Public Land & Resources Law Review

Volume 0 *Case Notes 2022-2023* Article 2

11-9-2022

West Virginia v. EPA

Amanda Spear
University of Montana School of Law

Amanda Spear
Alexander Blewett III School of Law at the University of Montana, amanda.spear@umontana.edu

West Virginia v. EPA, 142 S. Ct. 2587 (2022).

Amanda R. Spear*

The EPA created the Clean Power Plan in an effort to reduce the amount of greenhouse gas emissions generated by coal-fired power plants. The EPA determined that the Best System of Emission Reduction for existing coal-fired power plants included generation shifting methods, meaning a shift from coal to cleaner sources. The Supreme Court held, under the major questions doctrine, that Congress had not intended for the EPA to use generation shifting methods for the Best System of Emission Reduction and that the EPA had exceeded its authority in doing so. This note will explore how the decision may impact administrative law with the official introduction of the major questions doctrine, as well as the potential environmental impacts.

I. INTRODUCTION

The question presented is whether the Environmental Protection Agency ("EPA") acted within its congressionally delegated authority when it determined power generation shifting methods were an appropriate Best System of Emission Reduction ("BSER"), as opposed to solely technological and procedural controls.[1] To regulate carbon dioxide emissions from existing coal-fired power plants, the EPA, under Section 111(d) of the Clean Air Act ("CAA"), proposed the Clean Power Plan ("CPP").[2] Under the CPP, the EPA determined that the BSER for existing coal-fired power plants involved both heat rate improvements and generation shifting methods.[3] Generation shifting methods would result in change at the grid level, rather than change at the individual plant level.[4]

Before the CPP went into effect, the EPA, under the Trump administration, repealed the CPP and replaced it with the Affordable Clean Energy ("ACE") rule. Unlike the CPP, the ACE rule used only heat rate improvement measures for the BSER.[5] The D.C. Circuit Court later vacated the ACE rule, in turn vacating the repeal of the CPP, and held that the EPA had the authority to use generation shifting methods for the BSER.[6]

Unhappy with the Circuit Court decision, multiple states, coal corporations, and mining corporations petitioned for review of the CPP.[7] The

---

*Amanda Spear, Juris Doctor candidate 2024, Alexander Blewett III School of Law at the University of Montana.

1. West Virginia v. EPA, 142 S. Ct. 2587, 2600 (2022).
2. *Id*. at 2602.
3. *Id*. at 2603.
4. *Id*. at 2604–05.
5. *Id*. at 2605.
6. Am. Lung Ass'n v. EPA, 985 F.3d 914, 995 (D.C. Cir. 2021).
7. *West Virginia*, 142 S. Ct. at 2600.

Supreme Court granted certiorari.[8] The Court held, in an opinion written by Chief Justice Roberts, that the question of whether the EPA could include generation shifting methods in the BSER for existing coal-fired power plants fell under the major questions doctrine.[9] More specifically, the Court stated that if Congress had intended to give EPA this authority, it would have made that clear and would not have intended for that authority to be implied through a gap-filler provision like Section 111(d).[10] The Court, reversing the Circuit Court's decision, held that the EPA did not have the authority to consider generation shifting methods and remanded the case for further proceedings.[11]

The Dissent, written by Justice Kagan, argued that Section 111(d) is intended as a catch-all provision to regulate pollutants that do not fall under the National Ambient Air Quality Standards ("NAAQS") or the Hazardous Air Pollutants ("HAP") programs.[12] The Dissent reasoned that Congress used the language it did in Section 111 to provide the EPA with discretion and flexibility and that under that section, Congress gave the EPA the authority to use generation shifting methods when determining the BSER for existing coal-fired power plants.[13] The Dissent concluded by stating either Congress or the agency should be the decision maker on climate policy, not the Court.[14]

II. LEGAL BACKGROUND

The central issue is whether the EPA had the authority to determine that generation shifting was an appropriate BSER for existing coal-fired power plants.[15] This issue is based on the EPA's authority under the CAA.[16] Courts typically apply *Chevron*[17] deference when an agency is interpreting an ambiguous statute.[18] Here, the Court used the major questions doctrine to determine the breadth of EPA's authority.[19]

---

8. *Id*. at 2606.
9. *Id*. at 2610.
10. *Id*. at 2608.
11. *Id*. at 2616.
12. *Id*. at 2629 (Kagan, J., with Breyer and Sotomayor, JJ., dissenting).
13. *Id*.
14. *Id*. at 2644
15. *Id*. at 2600 (majority opinion).
16. *Id*.
17. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984).
18. *Id*. at 843.
19. *West Virginia*, 142 S. Ct. at 2609–10.

