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DIALOGUE

ANALYZING *WEST VIRGINIA V. ENVIRONMENTAL PROTECTION AGENCY*

SUMMARY

On the final day of the 2021-2022 term, the U.S. Supreme Court released its decision in *West Virginia v. Environmental Protection Agency*. The majority (6-3) opinion limited the U.S. Environmental Protection Agency's (EPA's) authority to regulate greenhouse gas emissions from power plants under Clean Air Act §111(d), in part by invoking the "major questions doctrine." The decision has implications for EPA's authority both to regulate emissions from stationary sources and to regulate greenhouse gases more broadly. It also has implications for administrative law generally, including how the U.S. Congress may delegate regulatory authority to any federal agency. On July 12, 2022, the Environmental Law Institute hosted a panel of experts that considered questions raised by the justices' opinions, and discussed what the decision will mean for environmental law, administrative law, and EPA's power to act on climate change.

Jordan Diamond is President of the Environmental Law Institute.
Kate Bowers (moderator) is a Legislative Attorney with the Congressional Research Service.
Kevin Poloncarz is a Partner at Covington & Burling LLP.
Stacey Halliday is a Principal at Beveridge & Diamond PC.
Lisa Heinzerling is a Professor of Law at Georgetown University Law Center.
Matt Leopold is a Partner at Hunton Andrews Kurth LLP.
Vickie Patton is General Counsel at the Environmental Defense Fund.

Jordan Diamond: Just under two weeks ago, the U.S. Supreme Court handed down a major ruling in the environmental and climate change law arena. Whether you have read the *West Virginia v. Environmental Protection Agency* opinions,[1] or some of the commentary so far, you likely already know the basics. This panel will go over those fundamentals briefly to make sure that we're all starting on the same page. Then, we will step into the realm of what this means. Where are we headed next? What are the paths laid out? How do these paths look different than before, and what are the questions we face as we move ahead?

I will now turn things over to Kate Bowers, who has kindly agreed to moderate the discussion today. Kate is a legislative attorney in the American Law Division of the Congressional Research Service (CRS).[2] Prior to CRS, Kate spent nearly a decade in the Environment and Natural Resources Division of the U.S. Department of Justice (DOJ), most recently as a senior attorney in the Environmental Defense Section.

Kate Bowers: We have a lot to talk about, and I will jump into some foundational background to get us situated. Before I do that, I would like to introduce the panelists.

Stacey Halliday is a principal at Beveridge & Diamond, where she co-leads the firm's environmental justice (EJ) practice group. She previously served as special counsel in the U.S. Environmental Protection Agency's (EPA's) Office of General Counsel, where she worked on congressional oversight and external stakeholder management, including as part of EPA's response to the drinking water crisis, at the U.S. Commission on Civil Rights' investigation into EPA's Title VI program, and in efforts to advance international and domestic climate and sustainability goals.

Lisa Heinzerling is the Justice William J. Brennan Jr., professor of law at Georgetown University. She specializes in administrative law and environmental law. Notably, Lisa was the lead author of the winning briefs in *Massachusetts v. Environmental Protection Agency*,[3] in which the Supreme Court held that the Clean Air Act (CAA)[4] gives EPA the authority to regulate greenhouse gases. In addition to her

1. 597 U.S. ___, 52 ELR 20077 (2022).

2. Editor's Note: The Congressional Research Service works solely for the U.S. Congress and takes no position on pending or enacted legislation.
3. 549 U.S. 497, 37 ELR 20075 (2007).
4. 42 U.S.C. §§7401-7671q, ELR Stat. CAA §§101-618.

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service at Georgetown, Lisa was the senior climate policy counsel to the Administrator of EPA in 2009, as well as the associate administrator of EPA's Office of Policy in 2009 and 2010.

Matt Leopold is a partner at Hunton Andrews Kurth, where he advises clients on federal, state, and regulatory issues. Before joining Hunton, Matt was general counsel at EPA, where he counseled the development and defense of the most significant regulations proposed by the Agency, including the Affordable Clean Energy (ACE) rule.[5] Prior to serving at EPA, Matt was the chief attorney at the Florida Department of Environmental Protection and an attorney in the DOJ Environment and Natural Resources Division.

Vickie Patton serves as the Environmental Defense Fund's (EDF's) general counsel, and leads its U.S. legal and regulatory initiatives. Before joining EDF, she served in EPA's Office of General Counsel, where she implemented the historic 1990 Clean Air Act Amendments and received the Gold Medal for Exceptional Service. She is also a co-founder of Moms Clean Air Force. She serves on the boards of the Environmental Law Institute, Earthshot, and the Initiative on Climate Risk and Resilience Law. And in 2013, she was inducted as a fellow of the American College of Environmental Lawyers.

Finally, Kevin Poloncarz co-chairs Covington & Burling's environmental and energy practice and its environmental, social, and governance (ESG) practice. He has represented a coalition of major power companies in *West Virginia*, and he argued the main statutory point on which the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit vacated the repeal of the Clean Power Plan (CPP).[6] He also argued the statutory question in the initial en banc argument in the D.C. Circuit back in 2016.[7] Kevin will be teaching the climate law and policy course at Stanford Law School next year.

With that, I'll get into an overview of the case. Many of you are familiar with *West Virginia v. Environmental Protection Agency*, but we'll start with the fundamentals. This is a case that has significant implications for U.S. environmental policy, climate policy, the U.S. Congress' ability to delegate authority over significant policy decisions, and for executive agencies beyond the realm of environmental protection to carry out programs related to significant policy decisions.

West Virginia is about two EPA rules that set emission guidelines for existing fossil fuel-fired power plants. The first of these rules is the CPP, which EPA issued in 2015. The second is the ACE rule, which EPA issued in 2019 to replace the CPP. EPA issued both of those rules under §111 of the CAA. As part of the Act's overall scheme to limit pollutant emissions for stationary sources, once EPA makes an endangerment finding—meaning once it identifies air pollution that may reasonably be anticipated to endanger public health or welfare—the Agency then has to identify source categories that contribute to that pollution. It also has to set emission guidelines for states to set standards of performance for existing stationary sources in those source categories to the extent they're not already regulated under several other CAA provisions.

