

The Supreme Court is hearing oral argument this morning in *West Virginia v. EPA*. The case is a challenge by the coal industry and coal states to EPA's power to limit carbon emissions by power plants. Here's what to look for today.

Q: What is the case about?

A: In practical terms, the question is what EPA can do to reduce carbon emissions from the power industry. The Trump EPA said it could only take very narrow actions to reduce emissions from coal-fired power plants. The Obama EPA said it could take more sweeping action to cut carbon emissions by pushing the power industry toward less use of coal and more use of natural gas and renewables.

Q: What are the key legal issues?

A: Part of the dispute is about the phrasing of a specific statute, section 111 of the Clean Air Act. A lot of the attention, however, will be on broader legal issues. Coal states and the coal industry are arguing that the Court should apply the major questions doctrine. That's the same theory the Court used to strike down the OSHA mask mandate. The major questions doctrine essentially says that Congress has to specifically authorize any really big, controversial rule. That would basically hamstring agencies in dealing with big societal issues.

Q: What should we look for at oral argument?

A: The Justices to keep an eye on are Roberts, Kavanaugh, and Barrett. Most observers assume they will vote to limit EPA power. But a lot could depend on how far they're willing to go in terms of the reasoning. So some things to look for are:

- Do any of them ask about the non-delegation doctrine, which is a constitutional rule that could undermine a lot of regulation?
- Do their questions tend to focus on the technical issues about the specific law in the case? Or do their question telegraph that they think the regulation is too big and controversial to be valid?
- Do any of them show any sympathy for the arguments that the issues in the case aren't ripe for decision since the Biden Administration hasn't even said what kind of regulation it may seek to issue?

Q: What impacts could the Court's ruling have?

A: Environmentalists are concerned about the scope of the ruling. They expect the Court to prevent EPA from requiring more use of renewables. The question is whether the Court will ban other tools that EPA could use that would encourage more use of natural gas or that reduce costs by allowing coal plants to buy credits from other types of power generators. The worst case scenario would be a ruling that EPA can't regulate greenhouse gases at all without express authority from Congress. That would require overruling a prior case, *Massachusetts v. EPA*.

Q: Is the Court likely to base its ruling on constitutional grounds?

A: The constitutional issue would be whether a broad reading of EPA's authority would violate the nondelegation doctrine. That doctrine, although it hasn't been applied for years, places some limit on the amount of discretion Congress can give agencies. Justices Thomas, Gorsuch, and Alito may want to use the nondelegation doctrine. I'm skeptical that they'll get two other votes for relying on this constitutional basis, which they failed to do in the OSHA mask case.

Q: If the Court doesn't rely on constitutional grounds, what's the most likely reasoning it will adopt?

A: I think it's more likely that at least two of the swing conservative Justices will rely instead on the major questions doctrine. That doctrine, which the Court used in striking down the OSHA mask mandate, says that Congress has to provide clear authority for agency regulations that are really important or controversial. However, it doesn't require Congress to write the regulations itself, which is what the nondelegation would do. So it's bad (at least from my point of view), but not as bad as the nondelegation doctrine.

Q: Will there be similar challenge to other climate initiatives?

A: We're already seeing that. Consider the Louisiana challenge to the government's estimate of the social cost of carbon. That case also illustrates that some Trump judges are going to be willing to bend the law quite a bit in favor of those challenges.

Q: How do you predict the Court will rule?

A: This case is part of a broader conservative attack on the power of agencies to protect the public. The Court seems eager to clip EPA's wings, so I think the result will be a cutback in EPA's ability to limit greenhouse gases. I expect the Court will use the major question doctrine to get to that result, though it's always possible that their reasoning will be

narrower than that (based on the text of the statute) or broader (based on the nondelegation doctrine). I hope that the ruling will only address EPA's power to require more use of renewables rather than taking away other tools EPA and other agencies might use to cut carbon emissions. We'll know more after today's argument about how sweeping a rule is likely to result.