A. Clean Air Act

The CAA was a landmark environmental law passed in 1970.[20] One of the primary goals of the CAA is to encourage and promote government action that focuses on pollution prevention.[21] The EPA administers the CAA, as designated by Congress.[22] There are three main regulatory programs created and enforced by the EPA that are used to control air pollution produced by mobile and stationary sources.[23] First, NAAQS focus on pollutants that are harmful to public health and are commonly produced by multiple stationary and mobile sources.[24] Second, the HAP program addresses toxic pollutants that NAAQS does not cover.[25] Third, the New Source Performance Standards Program, known as Section 111, guides performance standards for categories of stationary sources that produce air pollutants that "may reasonably be anticipated to endanger public health or welfare."[26]

Under Section 111, the EPA must determine the performance standard on a pollutant-by-pollutant basis for each source category.[27] Performance standard is defined as the emission standard that reflects the emission limitation possible when applying the BSER to the source.[28] Section 111 focuses on new and existing sources.[29] Once the EPA has set a standard for a pollutant from a new source, the EPA, under Section 111(d), must then determine the standard for existing sources in the same source category for any pollutant not already covered under NAAQS or HAP.[30] When Section 111 was enacted, the EPA Administrator created a list of stationary sources that would be regulated under Section 111; fossil-fuel-fired steam generating power plants were included on the list.[31]

When evaluating pollutants under Section 111, the EPA must first determine the appropriate BSER, considering costs and impacts on health, the environment, and energy requirements.[32] Second, the agency must then determine the "degree of emissions limitation achievable through the

---

20. *Clean Air Act Overview, Evolution of the Clean Air Act,* ENVIRONMENTAL PROTECTION AGENCY (Dec. 7, 2021), https://perma.cc/RYR4-PGE3 (last visited Oct. 28, 2021).
21. 42 U.S.C. § 7401(c) (2018).
22. *Id*. § 7602(a).
23. *West Virginia*, 142 S. Ct. at 2600.
24. 42 U.S.C. § 7408(a) (2018).
25. *Id*. § 7412.
26. *Id*. § 7411(b)(1)(A).
27. *Id*. § 7411.
28. *Id*. § 7411(a)(1).
29. West Virginia v. EPA, 142 S. Ct. 2587, 2601 (2022).
30. *Id*.
31. Am. Lung Ass'n v. EPA, 985 F.3d 914, 930 (D.C. Cir. 2021).
32. 42 U.S.C. § 7411(a)(1).

application" of the BSER and determine the appropriate standards of performance for the specific source category.[33] The states are tasked with implementing and enforcing the standards of performance.[34]

B. Clean Power Plan

In 2007, the Court held that greenhouse gases fit the broad definition of an air pollutant under the CAA.[35] This decision required the EPA to regulate greenhouse gases as pollutants.[36] The EPA could avoid the regulation in one of two ways.[37] First, by showing greenhouse gases did not contribute to climate change, or second, by showing there was another reasonable explanation for not regulating greenhouse gases.[38] The EPA later determined that fossil-fuel-fired electricity generating units produce almost one-third of the greenhouse gases produced in the United States.[39]

To reduce greenhouse gas production in the United States, the EPA sought to regulate emissions of greenhouse gas under Section 111 by regulating coal-fired power plans.[40] In 2015, the EPA promulgated a rule under Section 111 regulating carbon dioxide emission from new, modified, and reconstructed fossil-fuel-fired electric utility generating units.[41] This promulgation triggered the creation of the CPP, a plan establishing standards of performance to be used in the regulation of carbon dioxide emissions from existing coal-fired power plants.[42] Like all standards of performance determined under Section 111, the EPA first had to determine the BSER for existing coal-fired power plants, and then determine the appropriate standard of performance through the implementation of the BSER.[43]

Under the CPP, the EPA determined that the BSER for existing coal-fired power plants consisted of three "building blocks," or emission

---

33. Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,509, 64,512 (Oct. 23, 2015) (to be codified at 40 C.F.R. 60, 70, 71, et. al.).

34. 42 U.S.C. § 7411(c)(1).

35. Massachusetts v. EPA, 549 U.S. 497, 532 (2007).

36. *Id*. at 31–33.

37. *Id*.

38. *Id*.

39. Standards of Performance for Greenhouse Gas Emissions Fron New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,530.

40. *Id*. at 64,511.

41. *Id*.

42. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,661, 64,663 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

43. 42 U.S.C. § 7411(a)(1).

reduction measures, that would be used to determine the appropriate performance standards.[44] The first building block involved heat rate improvements, which are technologies used to improve a plant's efficiency.[45] The second and third blocks focused on generation shifting, meaning shifting the way the electricity is generated from dirtier to cleaner sources.[46] The first generation shifting block was a shift from coal-fired plants to natural-gas-fired plants. In contrast, the second generation shifting block shifted from coal and natural gas plants to cleaner forms of energy production, such as solar and wind energy. In 2019, the EPA repealed the CPP, stating it had exceeded the statutory authority granted to it by Congress.[47]