Section 111 also requires EPA to develop performance standards for new sources. But this case focuses on what EPA does to regulate *existing* sources under §111. So, once EPA issues these emission guidelines, states then use the standards to develop plans to establish standards of performance for existing sources that are in their jurisdiction.

For both new and existing sources, EPA's regulations have to reflect the emissions reductions that are achievable through application of something called the "best system of emission reduction," or BSER. The statute doesn't actually define that term though, and a lot of the debate around EPA's regulations centers on the scope of EPA's authority to determine the BSER for existing power plants.

In general, EPA identifies and evaluates adequately demonstrated systems of emission reduction for a particular source category to determine which is the best. And then it sets emission standards based on that best system, taking into account cost, non-air quality health, environmental impact, and energy requirements.

In 2015, EPA finalized the CPP, in which the Agency identified the BSER as a combination of three building blocks. The first was improving the heat rate at coal-fired units. The second and third blocks employed what we call "generation shifting." That's shifting electricity generation from higher-emitting sources to lower-emitting ones. So, the second building block was shifting generation to lower-emitting natural-gas units. And the third building block was shifting generation from fossil-fuel units to renewable-energy generation. When EPA issued the CPP, it explained that the best system was one that applied to the overall source category.

The CPP was issued in 2015, but it never took effect. It was challenged in the D.C. Circuit. And then before any court considered the merits of the rule, the Supreme Court stayed its implementation pending judicial review. EPA repealed the CPP in 2019 and issued the ACE rule. In that rule, EPA adopted a narrower interpretation of its authority under §111. It said that the only permissible reading of §111 limited the BSER to control measures that could be applied to a specific source.

States and stakeholders promptly challenged the ACE rule and the repeal of the CPP. On January 19, 2021, a three-judge panel of the D.C. Circuit vacated the ACE rule and the CPP rule in a split decision.[8] But the D.C. Circuit later agreed to grant a stay of its vacatur while EPA considered its regulatory options.[9]

5. 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 (July 8, 2019).
6. American Lung Ass'n v. Environmental Prot. Agency, 985 F.3d 914, 51 ELR 20009 (D.C. Cir. 2021).
7. Oral Argument Heard En Banc on September 27, 2016, West Virginia v. Environmental Prot. Agency, No. 15-1363 (D.C. Cir. Sept. 27, 2016).
8. *American Lung Ass'n*, 985 F.3d 914.
9. Order, American Lung Ass'n v. Environmental Prot. Agency, No. 19-1140 (D.C. Cir. Feb. 22, 2021).

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The Supreme Court then granted review to consider whether Congress constitutionally authorized EPA to consider control measures that can be implemented beyond the specific emission source when it determined the BSER and set emission standards under §111(d) of the CAA. That gets us to June 30, 2022, when in a 6-3 decision, the Supreme Court held that EPA exceeded its authority in the CPP when it based its emission guidelines on generation shifting. The Court analyzed EPA's interpretation of §111 under the "major questions doctrine."

Prior to *West Virginia*, the Court had never actually referred to this doctrine by name in a majority opinion. It was mentioned in concurring opinions and in a lot of scholarly commentary around the Court's use of it. Over the past three decades, in a handful of cases relating to challenges to agency action, the Court had rejected claims of agency regulatory authority when the underlying claim of authority concerned an issue of vast economic and political significance, and where Congress had not clearly empowered an agency to address a particular issue.

In several cases this term, the Court had signaled a heightened interest in applying the major questions doctrine to the review of agency actions. Many commentators thought that *West Virginia* might be where the Court would more formally describe the contours of that doctrine.

In *West Virginia*, the Court explained that when there is something extraordinary about the history and breadth of the authority an agency asserts, or the economic and political significance of that assertion of authority, the Court should hesitate before concluding that Congress meant to confer such authority. In those circumstances, an agency now has to point to clear congressional authorization for its action.

In this case, the majority held that there was a major question. The Court focused on the notion that EPA's generation shifting-based approach would implicate coal-fired plants' share of national electricity generation. And the Court cautioned that EPA could conceivably extend its authority under §111 to force existing coal plants to cease generating power altogether. The Court concluded that it was unlikely that Congress would task EPA with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy, such as deciding the optimal mix of energy sources over time and identifying acceptable levels of energy price increases.

The Court in reaching this conclusion described §111(d) as a "previously little-used backwater," and underscored that the prior limits set under §111 had been based on source-specific pollution control technology. Justice Neil Gorsuch wrote a concurring opinion focusing on the nature of the major questions doctrine. Justice Elena Kagan dissented. She argued that §111 did in fact confer a broad enough delegation of authority to permit the generation shifting that had been set up in the CPP.

There are a lot of interesting nuances in the concurring and dissenting opinions. We'll probably get to some of those in our discussion today. But with that basic framework, I would like to start delving into questions that I have for the panelists, as well as questions from webinar participants.

Kevin, I'm going to tee up the first question for you. I think there's been a lot of confusion about how generation shifting as a concept overlaps or differs from the idea of regulating inside the fence line or beyond the fence line. Are these distinct concepts? What did the majority opinion say about these concepts? And following this opinion, what did the Court actually take off the table in terms of pollution control measures that EPA can identify?

Kevin Poloncarz: It's important to start by clarifying what the Court did not decide. They did not decide that EPA doesn't have the authority to regulate greenhouse gases. There was a real concern that they would decide that and renege upon the *Massachusetts v. Environmental Protection Agency* decision, given that some of the petitioners and their supporters actively teed up a revisiting of that case. Recall that Chief Justice John Roberts dissented in *Massachusetts*, and the only member of the majority in that case who was still on the bench was Justice Stephen Breyer.

The Court also did not decide that the Donald Trump Administration's view of the statute was correct. They did not decide that in setting the standard based on the BSER, EPA is only limited to actions that can be done at or to an individual generating unit.

