



## The Supreme Court Narrows EPA's Authority to Regulate Greenhouse Gas Emissions

On the final day of its 2021-2022 term, the United States Supreme Court released its 6-3 ruling in *West Virginia v. EPA* that narrows the EPA's authority to regulate greenhouse gas emissions from power plants.

A coalition of states and power and coal companies led by West Virginia's Attorney General Patrick Morrisey petitioned the Supreme Court to review a 2021 decision from the United States Court of Appeals for the District of Columbia Circuit (D.C. Circuit).<sup>1</sup> That decision struck down the Trump administration's 2019 Affordable Clean Energy (ACE) rule, which had replaced the Obama administration's 2015 Clean Power Plan. Specifically, the petitioners asked the Supreme Court to revisit the D.C. Circuit's holding that EPA's ACE rule, and simultaneous repeal of the Clean Power Plan, was based on a "mistaken reading of the Clean Air Act"—namely, that the "generation shifting" scheme employed by the Clean Power Plan cannot be a "system of emission reduction" under Section 111 of the Clean Air Act.

Under the Clean Power Plan, EPA calculated rate-based (amount of carbon dioxide emitted per megawatt hour generated) and mass-based (total amount of carbon dioxide emitted per year) targets for each state through application of three "building blocks" that were deemed to constitute the "best system of emission reduction...adequately demonstrated" (BSER). These "building blocks" include: (1) improvements to heat rates (a measure of heat input to power output efficiency) achieved at individual power generation facilities; (2) shifting power generation to natural gas-fired or combined cycle (NGCC) facilities; and (3) increased power generation from renewable and zero-emitting sources. The latter two "building blocks" constituted the Clean Power Plan's "generation shifting" scheme, such that the EPA determined that the BSER included restructuring the nation's overall mix of electricity generation, to transition from 38 percent from coal-fired sources to 27 percent from coal-fired sources by 2030.

The Supreme Court's grant of certiorari in this case came as a surprise, as the Biden administration had said it would not enforce the Clean Power Plan and would propose its own regulation, meaning that the Supreme Court was reviewing a regulation that had never and would likely never take effect.

Ultimately, the Supreme Court reversed and remanded the D.C. Circuit's ruling in an opinion authored by Chief Justice John Roberts finding first, that the petitioners had standing because the Clean Power Plan harmed the states, and second, that the case was not moot because voluntary cessation, in this case the Biden administration's promise not to enforce the Clean Power Plan does not moot a case unless it's "absolutely clear wrongful behavior could not reasonably be expected to recur." Because the EPA could reimpose the generation shifting emissions limits in another form, the court did not dismiss the case as moot.

**JUNE 30, 2022**

### CONTACT

**VARUN SHEKHAR**  
[vshekhar@babstcalland.com](mailto:vshekhar@babstcalland.com)  
202.975.1390

**GINA N. FALASCHI**  
[gfaschi@babstcalland.com](mailto:gfaschi@babstcalland.com)  
202.853.3483

**MARLEY R. KIMELMAN**  
[mkimelman@babstcalland.com](mailto:mkimelman@babstcalland.com)  
202.853.3464

**Washington, DC**  
Suite 700  
505 9<sup>th</sup> Street NW  
Washington, DC 20004  
202.853.3455

**BABSTCALLAND.COM**

<sup>1</sup>American Lung Assn. v. EPA, 985 F.3d 914 (CA DC, 2021).

On the merits, the majority found that EPA had exceeded its authority under the federal Clean Air Act because Congress did not clearly authorize a generation shifting regulatory scheme to constitute a BSER under Section 111, pursuant to the “major questions” doctrine. The “major questions” doctrine says that if Congress intended agencies to make sweeping, economy-wide changes with their regulations, the relevant legislation must say so “specifically and clearly.” Here, the majority found it “highly unlikely that Congress would leave” to “agency discretion” the decision of how much coal-based generation there should be over the coming decades. The majority rejected EPA’s argument, saying the language found in Section 111(d), “best system of emission reduction,” did not give the agency the authority needed to employ the generation shifting approach because “the word [system] is an empty vessel” and “[s]uch a vague statutory grant is not close to the sort of clear authorization required by our precedents.”

Justice Neil Gorsuch filed a concurring opinion, in which Justice Samuel Alito joined. Justice Elena Kagan filed a dissenting opinion, in which Justices Stephen Breyer and Sonia Sotomayor joined.

EPA is expected to propose a new power plant regulation in the coming months. Regarding the anticipated proposed rule, during a Senate Environment and Public Works Committee hearing on April 6, 2022, EPA Administrator Michael Regan said, “we want to be sure that the rule that we design will fall within where the Supreme Court will land” and that the agency will be “ready to go as soon as the Supreme Court rules.”

Babst Calland is closely tracking this development and future climate change-related rulemakings. Please contact Varun Shekhar at (202) 975-1390 or [vshekhar@babstcalland.com](mailto:vshekhar@babstcalland.com), Gina Falaschi at (202) 853-3483 or [gfasalchi@babstcalland.com](mailto:gfasalchi@babstcalland.com), or Marley Kimelman at (202) 853-3464 or [mkimelman@babstcalland.com](mailto:mkimelman@babstcalland.com) if you have any questions or need assistance.

---

PITTSBURGH, PA | CHARLESTON, WV | SEWELL, NJ | STATE COLLEGE, PA | WASHINGTON, DC

*Babst Calland was founded in 1986 and has represented environmental, energy and corporate clients since its inception. Our attorneys concentrate on the current and emerging needs of clients in a variety of industry sectors, with focused legal practices in construction, corporate and commercial, creditors’ rights and insolvency, emerging technologies, employment and labor, energy and natural resources, environmental, land use, litigation, public sector, real estate and transportation safety. For more information about Babst Calland and our practices, locations or attorneys, visit [babstcalland.com](http://babstcalland.com).*

This communication was sent by Babst Calland, headquartered at Two Gateway Center, Pittsburgh, PA 15222.

This communication is privately distributed by Babst, Calland, Clements and Zomnir, P.C., for the general information of its clients, friends and readers and may be considered a commercial electronic mail message under applicable regulations. It is not designed to be, nor should it be considered or used as, the sole source of analyzing and resolving legal problems. If you have, or think you may have, a legal problem or issue relating to any of the matters discussed, consult legal counsel.

This communication may be considered advertising in some jurisdictions. To update your subscription preferences and contact information, please [click here](#). If you no longer wish to receive this communication, please [reply here](#). To unsubscribe from all future Babst Calland marketing communications, please [reply here](#).

©2022 Babst, Calland, Clements and Zomnir, P.C. All Rights Reserved.