C. Chevron Deference

The premise of *Chevron* deference is that Congress tasks agencies with administering statutes and "considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to adminster."[48] *Chevron* deference is based on the assumption that when an agency adminsters an ambiguos statute, Congress intends for the agency, not the courts, to resolve the ambiguity.[49] The premise is that the agencies have the technical expertise to resolve the ambiguity, unlike the courts.[50] The *Chevron* doctrine surfaced when the Court noted that if a "statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute."[51] The Court introduced a two-part test for determining when agency deference should be considered.[52] First, the court must determine whether Congress has spoken on the exact issue in question by asking whether the statute is ambiguous or silent.[53] If Congress has not spoken and the statute is either ambigous or silent, the court must then evaluate whether the agency's interpretation of the statute is reasonable.[54]

---

44. West Virginia v. EPA, 142 S. Ct. 2587, 2603 (2022).
45. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. at 64,667.
46. *Id*.
47. 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. 32,520, 32,520 (Sept. 06, 2019) (to be codified at 40 C.F.R pt. 60).
48. Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 844 (1984).
49. City of Arlington v. FCC, 569 U.S. 290, 296–97 (2013).
50. *Chevron, U.S.A., Inc.*, 467 U.S. at 863–66.
51. *Id*. at 842–44.
52. *Id*. at 843–44.
53. *Id*.
54. *Id*.

D. Major Questions Doctrine

The major questions doctrine, also known as the major rules doctrine, departs from typical *Chevron* deference and allows courts to question whether Congress intended a delegation of power when an agency asserts authority over a matter that is of economic or political significance in a way that deviates from or broadens historically accepted action.[55] In these instances, there must be "more than a merely plausible textual basis for the agency action."[56] The doctrine stems from the premise that if Congress intended an agency to have certain authority, it would explicitly state that and would not mask it in ambigous and vague terms.[57] The Court considers the major questions doctrine to be an exception to *Chevron* deference.[58] This case was the first time that a Supreme Court opinion explicitly referred to the major questions doctrine.[59] Although the Court has not used the specific term before; the Court has previously used the approach in several cases.[60]

III. FACTUAL AND PROCEDURAL BACKGROUND

The generation shifting methods were never implemented because the CPP never took effect.[61] After the EPA promulgated the CPP; multiple petitioners petitioned the D.C. Circuit for a review of the rule.[62] The D.C. Circuit Court refused to grant a stay.[63] The petitioners challenged the Circuit Court's decision, and the Supreme Court granted a stay, pending review of the rule.[64] Before the Circuit Court could issue an opinion, the new presidential administration requested that litigation surrounding the CPP be temporarily suspended to allow for reconsideration of the plan.[65] As a result, the Circuit Court halted litigation and the petition was dismissed as

---

55. CONG. RESEARCH SERV., THE MAJOR QUESTIONS DOCTRINE, IF I 2077 (April 6, 2022).
56. *Id*.
57. *Id*.
58. *Id*.
59. West Virginia v. EPA, 142 S. Ct. 2505, 2609 (2022).
60. CONG. RESEARCH SERV., THE MAJOR QUESTIONS DOCTRINE, IF I 2077; *see* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485 (2021); Util. Air Regul. Grp. v. EPA, 573 U.S. 302 (2014); Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661 (2022).
61. *West Virginia*, 142 S. Ct. at 2604.
62. *Id*.
63. *Id*.
64. West Virginia v. EPA, 577 U.S. 1126 (2016).
65. *West Virginia*, 142 S. Ct. at 2604.

moot.[66] The Supreme Court granted certiorari, consolidating *North American Coal Cooperative v. EPA,*[67] *Westmoreland Mining Holdings v. EPA,*[68] *North Dakota v. EPA,*[69] and *West Virginia v. EPA*[70] into this case.[71]

In 2019, the EPA repealed the CPP, stating that in using generation shifting methods to determine the BSER, the EPA had exceeded the statutory authority granted to it by Congress under the CAA.[72] The agency stated, under the CAA, the use of generation shifting methods in determining the BSER fell under the major questions doctrine and that if Congress had intended the BSER to be based on generation shifting methods, it would have made that clear.[73] The agency then stated the BSER should instead be limited to equipment and practice adjustments at a plant level and not a shift at the grid level.[74]

After the repeal of the CPP, the EPA replaced the plan with the ACE rule.[75] Under the ACE rule, the EPA determined that the BSER for existing coal-fired power plants was heat rate improvements.[76] The heat rate improvements would involve both new technology implementation and operating and maintenance practices at the plant level.[77]

Unhappy with the ACE rule, several plaintiffs filed for review of the rule by the D.C. Circuit.[78] The Circuit Court consolidated the petitions into a single case.[79] The Circuit Court concluded that the EPA incorrectly interpreted the statute by not allowing the inclusion of generation shifting methods for the BSER, and in doing so, the agency had unnecessarily restricted itself.[80] The Circuit Court held that the EPA had "misconceived the law" and determined that the only way to remedy the misconception was to vacate both the ACE rule and the repeal of the CPP and remand to the agency.[81]