The Chief Justice went out of his way in the opinion to say they're not deciding whether the best system refers exclusively to measures that improve the pollution performance at individual sources, such that all other actions are ineligible. All the Court decided was that the way the best system was set in the CPP and the way generation shifting figured there amounted to an arbitrary determination on the appropriate amount of coal generation, which was not rooted in any scientific basis or objective standard. The Court found that problematic.

As a result, what the Court has taken off the table is setting a standard that is *based upon* shifting generation to cleaner sources. It did not take off the table setting a standard that *results in* generation shifting. It was very clear that incidental generation shifting is okay. That's an important point, because there was some fear the Court would say that anything EPA does that necessarily changes the mix of generation is problematic. The Court did not say that.

One thing that is preserved in my view, which was very important to my clients, is the potential availability of emissions trading and averaging. This is distinct from the "inside the fence line" approach the Trump Administration espoused, where they said you can't even trade or average emissions for purposes of compliance. The Court left that possibility open and discussed how a 2005 George W. Bush-era rule, the Clean Air Mercury Rule,[10] differed from the way generation shifting functioned in the CPP. The 2005 rule included a cap-and-trade program for mercury

10. Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28605 (May 18, 2005).

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emissions. It was based upon available technology, and the Court implicitly acknowledges that this approach might be okay.

That's important because one of the reasons my clients sued is because the "straitjacket" interpretation that the Trump Administration espoused took off the table emissions averaging and trading, cap and trade, and all these measures that have long been used by the power sector.

It's important to clarify the boundaries of what the Court did. I know there's a lot of hand-wringing out there. But when it comes to EPA's authority, the Court was very, very narrow in what they were taking off the table. Now, how they got there and their pronouncement of the major questions doctrine—that is a big deal. I don't mean to undersell that. But that's separate from what the Court left for EPA's authority in regulating greenhouse gases from power plants.

Kate Bowers: We will definitely discuss the major questions aspect of the Court's holding, and what that might mean going forward for EPA and the executive branch writ large.

I want to ask Stacey the next question. Kevin helpfully explained some options that the Court's decision might take off the table in terms of regulating greenhouse gas emissions, at least under §111 of the CAA. From an EJ perspective, how will the availability of different regulatory options play into the Joe Biden Administration's EJ strategy going forward?

Stacey Halliday: From the EJ perspective, this case is introducing a lot of uncertainty, especially by introducing the major questions doctrine. There is no federal law for EJ. There is no major statute that explicitly outlines "environmental justice." But we've seen a real focus on the federal stage, accelerated by President Biden's prioritization of EJ alongside climate.[11]

I think we're going to see more creative strategies in terms of incorporating EJ into EPA's work. A lot of the tools that the Biden Administration is using won't necessarily be threatened here. I should note that, as we saw in the Intergovernmental Panel on Climate Change 2022 report,[12] climate impacts disproportionately impact marginalized communities. So, there may be a significant long-term impact on marginalized communities.

If you look at the strategies that EPA can use through setting emission standards to the max, EPA just released an updated version of a legal tool that looks very creatively at how they can use existing authorities and rulemaking abilities to incorporate EJ.[13] The creative use and incorporation of EJ, the use of enforcement, the renewed transparency we're seeing now with greater mapping tools to empower communities, and the expansion of data and monitoring will all continue to serve as important tools for EJ.

We might see more activity at the state level to push EJ forward. And I don't think we should undercut what we're seeing from investors as well. This last proxy season, there has been a demand for EJ and racial justice audits.[14]

There's a lot of momentum moving forward, and in a variety of sectors, that won't necessarily be hindered by this decision. But the major questions doctrine, the hit to administrative law, and that added uncertainty may bring additional challenges down the line.

Kate Bowers: The next set of questions is for Lisa. Kevin talked a bit about the distinction between EPA requiring generation shifting versus setting the BSER based on measures that would have an incidental effect resulting in generation shifting.

Justice Kagan's dissent described generation shifting as one tool in the pollution control toolbox. If there are now some limits on EPA's direct use of that tool, what other regulatory options can the Agency rely on for regulating greenhouse gas emissions, from either coal-fired power plants or other sources?

Lisa Heinzerling: I think EPA will be on firmest ground when regulating air pollution under long-existing programs that offer a huge amount of environmental protection. The sources at issue in *West Virginia*—fossil-fuel power plants—have enormous effects on human health and the environment that go beyond the effects of greenhouse gases. They can be controlled indirectly through setting stricter national ambient air quality standards. They can be reduced through controls on hazardous discharges to water, and on accumulation and disposal of hazardous waste products like coal ash.

There are a lot of ways in which these sources can be controlled. Those controls often have the effect of directly limiting emissions at these plants, but also indirectly limiting the operation of these plants. It strikes me that one obvious thing the Supreme Court is telling us is essentially, "We like the old programs the way you used to run them. There are a lot of opportunities under those programs."

The one caution I would raise is about the Court's use of the word "incidental." All the regulations I've mentioned cause generation shifting insofar as they clamp down on fossil-fuel sources. My worry is if EPA says that you can control a lot of different kinds of pollution at once, and that these pollution sources are bad in a lot of different ways for the environment, that the word "incidental" will come up and bite EPA if they talk about climate change in addition to other issues. For example, EPA might say they're regulating particulate matter because it's a lethal pollutant that kills millions of people around the world and many people

11. Exec. Order No. 14008, 86 Fed. Reg. 7619 (2021).
12. IPCC, Sixth Assessment Report of the Intergovernmental Panel on Climate Change, Climate Change 2022: Impacts, Adaptation and Vulnerability (2022), https://www.ipcc.ch/report/ar6/wg2/.
13. U.S. EPA, EPA Legal Tools to Advance Environmental Justice (2022), https://www.epa.gov/system/files/documents/2022-05/EJ%20Legal%20Tools%20May%202022%20FINAL.pdf.
14. Ron S. Berenblat & Elizabeth R. Gonzalez-Sussman, *Racial Equity Audits: A New ESG Initiative*, Harv. L. Sch. F. on Corp. Governance (Oct. 30, 2021), https://corpgov.law.harvard.edu/2021/10/30/racial-equity-audits-a-new-esg-initiative/.

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in this country, but they may also say that such policies will also have the effect of limiting greenhouse gases.

