This week, Sean Hecht and I filed an *amicus* brief at the Supreme Court in *West Virginia v. EPA* in defense of EPA's authority to effectively regulate greenhouse gas emissions under the Clean Air Act. Our client is Tom Jorling, a former Senate staffer and EPA official who was directly involved in drafting the Act in 1970. (We filed the brief in our individual capacities and not on behalf of our respective institutions.)

The case involves a group of challenges to EPA's ability to regulate greenhouse gas emissions from existing stationary sources under the 1970 Clean Air Act, a monumental piece of environmental and public health legislation. The history of the litigation is messy but it is vital to understanding the status and potential impact of the case.

The challenge originates with the Obama Administration's 2015 Clean Power Plan, which required states to reduce greenhouse gas emissions from existing power plants by 32 percent (below 2005 levels) by 2030, in line with the national commitment under the Paris Agreement. The plan relied on a mix of potential actions by states and power companies likely to include shifting from fossil fuel to renewable sources of energy.

The Clean Power Plan never went into effect. In 2016, the Supreme Court took the unprecedented step of staying the rule while the DC Circuit Court of Appeals considered a challenge by conservative states and coal companies, and the Trump Administration took office in 2017 before the DC Circuit issued an opinion. The court then paused the litigation while EPA revisited the issue.

In 2019, EPA issued the Affordable Clean Energy rule, repealing the Clean Power Plan on the basis that EPA only had the narrow authority to base standards on technologies that could be applied directly "to or at" individual power plants, rather than strategies that involve broader shifts in power sources (so-called "beyond the fenceline" measures).

States, power companies, and environmental groups sued EPA (Sean and I filed a brief in the case) and in January 2021, the DC Circuit vacated the Trump Administration rule, holding that the Clean Air Act in fact does grant EPA broad regulatory authority to consider measures like shifting to renewable power sources when setting emission standards. The ruling did not reinstate the Clean Power Plan, which had never technically gone into effect.

The Biden Administration took office the following day, and rather than revive the Clean Power Plan it again paused the litigation while it set out to craft an updated rule. More than seven years after the Clean Power Plan was first proposed, with no federal rule ever in place for greenhouse gas emissions from existing power plants, its targets and deadlines were long out of date.

Nonetheless, conservative states and coal companies filed a group of petitions asking the Supreme Court to overturn the DC Circuit's decision. The Supreme Court—in another unprecedented step—agreed to hear the case, despite there being no active rule to challenge or review. (As the environmental and trade group respondents stated in their brief, "petitioners identify no redressable injury caused by the disposition below; recent events and ongoing changes in the industry have mooted the parties' dispute over the CPP Repeal; and any complaints about future EPA rulemakings are unripe.")

The case centers on whether Section 111(d) of the Clean Air Act, which covers greenhouse gas emissions from existing stationary sources, allows EPA to consider "beyond the fenceline" measures (as opposed to measures only applied "to or at" individual sources) when the agency sets emission standards for states to achieve. A related question—which perhaps made the case appealing enough to some of the justices to merit taking what the respondents call an otherwise nonjusticiable case—is whether the provision authorizes EPA to issue rules with significant impacts under the Court's "major questions" doctrine.

As our brief details, the answer to both questions is plainly yes. Congress wrote the Clean Air Act to achieve an incredibly ambitious but clearly stated goal—promotion of public health and welfare through the protection of air quality—and it empowered EPA to achieve this goal by crafting and enforcing a set of emission reduction standards covering all major sources and types of air pollution. Section 111(d) is an integral component of this comprehensive scheme, and the requirements it places on EPA—to base standards on "adequately demonstrated" strategies and to account for cost, environmental, and energy considerations—ensure the agency sets achievable targets but do not limit the types of measures the agency may consider.

Moreover, as Mr. Jorling's experience and the Congressional record amply demonstrate, Congress was fully aware that this mandate might result significant economic and social impacts, and Congress was fully aware that climate change was an air pollution problem. Congress deliberately wrote the 1970 Act to enable significant, potentially industry-shifting regulation where necessary to protect public health and welfare.

And setting aside the merits of the "major questions" approach, it is clear that Congress granted EPA the authority to take significant actions when it directed the agency to protect public health and welfare, defined welfare to include climate, and created a comprehensive scheme of air pollution control mechanisms to achieve the statutory goal.

The text of the statute and the contemporaneous words of those who wrote and enacted it all support the conclusion that Congress "spoke clearly" (as the Court has indicated it

requires in order for legislation to address a "major question") in the Clean Air Act. To find otherwise would deal a significant blow not only in the fight against climate change but in all efforts to enact impactful federal legislation to address complex policy matters.

The case is scheduled for oral argument at the end of February. You can download our brief here.