---

66. *Id*.
67. No. 20-1531, 2021 U.S. LEXIS 5333 (Oct. 29, 2021).
68. No. 20-1778, 2021 U.S. LEXIS 5336 (Oct. 29, 2021).
69. 142 S. Ct. 418 (2021).
70. 142 S. Ct. 420 (2021).
71. West Virginia v. EPA, 142 S. Ct. 420 (2021).
72. 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. 32,520, 32,523 (Sept. 06, 2019) (to be codified at 40 C.F.R pt. 60).
73. *Id*. at 32,529.
74. *Id*. at 32,523.
75. *Id*. at 32,532.
76. *Id*.
77. *Id*.
78. Am. Lung Ass'n v. EPA, 985 F.3d 914, 921 (D.C. Cir. 2021).
79. *Id*.
80. *Id*. at 995.
81. *Id*.

IV. DECISION

The Court addressed the issue of whether the EPA had the authority under the CAA to use generation shifting methods for the BSER of existing coal-fired power plants.[82] The Court held that under the major questions doctrine, Congress had not clearly given the EPA the authority to include generation shifting methods in the BSER and because the decision was one of major breadth, clear congressional authority was necessary.[83] The Dissent rebutted by saying that Section 111(d) is intended to be a catch-all provision used to regulate pollutants that do not fall under NAAQS or HAP regulation. Congress intended the section to provide discretion and flexibility to the EPA.[84] The Dissent concluded that the EPA had the discretion to decide what methods to use when determining the BSER and that the inclusion of generation shifting did not exceed the agency's authority under the statute.[85]

A. Majority Opinion

The Court first discussed the justiciability of the case, determining that the petitioners had standing and that the issue was not moot.[86] The Court then turned to the major questions doctrine to evaluate the authority granted to the EPA under Section 111, holding that the agency has exceeded its authority and generation shifting methods could not be included in the BSER.[87]

1. Justiciability

The federal government argued that the case was not justiciable because none of the petitioners had Article III standing.[88] A party has Article III standing to appeal if the party has been injured by a judgement below and the injury could be redressed by a favorable ruling from the appellant court.[89] The Court determined that at least one of the petitioners, specifically the states, had standing.[90] The Court explained the decision of the District Court had vacated the ACE rule and, as a result, had also vacated the repeal of the CPP.[91] The CPP required the states to regulate coal-fired power plants more stringently.[92] Therefore, because the repeal was

82. West Virginia v. EPA, 142 S. Ct. 2600 (2022).
83. *Id*. at 2616.
84. *Id*. at 2629 (Kagan, J., with Breyer and Sotomayor, JJ., dissenting).
85. *Id*.
86. *Id*. at 2606–07 (majority opinion).
87. *Id*. at 2616.
88. *Id*. at 2606.
89. *Id*.
90. *Id*.
91. *Id*.
92. *Id*.

vacated, the states were injured by the lower court's decision.[93] The government argued that because the EPA had made clear that it had decided to create a new rule and did not plan on enforcing the CPP, there was no possibility of injury.[94] The Court stated the case was not moot unless it is clear that the wrong that caused the injury could not possibly occur again.[95] The EPA could choose to enforce the CPP since the repeal was vacated.[96] A favorable decision by the Supreme Court could redress the injury inflicted on the states, and because of that, the states had standing, and the case was justiciable.[97]

2. EPA Exceeded its Authority Under the CAA

The Court ultimately held that the EPA had exceeded its authority under the CAA when it determined that generation shifting could be included in the BSER for coal-fired power plants.[98] In coming to this conclusion, the Court first looked at the statute itself to determine whether Congress gave EPA the specific authority, and then evaluated the authority under the major questions doctrine.[99]

The Court began its analysis by first employing a fundamental canon of statutory interpretation.[100] The Court read the words of the statute in their context, keeping in mind their place in the entire statutory scheme.[101] The Court noted that when looking at a statute that an agency had interpreted, it is important to consider whether Congress intended to give that authority to the agency.[102] The Court then described that the major questions doctrine applies in "cases in which the 'history and the breadth of the authority that [the agency] has asserted,' and the 'economic and political significance' of that assertion, provide a 'reason to hesitate before concluding that Congress' meant to confer such authority."[103] In these cases, there must be "more than a merely plausible textual basis for the agency action."[104] The Court supported this doctrine by explaining an array of cases that relied on the principles of the major questions doctrine.[105] The Court explained that large congressional grants of power to

---

93. *Id*.
94. *Id*.
95. *Id*. at 2607.
96. *Id*.
97. *Id*.
98. *Id*. at 2615–16.
99. *Id*. at 2607–16.
100. *Id*. at 2607.
101. *Id*.
102. *Id*. at 2607–08.
103. *Id*. at 2606 (quoting FDA v. Brown & Williamson Tabacco Corp., 529 U.S. 120, 159–60 (2000)).
104. *Id*. at 2609 (quoting Util. Air Reg. Grp. v. FDA, 573 U.S. 302, 324 (2014)).
105. *Id*. at 2608.