I don't mean to suggest that EPA should never mention climate. But I think it's a mark of how aggressive the Supreme Court seems, and how worried we should be in the aftermath of this case, that just talking about climate might get EPA into trouble. It is very striking to me that the Supreme Court, both in the majority opinion by Chief Justice Roberts and the concurrence by Justice Gorsuch, mentions documents like congressional testimony, press releases from the White House and from environmental groups, and White House fact statements in describing this "major question" decided by EPA.

It makes me a bit scared about how much the Court is going to drill into statements made about EPA. That word "incidental" makes me worry that if there is any hint from those kinds of documents that EPA is consciously adopting a policy of reducing greenhouse gas emissions, the Agency might get in trouble.

Kate Bowers: Thank you for drilling into how the Court was using the word "incidental." I think there is some ambiguity and some potential for pushing that in different directions moving forward.

The next question I'm going to ask is for Matt. Lisa just talked about some of the regulatory options that would be available to EPA going forward. Matt, I was hoping that you could talk about what other regulations are on the horizon from EPA on these sources. Can we expect those rules to be affected by this decision?

Matt Leopold: I think this decision is potentially the most important administrative law decision since *Chevron*.[15] And I think we're going to get into how it may or may not interact with *Chevron*. It was notable that the majority opinion didn't even mention *Chevron*. That's an interesting issue.

As for what EPA will do going forward, I agree that the fundamental power to regulate greenhouse gases is undisturbed. But the Court discussed not only whether to regulate, but *how*. And they determined that the *how* under §111(d) was a major question. The opinion specifically discusses a couple different things that EPA might do on remand, which is fuel-switching, and to the extent that this is possible is probably an open question. I will point out that in a footnote, the Court says that EPA cannot recharacterize a coal plant as a natural gas plant.[16]

Clearly technological solutions applied at the source seem to remain in place. I would say cap and trade, however, as a BSER is not available after this opinion. But, as Kevin pointed out, it may or may not be available as a compliance methodology if a state wants to issue a plan to comply with the BSER.

I will also note that the Court did refer to the Mercury Rule, which the government had argued was an example of cap and trade that EPA had used under §111.[17] It referred to that as potentially dubious or unavailable as an approach, although the rule was reversed on other grounds.

Looking at that and looking at where to move forward, I think Lisa points out that trying to do something directly or making big pronouncements about a transformative rule—if it's not a clear statement in that particular section of statutory authority—is ill-advised for administrative agencies, both EPA and others at this point. But getting at climate change using traditional authorities, one would think of things still available under the CAA that were untouched—for example, the case has no impact on the Cross-State Air Pollution Rule program. The Court treats each section of the statute differently. Where it authorizes cap and trade, for example under the Acid Rain Program, it's permissible. But the Court is not going to infer a large power like that unless it's expressed in the statute.

I think EPA will continue to hit singles and doubles and maybe not swing for home runs to address the climate crisis. But it's certainly a shot across the bow of the whole-of-government approach to addressing climate change when you're trying to enlist every single agency in the government potentially when they've never attempted to regulate climate issues before.

Kate Bowers: I'd like to discuss what this means for the whole-of-government approach to combating the climate crisis. When President Biden took office, we heard some advocates say that every agency is a climate agency now. I think that there are some questions about what this decision may mean for other government actions going forward.

Vickie, I'd like to hear from you on this question. To what extent do you think other agencies beyond EPA have the ability to issue regulations to address climate change, following this decision?

Vickie Patton: I'm going to first touch on some comments that have been made about the scope of EPA's authority before turning to that important question.

Power plants in the United States discharge 1.5 billion tons of climate-destabilizing pollution every year.[18] That is the reason we're talking about power plant pollution, and that is the reason EPA relied on generation shifting in determining the BSER. I encourage everyone to read Justice Kagan's dissent because it carefully assesses the statute unlike the majority opinion, which does not.

1.5 billion tons of climate-destabilizing pollution matters. And it matters to everyone in our country. That makes power plants not only one of the largest single sources of climate pollution in the United States, but in the world. To

15. Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc., 467 U.S. 837, 14 ELR 20507 (1984).
16. West Virginia v. Environmental Prot. Agency, 597 U.S. ___ (2022).
17. *Id.*
18. Eric Schaeffer & Tom Pelton, Environmental Integrity Project, Greenhouse Gases From Power Plants 2005-2020: Rapid Decline Exceeded Goals of EPA Clean Power Plan (2021), https://environmentalintegrity.org/wp-content/uploads/2021/02/Greenhouse-Gases-from-Power-Plants-2005-2020-report.pdf.

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be clear, EPA continues to have the responsibility to protect the American people from climate-destabilizing pollution, including from existing and new power plants. Today in the United States, we have new gas plants that are being built at large volumes—extensive capacity additions that are not addressing the heavy burden that they impose on the American people in terms of climate pollution.

We continue to need to address oil and gas methane emissions, which is an enormous source of harmful pollution. And we can do it in a way that will also have profound benefits for communities and neighborhoods afflicted by this pollution. EPA has a responsibility to complete its important work to address existing source—oil and gas methane—pollution.

Vehicles are also a huge source of climate-destabilizing pollution. EPA continues to have a responsibility to tackle and address the climate pollution from vehicles. The good news for our country is that all of these challenges can be addressed in a way that creates jobs and economic opportunities. And doing so can provide greater justice and benefits in terms of healthier air and safer communities. We've got a lot of work to do. We can't let this really damaging opinion take our country in the wrong direction.

There are a couple other elements of the Court's decision that are important. One is that the Court settled some long-contested issues. One related to whether when EPA issues new source standards under §111(b), there's also responsibility for EPA to tackle existing sources under §111(d). The Court said yes. There had also been long-contested questions about whether §111(d) standards are binding. The majority opinion says they are—when EPA establishes emissions performance standards, they must be met.

