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Journey to the U.S. Supreme Court – Regulating Power Plant Greenhouse Gas Emissions

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This article is an effort to hit the “reset” button on the frequently breathless commentary on the recently argued Supreme Court case (*West Virginia et al v. EPA*) addressing the scope of the United States Environmental Protection Agency’s (“EPA”) authority to regulate greenhouse gas emissions from

existing fossil-fuel powered power plants. First, the power generation sector beat the Obama-EPA’s Clean Power Plan’s (“CPP”) GHG emission goals by *10 years without any federal GHG emission regulations*. Second, the petitioners are not challenging whether EPA has the authority to regulate GHG emissions, but rather how it can be lawfully exercised. Third,

the concern that the Supreme Court might “dismantle the administrative state” suggests a fundamental distrust of American democracy: applying the “major question” doctrine would mean that major climate change policies would have to be set by elected representatives rather than unelected administrators. That Congress may be ineffective is hardly a rationale for

bypassing the democratic process: the unilateral exercise of central executive authority, particularly in the face of existential challenges, does not have a pretty history. Fourth, this case is not a hypothetical exercise looking for an “advisory opinion” from the Supreme Court: North Dakota seeks the specific relief of reinstatement of the Affordable Clean Energy (“ACE”) rule vacated by the D.C. Circuit.

Lastly, and this will be the focus of this article, there is a little-noticed path forward that simply requires confirmation of the relative roles of the states and EPA established by Congress in the Clean Air Act. This case is not just about EPA: it is about EPA’s *and the states’ relative authority* to regulate GHG emissions. Specifically, North Dakota has asked the Supreme Court to confirm that Congress gave the states a primary role in regulating air emissions from existing power plants and to tell EPA that it cannot unilaterally impose major national requirements that cut states out of the process. The Supreme Court has described the Clean Air Act as “a model of cooperative federalism” spelling out the respective roles of EPA and the states. In this case the D.C. Circuit dismantled Congress’ cooperative federalism framework by ruling that EPA can effectively deprive the states of any meaningful role in regulating greenhouse gas emissions from existing power plants.

The U.S. Supreme Court in 2016 stayed implementation of the CPP, which set national GHG emission standards that could not be met by existing coal-fired power plants, even though the Clean Air Act required that such standards be “achievable.” The CPP deprived North Dakota of any meaningful role in regulating GHG emissions from existing power plants other than choosing which coal-fired power plants would be shuttered and finding (and paying for) replacement sources of electricity. The CPP transformed EPA from an environmental regulator directed by Congress to cooperate with the states as equals into a national regulator of the electrical grid, dictating how and by

whom electricity would be generated and transmitted.

EPA replaced the CPP with the ACE Rule in 2019, which was promptly challenged in the D.C. Circuit. North Dakota intervened on behalf of EPA, arguing that the ACE Rule correctly allocated the responsibility to regulate power plant emissions between EPA and the states as directed by Congress. The D.C. Circuit vacated the ACE Rule in January 2021, largely adopting EPA’s reasoning from the CPP Rule.

This case is not just about EPA: it is about EPA’s and the states’ relative authority to regulate GHG emissions.

On October 29, 2021, the U.S. Supreme Court granted North Dakota’s petition for certiorari, along with those of three other petitioners (West Virginia et al., North American Coal Corporation and Westmoreland Mining Company). North Dakota filed its own briefs, arguing that the D.C. Circuit incorrectly diminished North Dakota’s rights under the Clean Air Act and that the ACE Rule should be reinstated. Oral argument occurred on February 28, 2022.

North Dakota’s petition uniquely presented the Supreme Court with a straightforward question of statutory interpretation. Section 111(d)(1) directs EPA to promulgate regulations governing the process whereby “each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant,” and that the state plans could consider, “among other factors, the useful remaining life of a particular source of air emissions.” Thus, Congress granted to the states the authority to set emission standards for existing power plants. The states’

authority is not unbounded: when setting emission standards, the states must apply EPA’s “guidelines” describing a “best system of emission reduction” (“BSER”) that has been “adequately demonstrated.” EPA’s “guidelines” are the boundaries within which the states must work to establish the performance standards for specific existing sources. A second layer of federal oversight is EPA’s authority to review and approve the state plans. The primary role of states in setting emission standards for *existing* sources differs from setting standards for *new* sources, for which EPA is the primary authority.