agencies are not likely done in vague and unapparent ways and that it is presumed that "Congress intends to make major policy decisions itself."[106]

The Court concluded that the major questions doctrine applied in this case.[107] The Court used multiple factors to determine whether Congress intended to give the agency the authority that the agency believed it had.[108] Those factors included the economic and political significance of the rule, the statute's history and the agency's past interpretations of the statute, congressional action on the matter, and the place of the statute in the statutory scheme.[109]

The Court looked at the extend of authority the EPA was exercising and whether Congress had intended to give the agency that authority.[110] The EPA noted that to regulate carbon dioxide emissions effectively, it would need to take a broader approach when determining the necessary regulations.[111] The Court held that the broad approach was unprecedented and a revision of the regulatory scheme from one form to an entirely different one.[112] The Court explained that by using generation shifting in the BSER, the EPA tried to exercise gross power over the American energy industry and that unless explicitly given that authority by Congress, the agency did not have the authority to do so.[113] The government argued that because the amount of generation shifting required must be adequately demonstrated and take into account other factors such as cost, health, and environmental impacts, the authority is not as extensive as the Court claimed.[114] The Court stated that the government's argument revealed the breadth of the authority the agency claimed because the EPA itself stated that the expertise required to determine the standards when using generation shifting in the BSER is not traditionally the expertise needed for the EPA, demonstrating that this is likely not something Congress intended the EPA to do.[115]

The Court also looked to EPA's previous use of Section 111. The Court pointed out that the EPA's previous uses of Section 111 focused on requiring plants to operate cleaner and did not mention generation shifting.[116] The government argued that the EPA implemented one rule that relied on a cap-and-trade mechanism, akin to the one at issue here. Still, the Court stated that the legality of that rule was never addressed and that that rule was not the same as the one at issue here because in the previous rule, a plant could comply with the regulation by installing appropriate

---

106. *Id*. at 2609 (quoting U.S. Telecom Ass'n. v. FCC, 855 F.3d 381, 428 U.S. App. D.C. 439 (CADA 2017)).
107. *Id*. at 2610.
108. *Id*. at 2607–16.
109. *Id*.
110. *Id*. at 2610–14.
111. *Id*. at 2611.
112. *Id*. at 2612.
113. *Id*.
114. *Id*.
115. *Id*. at 2612–13.
116. *Id*. at 2610.

controls.[117] There are no controls that a coal-fired plant could install that would allow it to meet the emission limits of the CPP.[118] The Court also made a point to mention that in the inaugural rulemaking under Section 111(d), the EPA itself stated that "Congress intended a technology-based approach" of emission standards.[119]

The Court then looked to the statutory scheme of the section. The Court noted that Section 111(d) is a gap-filler provision used only for pollutants that do not fall under NAAQS or HAP regulation.[120] The government argued that generation shifting fits under the definition of the word "system" and that cap-and-trade schemes have been used as a "system" of emission reductions in the past.[121] The Court disagreed, stating that the word system is too vague to assume that Congress intended the authority that the EPA exercised under the CPP.[122] The Court also noted that just because a cap-and-trade system had been used in other provisions does not mean that it is what was intended by the use of the word system in Section 111.[123]

Ultimately, the Court held that a nationwide transition from coal-fired power plants is not something that Congress gave the EPA the authority to regulate under Section 111(d) and that generation shifting could not be included in the BSER for existing coal-fired power plants.[124] Further, the magnitude of that authority could only come from clear congressional delegation to the agency, which the Court failed to find.[125]

The Concurrence, written by Justice Gorsuch, agreed that the question presented in this case fell under the major questions doctrine and further explained that the doctrine protects the separation of powers and the belief that Congress should be the only body regulating such impactful issues or provide clear delegation of such regulation.[126]

B. Dissenting Opinion

The Dissent stated that Congress gave EPA the authority to regulate coal-fired power plants by including generation shifting in the BSER.[127] The Dissent began its analysis by noting that under Section 111, Congress tasked the EPA with regulating "stationary sources of any substance that 'causes or contributes significantly to, air pollution' and that

---

117. *Id*.
118. *Id*.
119. *Id*. (quoting 40 Fed. Reg. 53343 (1975)).
120. *Id*. at 2600–01.
121. *Id*. at 2614–15.
122. *Id*. at 2615.
123. *Id*.
124. *Id*.
125. *Id*. at 2616.
126. *Id*. at 2617–19 (Gorsuch, J., with Alito, J., concurring).
127. *Id*. at 2643–44 (Kagan, J., with Breyer and Sotomayor, JJ., dissenting).