We need to address climate change in every way we can. It is a systemic threat to life on earth. Does the U.S. Department of Health and Human Services need to ensure that it is protecting workers and people who are harmed by heat illness? You bet. Because we're going to see increasing heat illness and heat distress. Do the U.S. Department of Energy and the U.S. Department of Transportation need to make investments consistent with the bipartisan infrastructure legislation to modernize our transmissions to bring renewables to load centers? You bet. Invest in new charging infrastructure? Absolutely. There are all sorts of things that we need to do to help address the climate crisis.

Kate Bowers: I'd like to shift gears a bit and start digging into the major questions doctrine. It was central to the Court's holding here and will continue to be relevant to the Court's review of significant regulatory actions in the environmental sphere going forward.

Vickie, I'd like to start with you. How do you see the Court's reliance on and the centrality of the major questions doctrine in this ruling impacting future efforts to regulate greenhouse gas emissions?

Vickie Patton: Adrian Vermeule, a professor of constitutional law at Harvard Law School, has an important op-ed in the *Washington Post* on this issue.[19] This very conservative scholar says that there is nothing conservative about what the majority has done. It doesn't reflect originalism, textualism, or judicial restraint. There is a careful assessment of the breadth of EPA's authority in the dissent, and a critique of the Court having reached out and taken a case that wasn't appropriate for judicial review.

What does that mean? That means we have a judge-made doctrine that creates uncertainty that hurts our country. When Justice Brett Kavanaugh was in the D.C. Circuit, he wrote a dissent from the denial of rehearing en banc in the net neutrality case in 2017,[20] in which he said that when it comes to the major questions issue, you "know it when you see it." That's not a way for our country to tackle big challenges. The way for our country to solve the climate crisis is to have the environmental laws that we've administered for decades, that are designed by Congress, the people's representatives, adapt to new science, technologies, and solutions. That is what we need to help our country tackle these problems, not a "know it when you see it" judge-made law that creates enormous uncertainty, and hurts our country in achieving environmental protections and hurts businesses that are trying to make investments.

Kate Bowers: Vickie, you talked a bit about some distinctions folks have identified between the majority opinion and Justice Kagan's dissenting opinion in *West Virginia*. I also found Justice Gorsuch's concurring opinion interesting. And he's a Justice who's taken a keen interest in this doctrine. He's written concurring opinions now on major questions in multiple cases this term.

Kevin, would you like to talk about the daylight between the majority and the dissenting opinions? Do you think that Justice Gorsuch's position on major questions is going to become more prominent as the doctrine continues to evolve?

Kevin Poloncarz: It's interesting—the daylight between the majority opinion and the concurrence. If you read the concurrence, what the majority opinion did in announcing the major questions doctrine by name is to say that this doctrine is rooted in the separation of powers. In shadow docket cases concerning vaccine mandates and the Centers for Disease Control and Prevention's eviction moratorium, the Court never talked about that. They applied the major question precedents, but they didn't elevate it to the point that it is a quasi-constitutional question rooted in the separation of powers.

That's a different question. We thought we were doing statutory interpretation. As Justice Kagan's dissent expresses, we thought we were talking about the language of the text and what is a plausible interpretation of the text. And what the majority opinion says is that it really doesn't

19. Adrian Vermeule, *There Is No Conservative Legal Movement*, Wash. Post (July 6, 2022), https://www.washingtonpost.com/outlook/2022/07/06/epa-roberts-conservative-court-libertarian/.
20. U.S. Telecom Ass'n v. Federal Commc'ns Comm'n, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting).

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matter what a plausible interpretation is in these extraordinary cases.

What Justice Gorsuch's concurrence does that is different is he roots the major questions doctrine as almost a corollary of the nondelegation doctrine—that long-believed-dead doctrine that he would like to revive, based on a number of concurrences and dissents that have been written. The nondelegation doctrine would basically say that a "blank check" authority that's written to an agency—even if it is Congress telling EPA to protect public health and the environment—is unconstitutional.

Consider how far that is from where we were just over a decade ago, when this Court in *American Electric Power Co. v. Connecticut*[21] ruled that Congress delegated to EPA the authority to decide whether and how to regulate greenhouse gas emissions from power plants. Now, we have a concurrence that essentially agrees with the majority's outcome in applying the major questions doctrine because there is no clear delegation of authority for EPA to take such actions on climate.

Justice Gorsuch's opinion seems to lay out some criteria that aren't enumerated in the majority opinion for when and how the major questions doctrine applies. This may be underselling it, but the best you can get between the majority opinion and the dissent is that the doctrine uses a "raised eyebrow" test—something like "know it when you see it." Whereas Justice Gorsuch more methodically, without engaging with the text, tries to establish some principles of how this doctrine is rooted in the separation of powers—how this is a constitutional question implicit in the Vesting Clause, as he says.

That's the real significance of the concurring opinion. And another important point is that this didn't end up in the majority opinion. But Justice Gorsuch has very clearly signaled where he is interested in going. Based on some of the pronouncements of Justice Kavanaugh and others, there could be an appetite to further expand the boundaries of the nondelegation doctrine through the major questions doctrine.

Kate Bowers: Another issue is major questions and *Chevron*. This majority opinion didn't refer to *Chevron*. I would open this up to any of the panelists. How do you think courts are going to decide what framework to use when reviewing potentially significant environmental regulations going forward? What does this mean for *Chevron* deference?

Matt Leopold: What I see in the majority opinion is how the major questions doctrine interacts with *Chevron*. It's an antecedent to *Chevron*. It's something that the agency should apply when setting out to regulate on a particular issue. They have to first clearly identify authority, meaning a sufficient delegation from Congress. There are a number of cases the Court cites, starting with *Brown & Williamson Tobacco*[22] all the way to *Utility Air Regulatory Group*,[23] and the COVID cases as well, to confirm this principle.[24] You don't even get to *Chevron*—you don't get to a question of ambiguity about the delegation, scope, and range in which an agency may interpret and fill gaps until after applying the major questions doctrine.

One thing everyone will agree on is agencies are necessary. They need to fill certain gaps, particularly EPA, with very technical subject matter, sometimes science-based, health-based, or so on—issues that Congress is not going to tackle or may not be equipped to tackle.

