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Climate Change Litigation Update:

U.S. Supreme Court to review EPA authority to regulate GHG emissions from existing power plants: *West Virginia v. EPA*

NACAA Climate Change Committee

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West Virginia v. EPA

- On February 28, 2022, the U.S. Supreme Court will hear oral arguments in *West Virginia v. EPA*
- At issue is the extent of EPA's authority to regulate GHG emissions from existing power plants under Section 111(d) of the Clean Air Act
- The case involves major questions of administrative and Constitutional law
- The outcome may have implications beyond the Clean Air Act, limiting the scope of authority that EPA and other agencies may exercise via statutory delegation

How We Got Here

CAA Section 111(d) requires EPA to determine the "best system of emission reduction" (BSER) for existing fossil-fuel fired power plants. Provides for the establishment of standards of performance reflecting emissions reductions that can be achieved through application of BSER.

- October 2015: Obama administration EPA promulgates the Clean Power Plan (CPP)
  - BSER defined as a combination of heat rate improvements, generation shifting from coal to natural gas, and generation shifting from coal to renewable energy ("beyond the fenceline")
  - Set numeric, statewide emissions goals based on emission rates established based on BSER and applied to affected plants
  - States must develop and implement plans that ensure their power plants (individually, collectively, or in combination with other methods) meet the statewide goals

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How We Got Here

- Petitions for review and motions to stay the CPP filed in the D.C. Circuit (*West Virginia v. EPA)*
- January 2016: D.C. Circuit denies the stay motions
- Five stay applications filed in the U.S. Supreme Court
- February 2016: Supreme Court (5-4) stays the CPP pending D.C. Circuit disposition of *West Virginia* and Supreme Court disposition of any *cert* petitions
- September 2016: D.C. Circuit hears oral arguments *en banc*
- March 2017: President Trump orders EPA to review and revise the CPP; D.C. Circuit grants EPA motion to hold *West Virginia* litigation in abeyance

How We Got Here

- July 2019: EPA promulgates the Affordable Clean Energy (ACE) Rule, which includes CPP repeal
  - Concludes that the CPP exceeded EPA's statutory authority
  - Finds BSER is limited to systems that can be applied to and at an individual source ("inside the fenceline")
  - Defined BSER for existing coal-fired plants as efficiency measures/heat-rate improvements
  - Provided information on candidate technologies to improve heat rate and degree of emission limitation achievable through application of BSER; states use this information to set unit-specific emission standards
- Petitions for review of ACE Rule filed in the D.C. Circuit (*American Lung Association v. EPA*); CPP cases dismissed as moot
- October 2020: D.C. Circuit hears oral arguments in *ALA*
- January 19, 2021: D.C. Circuit vacates ACE Rule and remands to EPA

D.C. Circuit Opinion in *American Lung Ass'n v. EPA*

- The ACE Rule (and embedded Clean Power Plan repeal) rested on a "fundamental misconstruction" of the Clean Air Act
- CAA statutory text does not expressly foreclose consideration of GHG reduction measures other than those that apply to and at individual plants
- Because EPA wrongly contended that its interpretation was the "only permissible interpretation" of the CAA, the court did not decide whether a "beyond the fenceline" approach is a "permissible" reading of the statute
  - But the opinion also includes language stating that Congress imposed "no limits" in Section 111(d) other than directives to consider costs, nonair health and environmental impacts, and energy requirements
- Regulation of power plants under Section 111(d) is not precluded by the fact that they are regulated under Section 112
- EPA is to "consider the issue afresh"; the court's partial mandate requires the agency to undertake a new rulemaking action

Petitions for Supreme Court Review

- April-June 2021: Four petitions for a writ of *certiorari* are filed by ACE Rule supporters (respondent-intervenors in D.C. Circuit) asking Supreme Court to review the *American Lung Association* decision
  - West Virginia and 18 other states (No. 20-1530)
  - The North American Coal Corporation (No. 20-1531)
  - Westmoreland Mining Holdings, LLC (No. 20-1778)
  - North Dakota (No. 20-1780)