'may reasonably be anticipated to endanger public health or welfare.'"[128] The Dissent stated that greenhouse gases fit that description, which means under Section 111, Congress gave EPA the authority to regulate greenhouse gas emissions from coal-fired power plants.[129]

Unlike the Majority, the Dissent determined Section 111(d) is not a gap-filler provision, but instead a catch-all provision because it applies to all pollutants not covered by the NAAQS or HAP.[130] The Dissent noted that by using the words "best system of emission reduction" in Section 111, Congress intentionally gave the EPA the broad authority to regulate using its own discretion.[131] The Dissent reasoned that Congress creates broad provisions like Section 111 so agencies can respond to new and large problems that arise.[132] The Dissent determined that the Majority's reasoning is based solely on the idea that the system the EPA is proposing is too new and significant to be regulated in such general terms, but noted it is not a reason to restrict an agency, an expert in the given area, from regulating.[133]

The Dissent thought it was clear that generation shifting fits within the meaning of BSER because the point of using the word system was for the possible implementations to be broad.[134] The Dissent then looked to other rules the EPA has implemented under the CAA, noting cap-and-trade systems had been implemented under other provisions that use the word system.[135] This demonstrated that generation shifting as the BSER was appropriate under the wording of the provision and the CAA.[136] The Dissent next turned to other provisions of the CAA and noted Congress did not give the EPA as much flexibility when setting emission standards under other provisions because in other provision, Congress limited the authority by using the word technology to describe the controls that could be used.[137] In Section 111, the technological restraint was purposefully excluded.[138] This shows Congress intended the interpretation of this section to be broader than other sections and include more than just technological controls.[139]

The Dissent finally addressed the Majority's application of the major questions doctrine, stating the doctrine has only been used in instances where an agency was doing something not usually in its expertise or doing something that would restrict "Congress's broader design."[140]

---

128. *Id*. at 2627–28 (quoting 42 U.S.C. § 7411(b)(1)(A) (2018)).
129. *Id*. at 2627 (Kagan, J., with Breyer and Sotomayor, JJ., dissenting).
130. *Id*. at 2628–29.
131. *Id*. at 2628.
132. *Id*.
133. *Id*.
134. *Id*. at 2629–30.
135. *Id*. at 2631.
136. *Id*.
137. *Id*. at 2631–32.
138. *Id*.
139. *Id*.
140. *Id*. at 2633.

This case presents neither of those issues.[141] Referring to a previous Supreme Court decision, the Dissent noted the Court determined that under Section 111, Congress had given the EPA the authority to determine whether and how to regulate carbon dioxide emissions, emphasizing the word *how*.[142] The Dissent then went on to state every power plant regulation "'dictat[es]' the national energy mix to one or another degree" and because of that everything the EPA does could be considered generation shifting.[143] Thus, the Dissent found Section 111(d) gave EPA the authority to develop the CPP and to use generation shifting as the BSER.[144]

V. ANALYSIS

A. Justiciability

The Court determined that this case was justiciable.[145] This case centered on the CPP, a plan created by the EPA under the CAA aimed to reduce the amount of electricity generated by coal from 38% to 27% by 2030 nationally.[146] As the Dissent noted, that goal was reached without the CPP's implementation and before the Supreme Court decided to take this case. Not only had the goal been met, but the EPA made clear that it was not planning on enforcing the CPP and was instead creating a new regulation.[147] Some felt that this case was the Court making a decision on a hypothetical question and that the case should not have been heard because the EPA was not enforcing the plan—resulting in no injury to the petitioners.[148] Others believed that the Court took this case to make clear to the EPA that it does not have the authority it tried to exercise in the CPP and that it cannot read its authority too broadly.[149]

The Supreme Court cannot and does not grant every petition it receives for certiorari. It was arguably unnecessary for the Supreme Court to have granted certiorari for this case—where the plan at issue was nearly irrelevant—even though it legally could hear the case. The Court not only granted certiorari, but formally introduced the major questions doctrine.[150]

---

141. *Id*.

142. *Id*. at 2636 (citing Am. Elec. Power Co. v. Connecticut, 564 U.S. 410, 426 (2011)).

143. *Id*. at 2637–38.

144. *Id*. at 2643–44.

145. *Id*. at 2607 (majority opinion).

146. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,661, 64,665 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60).

147. *West Virginia*, 142 S. Ct. at 2607.

148. *See* Adam Liptak, *Supreme Court Considers Limiting E.P.A.'s Ability to Address Climate Change*, N.Y. TIMES (Feb. 28, 2022), https://perma.cc/6WFZ-M982 (last visited Oct. 28, 2022).

149. *See* Maxine Joselow, *Supreme Court's EPA ruling upends Biden's environmental agenda*, WASHINGTON POST (June 30, 2022), https://perma.cc/B9JR-WSTV (last visited Oct. 28, 2022).

150. *West Virginia*, 142 S. Ct. at 2610.