But this case centers on a question of when something has been delegated, what's the scope of the delegation? This is the starting point for a court, and I see this playing out more in the lower courts going forward. Because courts will now approach big projects that aren't explicit within the statute with skepticism, rather than an assumption of broad delegation to the agency.

I think you're going to see a lot of advocates raising major questions in lower courts, rightly or wrongly. We'll have to see how that plays out. But it seems like a de-emphasis in my mind of *Chevron* and the traditional analysis of agency authority, although it's certainly still there. When you get past major questions doctrine, I think you get back into the traditional realm of *Chevron*.

Lisa Heinzerling: I think what the Court's opinion in *West Virginia* doesn't talk about is just as important as what it does talk about. It doesn't talk about nondelegation. But as Kevin said, it talks about separation-of-powers principles. That's nondelegation. For some reason, the majority didn't want to explicitly say it, but that's the only separation-of-powers principle that really could be at play here. Chief Justice Roberts, Justice Gorsuch, and Justice Samuel Alito have joint opinions talking about reviving the nondelegation doctrine, including its connection to the major questions doctrine.

It's important to recognize that, for some reason, the Court is being coy. It's not telling us exactly what it's doing while it's doing it. So, the nondelegation doctrine looms. And likewise with *Chevron*, the Court has just stopped mentioning *Chevron* altogether. People have stopped asking for *Chevron* deference. The Court hasn't deferred since 2016. I don't think it's *West Virginia* that killed *Chevron* by any means. It's just one more piece of evidence that the historical use of *Chevron*, with its generous deference to agency interpretations, is no longer with us. There are other opinions from this term on statutory interpretation that would be perfect locations for a discussion of *Chevron*, but you just don't see it.

21. 564 U.S. 410, 41 ELR 20210 (2011).

22. Food and Drug Admin. v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000).

23. Utility Air Regul. Grp. v. Environmental Prot. Agency, 573 U.S. 302, 44 ELR 20132 (2014).

24. Alabama Ass'n of Realtors v. Department of Health and Hum. Servs., 594 U.S. ___ (2021); National Fed'n of Indep. Bus. v. Department of Labor, Occupational Safety and Health Admin., 595 U.S. ___ (2022).

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To me, in terms of *Chevron*, this decision is consistent with what we've seen. I think it's also consistent in not explicitly mentioning the doctrine. So, as with nondelegation, the silence with respect to *Chevron* leaves us in a state of real uncertainty. Now, I worry that the Supreme Court has unleashed the lower courts to rule in cases with an increased hostility to deference—or at least an eye on major questions. And it has, through its shadow docket, shown an incredibly aggressive willingness to reach down and either stop or affirm lower courts if they're doing something the Court doesn't or does like, respectively.

Arguably, today's shadow docket actually started with a stay of the CPP in 2016, which happened on the shadow docket. We have every reason to believe that decision involved major questions.[25] It strikes me that *West Virginia*, again, shows us what we probably should already know: that *Chevron* as we knew it is no longer with us.

Kate Bowers: We've had some questions about what the panelists think might be the next big environmental case where major questions comes into play. We have *Sackett v. Environmental Protection Agency*[26] coming up next term, where the Court has been invited to revisit *Rapanos*[27] and an aspect of the definition of "waters of the United States."

We have another audience member who has made reference to the Texas attorney general (AG) making a filing recently in the U.S. Court of Appeals for the Fifth Circuit citing the major questions doctrine.[28] Do you see a likely case or cases that could be a vehicle for further discussion of the doctrine up to the Supreme Court?

Kevin Poloncarz: There's a *Texas v. Environmental Protection Agency* case in front of the D.C. Circuit that Vickie and I are involved in already.[29] In this case, the Texas AG and other Republican AGs have in their nonbinding statement of issues raised the major questions doctrine, challenging EPA's authority to set standards for light-duty vehicles that are premised upon what they view as an implied electric vehicle (EV) mandate.

Notably in that case, all the automakers are on the same side as us. Yet a challenge is being brought that, just like in *West Virginia*, EPA can't shift generation to new types of sources in deciding the appropriate standard for power plants or tailpipes under the CAA. EPA can't decide to outlaw the internal combustion engine or require the production of EVs, because those are the types of quintessential policy questions that only Congress should be answering.

So, we are going to be briefing that. We got an order in a related case as well to set a briefing schedule. We still haven't gotten the order to brief in that case, but I am certain that that issue is going to be raised. Whether it receives a warm or hostile reception from the D.C. Circuit, it likely will go up to the Supreme Court. And we'll be asking similar questions. We'll be asking questions like, isn't this what EPA has always done? They've always been regulating tailpipe pollution, just like EPA has always been regulating power plant pollution. Isn't this just the direction that industry writ large is already going? Most major automakers have announced an all-electric future by 2035.[30] That's why they're on our side.

The CPP's goals were achieved a decade in advance even though it never went into effect. That's why Justice Kagan points out that my clients were on the side of EPA. That didn't matter to this Court in deciding the major question. I worry that *Texas* is one case where we are going to see this teed up again, and soon.

Vickie Patton: I would add that a better question is to examine all the forces out there that will make assertions of major questions. These assertions will be made in a number of instances. And they will result in disrupting protections for the American people—protections for human health and the environment and for ensuring healthier communities.

What's crucial is that EPA continue to do its job and continue to conduct the important work that's reflected in extensive statutes crafted by the people's representatives after years and years of hearings, fact-finding, and debate. In all parts of our country, these stakeholders say to EPA: Do your job. Address these harms. Consider all of these important factors and all of the best science and technology, and engage all stakeholders. That's what we need to do.

There will be lots of people who will use this case to try to disrupt progress. I think it's up to all of us to ensure that we continue to make progress in protecting the American people from the harms that environmental law was long designed to address.

Stacey Halliday: I remember in 2016 when I was in the Office of General Counsel, we started talking a lot about where environmental law is heading and addressing these cross-cutting issues by getting away from the traditional media-based silos of environmental law, like air, water, and waste. We need to start thinking creatively. EJ demands that kind of thinking—incorporating considerations in ways we hadn't previously.

