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U.S. Supreme Court Case Limits the Authority of the EPA in Regulating Air Emissions

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In what many consider to be one of the most important environmental cases of the last decade, the U.S. Supreme Court ruled on June 30, 2022, in the case of *West Virginia v. EPA*, 597 U.S. ___, 2022 WL 2347278, that the authority of the U.S. Environmental Protection Agency (EPA) under Section 111(d) of the Clean Air Act (CAA) in controlling greenhouse gas emissions by requiring existing fossil fuel power plants to convert to the use of non-greenhouse gas emitting forms of energy, is limited. The case focused on the "Clean Power Plan" which was promulgated by the EPA in 2015 to address, in-part, carbon dioxide emissions from coal-fired power plants. One of the major provisions of the Clean Power Plan was the adoption of air emission limits by use of the "best system of emission reduction" (BSER). The BSER for existing fossil fuel power plants included a "generation shifting" requirement which required an industry-wide shift in generation of electricity from coal-fired plants to natural gas-fired plants over a period of years. Specifically, the Clean Power Plan required reduction in the use of coal to provide 27% of the nation's electricity by 2030, down from 38% in 2014. The EPA projected the BSER could require billions of dollars in compliance costs, raise retail electricity rates, and require retirement of numerous coal plants.

The central issue before the Supreme Court was whether the EPA had the authority to include in the BSER a requirement to regulate emissions "beyond the fenceline" of individual power plants by requiring a shift to alternative forms of energy sources on an industry wide basis across the entire U.S. power grid. The Plaintiffs, which included the state of West Virginia and several other U.S. states and energy industry representatives, argued that the requirement of an industry-wide generation shift to use of non-fossil fuel energy sources exceeded the scope of the EPA's authority as it had major economic and political impacts, that constituted a climate change policy for the country, which they argued is the role of Congress, and not a regulatory agency. They further argued that such action exceeded the authority of the EPA under the CAA unless there had been a clear delegation of authority to take such an action.

The majority opinion was authored by Chief Justice John Roberts, who was joined by Justices Samuel Alito, Amy Coney Barrett, Neil Gorsuch, Brett Kavanaugh and Clarence Thomas. Justices Sotomayer, Kagan and Breyer joined in a dissent of the majority opinion. The majority held that regulation of existing power plants was subject to the "Major Questions Doctrine," which the Supreme Court has used to require courts to defer to Congress rather than administrative agencies regarding matters that it concludes have significant economic and political impact if it believes that

Congress did not specifically grant such powers to an agency, which the Court expressed had not been done in this case. Further, the Court stated that the EPA lacked the authority under Section 111(d) of the CAA to limit emissions at existing power plants through generation shifting to alternative energy sources. The Court stated that according to "EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030…There is little reason to think that Congress assigned such decisions to the Agency…We also find it highly unlikely that Congress would leave to agency discretion the decision of how much coal-based generation there should be over the coming decades." Further, the Court concluded that "our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must – under the major questions doctrine – point to clear congressional authorization to regulate in that manner," which the Court stated, the EPA had not been able to show.

The dissenting Justices expressed concern over the Court's steps to override the EPA's expertise in regulation of air emissions. Justice Kagan wrote in a dissenting opinion that, "[w]hatever this Court may know about, it does not have a clue about how to address climate change. And let's say the obvious: the stakes are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy."

The Supreme Court's ruling will likely curb the President's current plans to address climate change, requiring the EPA to revisit its approach to regulating power plant emissions. It is also expected that the precedent set by the *West Virginia v EPA* case will be used by future litigants to request federal Courts to closely scrutinize administrative agency actions under the Major Questions Doctrine to determine whether the actions are supported by a clear congressional authorization. While the *West Virginia v EPA* case limits the EPA's authority to regulate power plant emissions, it does not limit the ability of individual states to adopt clean energy initiatives. For example, the state of Oregon adopted a law that requires utilities to reduce fossil fuel emissions by 80 percent by 2030, 90 percent by 2045 and 100 percent by 2040. Connecticut implemented a plan of meeting a zero-carbon electric energy grid by 2040, and in Nebraska, the largest utilities in the state have agreed to a goal of achieving net-zero emissions by 2050.

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