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The Supreme Court's Plan to Block Climate Action We Haven't Even Taken Yet

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On Feb. 28, the Supreme Court will hear oral arguments in the first of an expected wave of cases challenging governmental action to address the climate crisis. The court's grant of four petitions seeking review in this case—two by coal companies and two by states—portends that the six conservative justices will erect significant barriers to meaningful climate policy and will continue to interfere with democratic governance in disregard of the rule of law.

The issue presented in the case, *West Virginia v. Environmental Protection Agency*, concerns the EPA's authority to regulate pursuant to its mandate in the Clean Air Act. Oddly, there's no regulation in effect for the court to review; instead, it will ostensibly review the interpretation of the act adopted by the Obama administration nearly a decade ago, which gave the EPA the authority to regulate greenhouse gases from power plants by requiring plants to implement measures targeting polluting energy *sources* and not just backend carbon emissions. While moving away from these energy sources is precisely what is necessary to respond to catastrophic climate disruption, it also conflicts with what remains the fossil fuel industry's core business of fossil fuel production.

Following an initial proposal in 2014, the Obama EPA did issue such a potentially impactful rule, known as the Clean Power Plan, but it was short-lived because five justices granted fossil fuel companies' and other industry groups' and states' petitions for an emergency stay in 2016. The justices took this extraordinary measure in a brief order on the court's shadow docket, and without full briefing, oral argument, or a reasoned opinion. Notably, this was the first time the court had stayed a rule before a federal appellate court had the chance to review it. That move represented a sweeping assertion of judicial power and a harbinger of what we can expect in *West Virginia v. EPA*, particularly given the court's now stronger conservative bent.

Indeed, the court's grant of certiorari in the case is nearly as notable as its 2016 stay of the CPP. The court will be reviewing the U.S. Court of Appeals for the D.C. Circuit's decision invalidating the Trump administration's repeal of the CPP on the ground that the administration was wrong to conclude that a specific section of the Clean Air Act unambiguously precluded the EPA from regulating emissions in this way. Although the D.C. Circuit vacated the Trump administration's rule, it did not reinstate the CPP. That's because the Biden administration noted it was working on an entirely new power plant rule by that point.

The absence of a rule to review, coupled with the questionable nature of the court's 2016 stay, suggests that at least some of the conservative justices are not interested in a narrow decision. And the petitioners' briefs, as well as the court's own recent shadow-docket precedents, provide the justices with a pathway for potentially gutting the EPA's authority to address the climate crisis in any meaningful way.

Crucially, all of the petitioners' briefs rely on some variation of the so-called major questions doctrine. As the Supreme Court recently described this area of jurisprudence: "We expect Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." When, though, is an agency's delegated authority "of vast economic and political significance"? And what is the requisite level of clarity with which Congress must speak in order to give an agency such authority?

The high court has yet to answer either. That is so even after it applied the doctrine this month to justify an emergency stay of the Occupational Safety and Health Administration's rule requiring large employers to mandate COVID-19 vaccinations for workers or regular testing and masking.

Petitioners have pushed broader arguments than merely challenging the EPA's interpretation of one section of the Clean Air Act underlying the CPP alone as a violation of the murky "major questions" doctrine. Ultimately, the argument pushed by the fossil fuel industry and its political backers is that *any* assertion of agency authority to regulate greenhouse gas emissions—not the EPA's specific application of that authority in this now obsolete rule—raises a "major question."

By focusing primarily on the nature of regulation of greenhouse gas emissions and shifting away from fossil fuels more generally, the petitioners' arguments involve a rhetorical sleight of hand that opens the door for the six conservative justices to limit the EPA's authority to a much broader extent. At the very least, they invite the justices to lay the precedential foundation for such a ruling in the inevitable next round of anti-climate cases.

In very recent shadow-docket rulings, the conservative justices appear to have developed a sort of "major questions" continuum that seems to provide them with multiple avenues to gut climate regulation. In the OSHA case, the unsigned majority opinion interprets the governing statute as not providing the agency with the asserted authority on the ground that it raised a "major question." But Justice Neil Gorsuch's concurrence in the case, joined by Justices Clarence Thomas and Samuel Alito, suggests that the major questions doctrine and what's known as the "nondelegation doctrine" are basically interchangeable. Gorsuch

writes, "*Whichever the doctrine*, the point is the same. Both serve to prevent 'government by bureaucracy supplanting government by the people' " (emphasis added).

The nondelegation doctrine holds that Congress cannot delegate its legislative power to administrative agencies; rather, it can only give agencies the authority to implement legislation with guidance by an "intelligible principle."

The court has applied the doctrine to strike down congressional legislation only twice, both times in the early New Deal era. After that, the significance of those two cases diminished significantly, as the court repeatedly upheld broad grants of agency authority to provide public health and safety protections requiring extensive expertise and the ability to respond to scientific, technological, and other societal developments. Ultimately, this amounted to a recognition that, in the modern era, a workable government requires this type of flexibility, and the judiciary should guard against stringent limits that would amount to second-guessing of complex policy decisions made by the two politically accountable branches. Alarmingly, Gorsuch cites a concurring opinion from one of that pair of nine-decade-old nondelegation cases.

In *West Virginia v. EPA*, there is a significant risk that the court will again obscure its own sweeping assertion of authority by purporting to merely be policing the limits on the other branches' authority. As Gorsuch put it in the OSHA case: "On the one hand, OSHA claims the power to issue a nationwide mandate on a major question but cannot trace its authority to do so to any clear congressional mandate. On the other hand, if the statutory subsection the agency cites really *did* endow OSHA with the power it asserts, that law would likely constitute an unconstitutional delegation of legislative authority." Hiding in plain sight is the tremendous expansion of judicial power that this represents: to define "a major question."

With this upcoming case, the future of vitally important U.S. climate regulation, and potentially climate legislation—which almost certainly will have to pass some as-yet-unknown higher level of judicial scrutiny to be of sufficient "clarity"—appears tragically bleak.

The sort of climate ruling that the conservative justices have telegraphed would amount to a tremendous arrogation of judicial power that jeopardizes the lives of everyone, as well as our system of democratic governance. As Justices Stephen Breyer, Elena Kagan, and Sonia Sotomayor put it in their dissent in the recent OSHA COVID-19 case, this approach "substitutes judicial diktat for reasoned policymaking."

As evidence mounts that this is a Supreme Court majority determined to rule by judicial fiat, though, it is becoming past time to actually reform the court itself.