I think we're seeing that shift in thinking start to play out. We've started to see a lot of incorporation of EJ-based considerations in rulemaking, things like the recent hydrofluorocarbon phasedown[31] and instances where agencies that previously did not explicitly consider EJ in their work—such as the Federal Energy Regulatory Commission—are

25. Lisa Heinzerling, *The Supreme Court's Clean-Power Power Grab*, 28 Geo. Env't L. Rev. 425 (2016).
26. No. 21-454 (U.S. 2022).
27. Rapanos v. United States, 547 U.S. 715, 36 ELR 20116 (2006).
28. Press Release, Texas Attorney General Office, AG Paxton Files Two Amicus Briefs Opposing Biden's Federal Contractor Vaccine Mandates (July 1, 2022), https://www.texasattorneygeneral.gov/news/releases/ag-paxton-files-two-amicus-briefs-opposing-bidens-federal-contractor-vaccine-mandates.
29. No. 22-1031 (D.C. Cir. 2022).
30. Jim Motavalli, *Every Automaker's EV Plans Through 2035 and Beyond*, Forbes (Oct. 4, 2021), https://www.forbes.com/wheels/news/automaker-ev-plans/.
31. Phasedown of Hydrofluorocarbons: Establishing the Allowance Allocation and Trading Program Under the American Innovation and Manufacturing Act, 40 C.F.R. 9 (2021).

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starting to work EJ into their efforts. And changes in the way that we think about equity and incorporate it into the administration of traditional environmental laws.

The progress that Vickie referenced for EJ to advance requires novel thinking that may be a greater challenge for folks who think that it's not as high a priority. Hopefully, the states will continue to move the ball forward on these important questions of equity, but EJ is inherently a novel area for many people, particularly within the scope of the traditional environmental laws. So, there may be issues there.

Matt Leopold: The Court is pointing back to Congress. I think we all agree Congress should probably be legislating more in the environmental area than it has been able to. Clearly, when Congress wants to design a cap-and-trade program, it can do so. The Court actually pointed to attempts to do that in the past that have failed. But I think Congress is going to have to take more of a leadership role to make progress on certain issues.

We also have to look at some of the proposals. I think one rulemaking that may raise questions on the major questions doctrine could be the Securities and Exchange Commission's (SEC's) climate disclosure rule and greenhouse gas reporting rule, just because that agency has never really been involved in those areas.[32] Agency expertise is clearly a factor that courts are going to look at. One has to question whether the SEC has that particular set of expertise like EPA does, for example, in its greenhouse gas reporting rule.

Lisa Heinzerling: The *West Virginia* case makes clear that an agency can shrink regulatory authority but not expand it. I don't know where in the Court's constitutional universe the agency gets that power to shrink its authority and where the Court finds that kind of regulatory asymmetry. If an agency doesn't use a regulatory authority, then the statute doesn't grant it—I think that's one of the Court's messages. But if an agency uses an authority for the first time and tries to be creative in all the ways that this panel has discussed, that's when it gets in trouble. That asymmetry strikes me as problematic.

Vickie Patton: By the Court's own terms, this doctrine is supposed to be confined to extraordinary cases. That is the language the Court uses over and over. In terms of the SEC initiative to provide investors from Main Street to Wall Street with basic information so they can make sound and informed decisions about climate risk, the SEC has for decades required environmental disclosures. This is something they've been doing for many years, and there's an enormous amount of information in that administrative record from people who have extensive experience implementing the 1933 and 1934 Securities Acts, explaining the long history of the SEC's environmental disclosures.

Kevin Poloncarz: I won't speak to that specific rule and whether this case aligns with that rule or not. But all of the political announcements and fanfare that pronounce a new policy as the biggest thing we've ever done, the most monumental—all that noise should be tamped down if an agency wants to avoid the major questions issue. That's an obvious point. All of us lawyers who have been litigating these cases thought that, ultimately, we were arguing about the text. There are certain aspects, such as failure to pass legislation, that are usually not looked at by a court as informative of what Congress intended or not in interpreting the text of statutes.

Here, the Court brings all of that evidence in. And so if an agency is going to employ existing tools to try to address some of these problems—EJ, climate change—they might be wise to not issue those political announcements. It may be wise to not pound their chest and say this is the biggest thing we've ever done, but to say this policy is incremental. This measure is "swimming in our lane," and being consistent with what we've already done.

It is funny because we thought these were all lawyerly arguments, but to some extent, I think it's more about public relations. We need to make sure that the politicos don't get out there in front of the lawyers.

Lisa Heinzerling: This is also the same Court that has brought civil servants at the agencies, who used to not be subject to the political apparatus, closer and closer to the political side. This is the same Court that has been strengthening its separation-of-powers jurisprudence to make the president ever more powerful, so that the president controls the executive branch all the way down.

The reason I mention this is that Kevin mentioned how the Court doesn't like it when the regulatory system takes on the cast of politics—when people in the regulatory system talk in political terms. There's a real disconnect between the thrust of the Court's separation-of-powers jurisprudence and its dislike of agency heads and presidents bragging about their political accomplishments.

Kate Bowers: We've received a few questions about *Massachusetts*. The Court did not revisit that holding in this case. Do any of the panelists have thoughts on what this ruling and the major questions doctrine might mean for the potential of the Court to revisit *Massachusetts* somewhere down the line?

Lisa Heinzerling: I don't think the Court is likely to revisit the now-narrowed, specific holding of *Massachusetts*, which is that the CAA empowers EPA to regulate greenhouse gas emissions from automobiles under §202. Although it may well, as Kevin was saying, deploy the major questions doctrine to limit the regulations that can occur.

The Court has limited *Massachusetts*' significance in some sense already since the *Utility Air Regulatory Group* case—by looking provision-by-provision at whether the

32. Press Release, SEC, SEC Proposes Rules to Enhance and Standardize Climate-Related Disclosures for Investors (Mar. 21, 2022), https://www.sec.gov/news/press-release/2022-46.

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statute gives authority over the regulatory program EPA is trying to construct. I do think that comparing *Massachusetts* to *West Virginia* shows us the effect of the drastically changed composition of the Supreme Court.