The Court could have waited to address the issue until the new rule was implemented and the potential for injury to petitioners was more apparent. The Court could have then formally introduced the major questions doctrine instead of prematurely introducing a doctrine that will have such a significant impact on administrative law—now made precedent by a case that arguably should not have even been heard.

B. Major Questions Doctrine

In implementing the CPP, the Court claimed that the EPA had strayed away from its typical interpretation of Section 111.[151] The agency had previously implemented regulations under the section using only technological controls for BSERs, and under the CPP, it had shifted to using generation shifting methods and technological controls.[152] The Court suggested that this case falls under the major questions doctrine because it presents a substantial economic impact and deviates from the agency's previous interpretations of the section by broadening the interpretation and considerations for the BSER.[153] The EPA is not deviating from its previous interpretation by including generation shifting in the BSER; it is simply determining the BSER as directed by Congress. As the Dissent pointed out, in creating Section 111, Congress explicitly excluded the word technology when describing the system standards and inserts the word best, allowing the EPA to use its judgment in determining what the best system would be, without adding constraints.[154]

The CPP met the economic significance element of the major questions doctrine. However, the Court should not have restricted the authority exercised by the EPA because the CPP did not meet the broad newfound power element. The statute and the statutory scheme clearly demonstrated that Congress intended flexibility in the interpretation by the EPA, the experts in the area.

The proposition that in extraordinary cases there should be pause when determining whether Congress has given an agency specific authority, particularly when the authority has significant newfound breadth, has been addressed by the Court in the past.[155] In *FDA v. Brown & Williamson Tobacco Corporation*[156], the Court held that the Food and Drug Administration did not have authority to regulate tobacco products because under the statutory language of the specific act the FDA would be required to completely remove tobacco products from the market and Congress had created separate tobacco specific regulations.[157] In *Alabama Association*

---

151. *Id*.
152. *Id*.
153. *Id*. at 2616.
154. *Id*. at 2639–40.
155. *Id*. at 2608.
156. 529 U.S. 120 (2000).
157. *Id*. at 161.

of Realtors v. HHS[158], the Court held that the Center for Disease Control could not impose an eviction moratorium to prevent the spread of COVID-19 because that kind of authority was outside of the authority granted to the CDC by Congress and would have significant economic impacts.[159] In these cases, as well as other past cases where the Court utilized the major questions doctrine concept, the agency action was clearly outside of the scope of the agency's authority and area of expertise.[160] Unlike the CDC trying to step into landlord-tenant law, the CPP and regulation of greenhouse gases is clearly something that is within the authority of the EPA. This decision potentially broadens the reach of the major questions doctrine to not only prevent agency regulation of issues outside of the agency's authority, but also restrict regulation of issues clearly within the agency's expertise.

C. Administrative Impact

The official introduction of the major questions doctrine will likely result in confusion and potentially less authority for agencies. The Court has yet to expressly state when congressional delegation meets the threshold of clear delegation under the major questions doctrine. This leaves room for confusion because an agency will not know if it has exceeded the threshold, potentially resulting in agencies not regulating in ways they should be for fear of being scrutinized under the doctrine.

The doctrine appears to be an exception to the traditional *Chevron* deference given to agencies when interpreting a statute that is either silent or ambiguous.[161] The doctrine is invoked when an agency action does not match historical actions taken by the agency or encompasses a wide breadth, and has a significant economic or political impact.[162] This means that just because an agency decision has economic or political significance, the major questions doctrine does not automatically apply. The action has to meet the significance element and be a novel action by either expanding or deviating from prior action that the agency has taken under the same authority.[163] This second element will likely provide some insulation for agencies when acting in ways that have significant economic or political impacts as long as the agency is acting in a way that it has in the past.

Under *Chevron* deference, an agency that is given deference under step two of the *Chevron* analysis can change their interpretation of the statute as long as the change is still a reasonable interpretation of the

---

158. 141 S. Ct. 2485 (2021).

159. *Id*. at 2488–91.

160. *See* FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 161 (2000); Ala. Ass'n of Realtors v. HHS, 141 S. Ct. 2485, 2488–91 (2021); Util. Air Reg. Grp. v. EPA, 573 U.S. 302, 310 (2014); Nat'l Fed'n of Indep. Bus. v. DOL, OSHA, 142 S. Ct. 661, 666–67 (2022).

161. CONG. RESEARCH SERV., THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE: BACKGROUND AND RECENT DEVELOPMENTS, LSB10745 (May 17, 2022).

162. West Virginia v. EPA, 142 S. Ct. 2587, 2607–08 (2022).

163. *Id*.

statute.[164] It is possible that if an agency were to change its interpretation, as allowed by *Chevron*, and create a rule that would meet the significance element of the major questions doctrine, a court would determine that the interpretation is subject to the major questions doctrine if the agency is not acting as it had in the past. It is important to note that the Supreme Court has recently decided three cases using the major questions doctrine.[165] This suggests that the Court is moving away from agency deference and exercising more control over statutory interpretation.

