Chemerinsky: SCOTUS could make significant ruling on EPA's authority to fight climate change—or not

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In a term likely filled with blockbuster cases, *West Virginia v. Environmental Protection Agency* is an enigma: It could turn out to be unimportant and dismissed without a decision; it may be a major ruling on the scope of the EPA's power; or it could be a huge decision about judicial review of agency decisions. The case, which was argued on Feb. 28, arose in an unusual procedural posture that may cause the court to dismiss it. But if the justices reach the merits, it could be a decision of great significance about environmental and administrative law.

Factual background

In 2015, the EPA under the Obama administration adopted two new rules—the New Source Rule and the Clean Power Plan—to address carbon and other emissions from power plants. The New Source Rule established standards of performance for new fossil-fuel-fired power plants. The EPA stressed that power plants are "by far the largest emitters" of greenhouse gases among stationary sources in the United States." The Clean Power Plan rule mandated that states submit plans for compliance by 2019 and required that states "achieve the full required reductions to meet the CO2 performance rate," by 2030.

Lawsuits were brought challenging these rules. But before the court of appeals could hear the case, the U.S. Supreme Court in 2016 stayed the rules pending appellate review. The case subsequently was argued in the D.C. Circuit but was dismissed as moot because the Trump administration rescinded the challenged rules.

In 2019, the EPA in the Trump administration finalized the two rules that are now before the Supreme Court. One was the CPP Repeal Rule, which repealed the Obama EPA's Clean Power Plan. The EPA also adopted the Affordable Clean Energy Rule, a new set of emission guidelines for existing coal-fired steam plants. EPA stated that under the ACE Rule, states would have "discretion in setting standards of performance," and that affected sources would "have flexibility in how they comply with those standards."

A crucial difference between the Obama EPA and the Trump EPA was the scope of statutory authority. The latter took the view that the Clean Air Act only allows the EPA to adopt

regulations to “apply at and to an individual source and reduce emissions from that source.” But the Obama EPA more broadly interpreted the agency’s power to act to require action to decrease carbon dioxide emissions in the United States.

A group of states and private parties brought a challenge to the Trump administration’s policy. The D.C. Circuit ruled in favor of the challengers, vacating and remanding the Trump EPA’s decision. It found that the EPA acted improperly in repealing the Clean Power Plan and in enacting the Affordable Clean Energy Rule. It read the EPA’s statutory authority in accord with the Obama administration’s broader interpretation and rejected the Trump EPA’s narrow view.

West Virginia and several other parties successfully sought Supreme Court review of the D.C. Circuit decision. That is what is now before the high court, and there are many issues.

Is the case justiciable?

The Biden administration urged the court not to take the case and now seeks dismissal on standing grounds. It contends that there is no rule now in place: The Biden EPA is not following either the Clean Power Plan or the Affordable Clean Energy rule; instead, it is planning to promulgate its own rule in the future. It therefore says no one is currently suffering an injury, and thus the case is not justiciable. The United States argues in its brief, “no regulation currently applies. Petitioners, who oppose stricter regulation, are not injured by that status quo and do not ask this court to change it. Instead, they urge the court to constrain EPA’s authority in future rulemakings.” The EPA is currently not regulating CO2 from existing coal-fired power plants at all.

West Virginia argues that standing existed when the initial case was filed, so the question is one of mootness. In its reply brief, West Virginia states: The United States “could not bear their ‘heavy burden’ to show mootness by making it ‘absolutely clear’ that ‘the challenged conduct cannot reasonably be expected to start up again.’ ” It says because EPA could adopt the Clean Power Plan again, the case is not moot. The challengers also argue that they suffer a sufficient injury for standing because “[l]egal consequences flow to the States from the D.C. Circuit’s ruling. Lest we forget: The court below struck down an effort to repeal the CPP, vacated its replacement and ordered EPA to consider even more aggressive options.” West Virginia stresses that “EPA will issue a new rule.”

The court’s choice to grant certiorari over the Biden administration’s objections is an indication that the justices are unlikely to dismiss the case. On the other hand, the Biden administration has a strong argument in that no rule exists now and there can be a challenge when one is promulgated.

The scope of EPA power to deal with greenhouse gases

If the court reaches the merits, the statutory question concerns the scope of the EPA’s authority under the Clean Air Act. West Virginia, the other plaintiffs and the many amici argue that the Clean Air Act allows the EPA to regulate air pollution only “at the source.” Under the law, a “stationary source” is “any building, structure, facility or installation which emits or may emit

any air pollutant." Also, under U.S.C. Section 7411(b), EPA sets standards of performance for new stationary sources.

West Virginia says EPA authority under these provisions is limited to regulating pollution from stationary sources within their "fenceline." It objects that under the Clean Power Plan, "EPA took a new approach to curbing emissions designed to alter the makeup of the nation's energy grids—changing which plants generate electricity and where they generate it. … EPA asserted new authority to regulate source owners and operators, as opposed to the sources themselves."

The United States reads the statute very differently as empowering it to act to regulate air pollution and not limiting the EPA's authority to stationary sources within its fenceline. The United States argues in its brief, "Nothing in the phrase 'best system of emission reduction' excludes all outside-the-fenceline measures. … And the sequence of amendments to Section 7411 demonstrate that Congress did not intend to constrain the measures that EPA could consider in determining the [best system of emission reduction]."

Thus, the case asks the Supreme Court to interpret the Clean Air Act and answer the important question of the scope of the EPA's authority to regulate carbon dioxide to address the urgent problem of climate change.

Question of administrative agency power

Underlying all of this are significant issues about the permissible scope of administrative agencies' authority. For example, the brief of the Claremont Institute's Center for Constitutional Jurisprudence urges the court to use this case to revive the non-delegation doctrine, the principle that Congress cannot delegate legislative power to a federal agency. West Virginia, too, raises the nondelegation doctrine and asks the court to narrowly construe the EPA's authority to avoid this constitutional issue.

Not one federal law has been declared unconstitutional as violating the nondelegation doctrine since 1935. But in *Gundy v. United States*, in 2019, Justice Neil M. Gorsuch in dissent urged its revival and application, and there may now be a majority on the court to do that. If so, hundreds and maybe thousands of federal laws delegating power to agencies could be vulnerable to challenge.

The court is also asked to apply the relatively new "major questions" doctrine. This is the principle that courts should not defer to agency statutory interpretations that concern questions of "vast economic or political significance." The Cato Institute, in its amicus brief in support of West Virginia, urges the court to use this case to apply and clarify the major questions doctrine.

But the United States disagrees and sees this delegation as consistent with those long upheld by the court and finds no reason to apply the ill-defined major questions doctrine. In an amicus brief I submitted on their behalf, Sens. Sheldon Whitehouse, Richard Blumenthal, Bernie Sanders and Elizabeth Warren defend the essential nature of delegations of power to administrative agencies. In his amicus brief, University of Michigan Law School professor Julian David Mortenson supports the constitutionality of broad delegations from a historical perspective.

In conclusion

This is a case that easily could be dismissed, or it could be a ruling of historic significance in terms of the power of administrative agencies. The context—global warming—potentially makes it a case of great importance.