In *Massachusetts*, the Court majority rejected the application of something similar to the major questions idea. They said, no, we are not going to trim the statute based on the fact that this concerns a major topic. The dissents, and notably the conservative Justices in that case, assented and said that the Court should have deferred—under *Chevron* no less—to EPA's judgment that the statute didn't cover greenhouse gases.

So, they would have deferred under *Chevron*, and now they're saying there's no power at all. The fact that they would have deferred under *Chevron* illustrates the asymmetry of the Court's approach. The conservative Justices would have gone all the way toward *Chevron* deference when EPA didn't want to regulate greenhouse gas emissions, but it denies authority altogether when the Agency wants to regulate greenhouse gas emissions.

Vickie Patton: I would add that *Massachusetts* is statutory *stare decisis*, so it's really a precedent that is anchored in interpretation of a statute. There, the majority opinion takes as a premise that EPA has the authority to address climate pollution under the CAA. It cites a number of programs in which EPA does exactly that, including the landfill methane standards,[33] which it holds as noteworthy examples of rulemakings that EPA has conducted under §111(d).

The Court has also taken a journey on the separation-of-powers issues and the nondelegation doctrine. In a 2001 decision, the Court interpreted and reviewed EPA's health-based standards for particulate matter and ozone adopted in 1987.[34] That was a unanimous opinion by Justice Antonin Scalia, rebuking and rejecting claims that were made that Congress ran afoul of the nondelegation doctrine in giving EPA the responsibility to protect the American people from health-based ubiquitous pollutants.

Kate Bowers: Another question is whether this case has any impact on states participating in the Regional Greenhouse Gas Initiative.

Vickie Patton: That's a great question, and to Stacey's point, this case doesn't in any way undermine state and local governments and private-sector actions to tackle climate pollution. Indeed, it only underscores the importance of those actions. In addressing climate change, we need all of those solutions. We need all possible solutions to tackle climate pollution, and also to help ensure that we're addressing the heavy burden of pollution on communities that have been bearing a disproportionate burden for far too long. We need all of the tools in the toolbox to tackle the climate crisis, and the Court's ruling here couldn't underscore that any more clearly.

Kate Bowers: We received one question about mobile source regulation and whether this decision might have an impact on EPA's ability to set fleet-wide standards based on shifting sales to lower-emitting EV vehicles. Any comments on the applications of *West Virginia* in the mobile source sphere?

Lisa Heinzerling: Kevin mentioned this aspect earlier. I want to offer a related point that under major questions, a lot of work is done by framing the problem in front of you. If you frame EPA's regulation of vehicles as something they've always done—they're regulating pollution from automobiles—it might create a different result than if you frame it as requiring a certain amount of EVs or banning the internal combustion engine. My concern is partly the malleability of the doctrine, and the fact that the standard itself turns on how you frame the question in front of you, which leads to more and more discretion for the courts in applying this doctrine.

Matt Leopold: Tailpipe emissions are the context in which the Court first recognized EPA's ability to regulate greenhouse gases, and that remains a central issue. The Court also affirmed this indirectly in *Massachusetts*, by citing and affirming its *American Electric Power Co. v. Connecticut* holding. I think the question here is, what's the scope of the EPA authority under §202 of the CAA to regulate emissions from motor vehicles or motor vehicle engines?

There are some interesting questions about whether some of the fleet-wide purchasing mandates and sales mandates coming out of California under the Advanced Clean Cars Program, for instance, are regulations that would require a waiver under the CAA under the California Waiver Program. Are those the types of things that constitute regulation of emissions from motor vehicles? If so, are those major questions, or is that merely par for the course in the regular statutory interpretation questions? One could see how this arises if or when EPA takes action on a proposed California waiver. Those are certainly issues to watch.

Vickie Patton: A couple of comments. One is that those Advanced Clean Cars II standards that are moving forward in California are like the California standards that address nitrogen oxide pollution from heavy-duty vehicles, and are essential to protect millions of Californians who are afflicted by smog-forming contaminants. They will have enormous benefits in helping California meet its obligations under the nation's clean air laws to restore compliance with the health-based standard for ground-level ozone, which has far-reaching impacts. Those are also vital protections to help advance justice in communities that have been bearing a heavy burden from pollutants, including nitrogen oxides and diesel particulates.

It is curious that there are states seeking to interfere with and prevent other states from taking actions that protect

33. Massachusetts v. Environmental Prot. Agency, 549 U.S. 497, 37 ELR 20075 (2007).
34. Whitman v. American Trucking Ass'ns, Inc., 531 U.S. 457 (2001).

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the health of their own people. I hope that we can continue to move forward to restore cleaner, healthy air for all people in California who are afflicted by smog-forming contaminants and in other parts of the country. No doubt, we'll see lots of people coming up with ideas and theories to try to slow down progress. But they're important efforts and vital to protecting the health of millions of Californians.

Kate Bowers: I'd like to invite the panelists to share any closing remarks.

Vickie Patton: Billions of dollars in EV investments are happening by the big three automakers: Ford, General Motors, and Stellantis, formerly Chrysler. These are investments in manufacturing jobs and creating tremendous economic opportunities in places like Tennessee, Kentucky, Texas, Ohio, and Michigan. It's an example of our country's ability to address a major source of climate pollution and health-harming air pollution, and to do it in a way that creates high-quality jobs for thousands of people in all parts of our country.

Stacey Halliday: As a closing thought on the EJ front, this is still, regardless of this decision, an unprecedented time for EJ. The train has left the station. Some of the folks at these agencies have been thinking about these issues for a long time. They're putting those plans into action with existing authorities, and using tools in new ways that are still effective, like enforcement.

And in the private sector, again, the train has already left the station. People see the writing on the wall in a global way and are developing new policies and practices in meaningful ways. EJ continues to march forward in exciting ways.

Lisa Heinzerling: I'm very troubled by and worried about this decision and what it means going forward. But I also love Vickie's and Stacey's positive comments at the end of the panel, so I won't say more than I've already said.

Matt Leopold: To echo earlier comments, I think in the future we'll see major questions reserved for extraordinary cases as the Court intended. But I want to see how that plays out.