This decision could also present issues for Congress in their delegation of power to agencies. To regulate under the major questions doctrine, an agency must have clear delegation from Congress.[166] It is not apparent what this means, but it suggests that, at the very least, Congress will need to be more specific in creating statutes and will not be able to leave as much up to agency interpretation as it has in the past. This presents an issue because Congress cannot predict every problem an agency would need to address, and the doctrine will likely restrict agency authority and lessen court deference to agencies.

D. Environmental Impact

This decision greatly inhibits the EPA's flexibility and ability to regulate greenhouse gases effectively. Climate change is a serious problem that threatens the health of all people and the environment.[167] Greenhouse gas emissions are the most significant contributor to climate change.[168] Congress tasked the EPA with administering the CAA.[169] Congress created Section 111(d) of the CAA to regulate the pollutants that were not covered under NAAQS or HAP.[170] Not only did Congress create Section 111(d) as a catch-all provision, but it also broadened the standards by excluding the technology restraint.[171] This indicates that Congress intended Section 111 to be a broad statute to allow for agency interpretation and flexibility when determining the BSER. This decision not only restricts EPA's ability to regulate greenhouse gases, but also restricts EPA's ability to regulate generally.

---

164. CONG. RESEARCH SERV., CHEVRON DEFERENCE: A PRIMER, R44954, (Sept. 19, 2017).

165. CONG. RESEARCH SERV., THE SUPREME COURT'S "MAJOR QUESTIONS" DOCTRINE: BACKGROUND AND RECENT DEVELOPMENTS, LSB10745.

166. *West Virginia*, 142 S. Ct. at 2616.

167. *Climate Change Indicators, Understanding the Connections Between Climate Change and Human Health*, ENVIRONMENTAL PROTECTION AGENCY (Dec. 2, 2021), https://perma.cc/KL3U-RVD5 (last visited Oct. 28, 2021).

168. *Climate Change Indicators: Greenhouse Gases,* ENVIRONMENTAL PROTECTION AGENCY, https://perma.cc/MT8G-7XHM (last visited Oct. 28, 2022).

169. 42 U.S.C. § 7602(a) (2018).

170. *Id*. § 7411.

171. *Id*.

It is important to note that the Court did not rule that all greenhouse gas emissions are outside of the authority of the EPA.[172] Greenhouse gases are also regulated in other sections of the CAA.[173] Thus, all hope is not lost for greenhouse gas emission regulation. Nevertheless, this decision makes regulation much more difficult for the EPA because it requires that Congress clearly grants authority when regulating greenhouse gases in certain instances.[174] The EPA—not Congress—is the expert on climate change regulation and should be able to regulate as it deems necessary without requiring explicit direction from Congress when making decisions using its expertise with authority already granted to it.

VI. CONCLUSION

Climate change is causing the earth to deteriorate at an alarming rate.[175] Greenhouse gas emissions are one of the leading causes of climate change.[176] The EPA must be able to regulate greenhouse gas emissions from coal-fired power plants in the way it sees fit and should not have to rely solely on technological implementations.

Even though the case was justiciable, the Supreme Court should not have taken the case. Although the issue was not moot, it was not pressing and would not have come up in the future since the EPA stated it would not enforce the CPP.

The clear statutory language of Section 111 gave the EPA the authority to determine the BSER. Nowhere in the section does the language suggest regulation was restrained, let alone by technological restraints that would be ineffective in reaching the desired result.

This case will have significant implications on administrative law, particularly regarding agency deference. *Chevron* deference will likely be used more narrowly in the future, given that the Court has begun to frequently use the major questions doctrine and seems to be steering away from agency deference. The major questions doctrine will restrict agency authority because the agencies will have to rely on explicit congressional delegation when creating certain impactful regulations and will not be given the deference allowed to them in the past. This doctrine will also burden Congress when delegating authority because Congress can no longer defer to agency expertise and instead must provide unrealistically clear intent.

---

172. West Virginia v. EPA, 142 S. Ct. 2587, 2615–16 (2022).

173. *See* Massachusetts v. EPA, 549 U.S. 497 (2007).

174. Jeff Turrentine, *The Supreme Court's EPA Ruling, Explained*, NATIONAL RESOURCES DEFENSE COUNCIL (July 7, 2022), https://perma.cc/AA52-4LML (last visited Oct. 28, 2022).

175. Earth Science Communications Team, *The Effects of Climate Change*, NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, https://perma.cc/UW46-33JN (last visited Sept. 16, 2022).

176. *Climate Change Indicators: Greenhouse Gases*, ENVIRONMENTAL PROTECTION AGENCY, https://perma.cc/MT8G-7XHM (last visited Oct. 28, 2022).

This case inhibits the EPA's ability to protect the environment by properly regulating greenhouse gas emissions from coal-fired power plants. The EPA—not the Court—is the expert on environmental regulation, but this decision improperly removes important authority that Congress granted to the experts.