The CPP dismantled this framework by transforming BSER from “guidelines” into fixed national emission standards that were not “adequately demonstrated” for coal-fired plants, as the fixed standards themselves were impossible for coal plants to meet. Without any authorization from Congress, EPA seized the authority to set standards of performance for existing sources and upended over 100 years of state and local control over the electric power grid, which was based on a dispatching system prioritizing the lowest cost power, and would have imposed a national system based on dispatching power from sources with the lowest GHG emissions. North Dakota was largely stripped of its authority to set source-specific performance standards in its state plan as set forth in Section 111(d)(1) of the Clean Air Act, and was reduced to planning how it would replace the power (based on GHG emissions, not cost) that would be lost by shuttering existing coal-fired power plants.

The CPP never went into effect because it was stayed by the Supreme Court. Ironically, the power sector achieved the CPP’s GHG emission reduction goals about a decade faster than what the CPP contemplated, demonstrating that the CPP was ultimately unnecessary. The CPP was replaced by the ACE Rule, which returned the process back to its statutory roots: EPA sets guidelines based on what has been adequately





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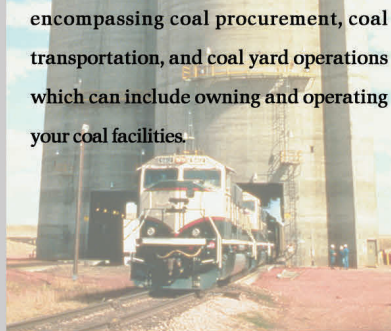
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demonstrated, and then the states apply that guidance to set performance standards in the state plans that EPA reviews and approves. The ACE Rule provided a framework for North Dakota to regulate GHG emissions from existing power plants in a manner consistent with the cooperative federalism mandate established by Congress.

North Dakota's argument to the Supreme Court is a relatively straightforward one of statutory interpretation that is distinct from the issues that have captured the attention of most commentators. The Supreme Court could adopt North Dakota's arguments and reinstate the ACE Rule without addressing the "major question" doctrine or opining on the limits of the administrative state. Interestingly, North Dakota's statutory arguments were not seriously contested by EPA.

Supreme Court oral arguments are often very difficult to read, and these cases were no exception. While most of questions challenged the petitioners' positions, they were asked primarily by the Court's three "liberal" justices. The five to six "conservative" justices were less active in questioning petitioners' counsel, but were more active in questioning EPA and its supporters. There were only a few exchanges that touched on North Dakota's arguments.

The Chief Justice and Justice Clarence Thomas questioned whether the "major question" doctrine was the only way to decide the case in Petitioners' favor, leaving the door open for North Dakota's position. Justice Sonia Sotomayor observed that the states "have a lead role in how this is supposed to work," though she did not take that observation very far (and



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is highly unlikely to vote to reverse the D.C. Circuit). The discussions about justiciability and standing also did not illuminate North Dakota's straightforward argument that the injury was the vacatur of the ACE Rule and the remedy was to reinstate that rule.

It may be tempting for some justices to kick the can and avoid tackling difficult issues such as the contours of the "major question" doctrine, complex technical issues about whether emissions standards are limited to "inside the fence line" applications or can include "outside the fence line" requirements, and what

is to be done about climate change. On the other hand, justices who are proponents of the D.C. Circuit's opinion may be concerned that a far-reaching decision reversing the D.C. Circuit could cause permanent harm to their vision of the administrative state, in which great deference is granted to unelected technical administrators on major policy decisions without the clear endorsement of elected legislators in Congress. In this context, North Dakota's straightforward statutory argument to re-establish the proper balance between federal and state authority, which does not require addressing all these other issues, may be attractive.

A decision is expected by June of 2022.

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