- August 2021: Briefs in opposition filed by:
  - EPA
  - 22 states, D.C., and 7 municipalities
  - Environmental groups and clean power trade associations
  - Power companies

Cert. Petitioners' Arguments

- The case presents issues of tremendous national importance about EPA's authority, with great economic significance
- Raises important federalism issues – allocation of federal versus state authority
- The Supreme Court already recognized the importance of the issues raised in this case when it stayed the CPP
- Supreme Court should weigh in now; otherwise, years and resources will be wasted while EPA crafts a new rule based on a faulty (overly expansive) interpretation of CAA Section 111(d)
- Continued uncertainty over scope of EPA's authority will impose heavy, unrecoverable burdens on states and industry
- The D.C. Circuit opinion was based on incorrect reading of statute

Cert. Opponents' Arguments

- Case is not ripe for review; there is no live "case or controversy," as no Section 111(d) rule is currently being enforced
- Petitioners are asking the Court to grant petitions based on speculation about what EPA might include in future rulemaking; this amounts to an advisory opinion
- The D.C. Circuit's decision was correct

Cert Granted!

- November 29, 2021: EPA grants the cert. petitions (except it will not review second question presented by Westmoreland petition – the "Section 112 exclusion" argument)
- Question presented (by *West Virginia* petitioners):

"In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules—including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy—with no limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements?"

Briefing Is Underway

- **Petitioners' briefs** (4) filed December 13
  - West Virginia, et al
  - The North American Coal Corporation
  - Westmoreland Mining Holdings, LLC
  - North Dakota

- **Briefs of Respondents in Support of Petitioners** (3) filed Dec. 13
  - America's Power
  - Basin Electric Power Cooperative
  - National Mining Association

Briefs of *Amici Curiae* Is Underway

- **Briefs of *Amici Curiae* in Support of Petitioners** (16) filed Dec. 16-20
  - 91 Members of Congress
  - America First Policy Institute
  - Americans for Prosperity Foundation
  - Buckeye Institute
  - Cato Institute and Mountain States Legal Foundation
  - Claremont Institute's Center for Constitutional Jurisprudence
  - Competitive Enterprise Institute
  - Doctors for Disaster Preparedness and Eagle Forum Education & Legal Defense Fund
  - Electric Cooperatives and National Rural Electric Cooperative Association
  - Kentucky, Arizona, Mississippi, and New Hampshire
  - Landmark Legal Foundation

Briefing Is Underway

- **Briefs of *Amici Curiae* in Support of Petitioners** (16) filed Dec. 16-20 (cont.)
  - Lignite Energy Council and State Coal Associations
  - Michigan House of Representatives and Michigan Senate
  - New Civil Liberties Alliance
  - New England Legal Foundation
  - Southeastern Legal Foundation and National Federation of Independent Business Small Business Legal Center

- **Brief of *Amici Curiae* in Support of Neither Party** (1) filed Dec. 20
  - Scholars of Congressional Accountability

Issues Raised by Petitioners and *Amici*

- **Major Questions Doctrine:** For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so. If a statute only ambiguously supplies authority for the major rule, the rule is unlawful.
  - *FDA v. Brown & Williamson Tobacco Corp*. (2000): Federal Food, Drug, and Cosmetic Act did not give FDA the authority to regulate tobacco products as "drugs" or "devices": "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."
  - *Utility Air Regulatory Group v. EPA* (2014): Re: GHG permitting: "EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." When Congress intends to assign to an agency decisions of "vast economic and political significance," it speaks clearly in making that assessment.

