November.

This could result in greater uncertainty for corporate reporting and compliance going forward, especially to the extent such reporting and compliance are required by novel actions by the Executive Branch and its agencies.

## Potential Effects on Climate Impact Investing and Corporate 'Net Zero' Plans

The Court's decision is also meaningful for investors and businesses. Institutions such as the International Energy Agency have stated that stable regulation and policy support is necessary to mobilize the trillions of dollars of investment required to achieve climate and decarbonization goals.[31] In support of EPA's position in the *West Virginia v. EPA* litigation, a number of power companies acknowledged the role of EPA regulation in an effective emissions reduction system.[32]

The rise of climate impact funds over the past several years has in part been due to concerns that government regulation on climate change is not sufficiently ambitious to achieve the goals of the Paris Agreement, with the private sector attempting to bridge this gap.[33]To that end, several multibillion-dollar private climate impact funds have recently been launched. [34] Although private capital will likely continue to help drive transition from higher-emitting sources to lower-emitting sources, one view is that the Court's decision could slow further growth in the renewables sector by continuing the regulatory uncertainty at the U.S. federal level and associated transition risk for investors. Another potential view is that private capital could be further mobilized to fill the gap.

Taking the view that climate risk is investment risk, certain investors and businesses across public and private markets are increasingly focused on corporate GHG emissions reductions and so-called 'net zero' transition plans. Market-led initiatives such as the Task Force on Climate-related Financial Disclosures ("TCFD") recommendations and the Science Based Targets initiative ("SBTi") provide voluntary frameworks for businesses to make GHG emissions disclosure and set emissions reductions targets.[35] Voluntary carbon markets, in which businesses buy carbon credits to neutralize (or "offset") their residual emissions outside of formal government cap-and-trade programs, are also rapidly developing.[36] It is worth recalling that, although the Clean Power Plan never came into effect, its nationwide emissions target was achieved — largely as a result of state-level efforts and market forces. Similarly, the *West Virginia v. EPA* decision would not seem to have an apparent impact on investors and businesses who are guided by voluntary standards and emerging best practices on emissions reductions and the use of high-quality carbon credits, in order to align with their net zero goals and other climate commitments.

The precise scope of the impact *West Virginia v. EPA* will have on future climate and other environmental regulation will become clear over the coming months and years. In the meantime, companies and organizations should follow how agencies and courts incorporate this new precedent into their upcoming decisions.

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1. This case is unusual because the Clean Power Plan never went into effect following its promulgation in October 2015, having first been stayed by the Court in February 2016, then later repealed by the Trump administration. *See* 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. 32520 at 32561–32562 (July 8, 2019). The Biden administration's proposed rule for existing sources has yet to be published. Moreover, as Justice Kagan noted in her dissent, the Plan's nationwide carbon emissions target was achieved in the intervening period. *West Virginia v. EPA, 597* U.S. _____ (2022)(Kagan, J. dissenting) (slip op. at 4). This shift has taken place primarily as a result of state-level efforts and market forces. ↩

2. *West Virginia v. EPA*, 597 U.S. _____ (2022) ("Opinion").↩

3. The "major questions doctrine" holds that where an agency takes action to regulate an issue of major economic and political significance, its action must be supported by clear statutory authorization.↩

4. *Id.* at 17, 19 (internal quotations omitted).↩

5. 42 U. S. C. §7411(d)(1).↩

6. *Id.* at §7411(a)(1).↩

7. Opinion at 2.↩

8. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64667 (Oct. 23, 2015).↩

9. Id. at 64727.↩

10. Id.↩

11. *Id.* at 64729, 64748.↩

12. Id., at 64731–64732.↩

13. Opinion at 10.↩

14. *Id.* at 11.↩

15. *Id.* at 19.↩

16. *Id.* at 20.↩

17. *Id.* at 12, 23.↩

18. *Id.* at 24 (internal quotations omitted).↩

19. *Id.* at 25.↩

20. *Id.* at 25-26.↩

21. *Id.* at 27 (internal quotations omitted).↩

22. Transcript of Oral Argument at 79, *West Virginia v. E.P.A.* 597 U.S. _____ (2022) at 79.(No. 20-1350) ("Oral Argument").↩

23. *Id.* at 30-31.↩

24. *See* Spring 2022 Unified Agenda, Environmental Protection Agency, Emission Guidelines for Greenhouse Gas Emissions From Fossil Fuel-Fired Existing Electric Generating Units, RIN 2060-AV10. ↩

25. The Enhancement and Standardization of Climate-Related Disclosures for Investors, 87 Fed. Reg. 21334 at 21334-21473 (proposed Apr. 11, 2022). See our March 2022 *Alert*for more information about SEC's proposed rule. ↩

26. *See* Spring 2022 Unified Agenda, Securities and Exchange Commission, Climate Change Disclosure, RIN 3235-AM87.↩

27. *See e.g.,* Letter from Jill E. Fisch to Vanessa Countryman, Secretary, Securities and Exchange Commission (June 17, 2022); Letter from John C. Coates to Vanessa Countryman, Secretary, Securities and Exchange Commission (June 17, 2022).↩

28. *See* Letter from Richard C. Breeden to Vanessa Countryman regarding the SEC's Draft Disclosure Rule (June 17, 2022). ↩

29. *See* Oral Argument at 75; *see also* Spring 2022 Unified Agenda, Environmental Protection Agency, Emission Guidelines for Greenhouse Gas Emissions From Fossil Fuel-Fired Existing Electric Generating Units, RIN 2060-AV10. ↩

30. Oral Argument at 75.↩

31. *See, e.g.*, International Energy Agency, "Net Zero by 2050: A Roadmap for the Global Energy Sector" (2021), at 14, 22.↩

32. *See, e.g.*, Brief for the Power Company Respondents at 38, West Virginia v. E.P.A. 597 U.S. _____ (2022) (No. 20-1530) ("[…] EPA, States and industry have long demonstrated that measures shifting generation from some producers to others are part of an effective emission-reduction system."); Brief of Amici Curiae The Edison Electric Institute and The National Association of Clean Water Agencies in Support of Respondents at 5-6, *West Virginia v. E.P.A.* 597 U.S. _____ (2022) (No. 20-1530) (suggesting that stripping EPA of authority to regulate GHG emissions could lead to "a deluge of tort litigation against GHG emitters, which if successful could effectively shift GHG regulation from a sensible and consistent nationwide regime governed by EPA and the States pursuant to a statutory scheme Congress designed, to a chaotic system dictated by the interests of individual plaintiffs, untethered from all consideration of commonsense statutory factors like technological feasibility, cost, and reliability of supply.").↩

33. In our November 23, 2021 *Alert*, we discuss key outcomes of the Conference of the Parties to the United Nations Framework Convention on Climate Change and their possible implications for the role of private capital in efforts to mitigate and adapt to climate change.↩

34. For example, Brookfield announced in June 2022 the close of a $15 billion fund focused on "facilitating the global transition to a net-zero carbon economy." In April 2022, TPG announced the close of a $7.3 billion fund, TPG Rise Climate, as the dedicated climate investing strategy of its global impact investing platform TPG Rise.↩

35. The SBTi is expected to issue guidance for the energy sector in 2023.↩

36. The Integrity Council for Voluntary Carbon Markets ("ICVCM") is expected to release "Core Carbon Principles" that set threshold standards for high-quality carbon credits.↩

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