Issues Raised by Petitioners and *Amici*

- **Major Questions Doctrine** (cont.)
  - There is a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies
  - Major policy changes should be made by the legislative branch, because they are the most democratically accountable
  - Petitioners and *amici* contend that Congress never provided a clear statement of authority that could permit the expansive, economy-transforming powers that EPA (in the CPP) and the D.C. Circuit read into Section 111(d)
  - Cato Institute: A robust major questions doctrine protects reliance interests from the instability resulting from conflicting policy preferences of different presidential administrations. “In lurching back and forth between their respective partisan preferences, these flip-flopping administrations deny any semblance of regulatory certainty to the electric industry.”
  - The Court should use this case to flesh out the major questions doctrine and establish a framework for lower courts to identify “major” rules

Issues Raised by Petitioners and *Amici*

- ***Chevron* Deference:** Courts must defer to an agency's reasonable interpretation of ambiguous statutory authority.
  - Courts' application of the *Chevron* doctrine proceeds in two steps:
    - ✓ Step 1: Determine whether the statute is ambiguous, *i.e.*, whether Congress has "directly spoken to the precise question at issue." If the statute is not ambiguous, the inquiry ends; court must give effect to Congress's intent.
    - ✓ Step 2: If the statute is ambiguous, determine "whether the agency's interpretation is reasonable." If so, court must defer to the agency interpretation even if it is not the reading the court would have reached internally if the question had arisen in a judicial proceeding.
  - National Mining Association: Application of the major questions doctrine should operate as a threshold inquiry before any *Chevron* analysis – i.e., the court would first determine whether a challenged rule purports to answer a "major policy question."
  - If so, court must decide whether Congress clearly and unambiguously delegated the resolution of that major policy question to the agency. If not, rule is unlawful on that basis alone.

Issues Raised by Petitioners and *Amici*

- **Section 111's text and context require source-specific regulation** and preclude "beyond the fenceline" emission reduction strategies such as generation switching
  - The text of Section 111(d) is unambiguous; calls for emission standards for "any existing source," not the industry as a whole; standards must be "achievable" by the source itself, not by acquiring credits from others
- The D.C. Circuit and EPA (in the CPP) interpretation of Section 111(d) **illegitimately changes the balance between the federal government and the states** and contravenes the cooperative federalism principles enshrined in the Clean Air Act
  - The plain text of Section 111(d) mandates that the states, not EPA, have the primary role in setting standards of performance

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Issues Raised by Petitioners and *Amici*

- **Nondelegation Doctrine:** Legislative bodies cannot delegate their legislative powers to executive entities.
  - Closely related to the major questions doctrine, which has been described as a "revitalization" of the nondelegation doctrine
  - Supreme Court has not invalidated a congressional action on nondelegation grounds since 1935
  - Court has held since 1928 that the doctrine requires only that Congress provide an "intelligible principle" when delegating legislative authority, to guide the discretion of the agency implementing the statute
  - This doctrine is generally understood as applying to statutes, not rules
    - ✓ E.g., in *Whitman v. American Trucking Ass'ns*, the Supreme Court upheld the CAA statutory provisions establishing the NAAQS-setting process, rejecting nondelegation doctrine challenge. "The idea that an agency can cure an unconstitutionally standardless delegation of power by declining to exercise some of that power seems to us internally contradictory."
    - ✓ At least one *amicus* brief argues that Section 111(d) itself is unconstitutional

Issues Raised by Petitioners and *Amici*

- **Nondelegation Doctrine** (cont.)
  - Some *amici* see growth of the administrative state as a threat to liberty and urge the Court to "reinvigorate" the nondelegation doctrine
  - At least one *amicus* brief urges the Court to discard the "intelligible principle" formulation
  - In the most stringent application of the nondelegation doctrine, Congress would not be allowed to let administrative agencies or private agencies make generally applicable rules that govern private conduct
  - In *Gundy v. United States* (2018), concerning delegation of powers to Attorney General under the Sex Offender Registration and Notification Act, four Justices indicated they are willing to "revisit" the nondelegation doctrine

What's Next

- January 18: Respondents' briefs due
- February 18: Petitioners' reply briefs due
- February 28: Oral arguments

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Questions?

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