

## High Court To Zero In On EPA Authority In Clean Air Act Fight

By Juan Carlos Rodriguez

*Law360 (February 25, 2022, 2:47 PM EST)* -- The U.S. Environmental Protection Agency's ability to regulate greenhouse gas emissions from power plants hangs in the balance as the U.S. Supreme Court hears arguments on Monday from one camp pushing for a narrow interpretation of the EPA's rulemaking capacity under the Clean Air Act and the other seeking to establish more expansive authority.

The justices are reviewing the D.C. Circuit's split decision to strike down the Trump administration's rollback of Obama-era greenhouse gas emission standards for existing power plants and the rule intended to replace those standards. There were four separate petitions for review from a group of states led by West Virginia, two coal companies and North Dakota.

The EPA, which is arguing to uphold the D.C. Circuit's decision, is supported by another group of states led by New York, environmental groups and clean energy companies, among others.

The stakes are high because while the case nominally tees up the legitimacy of former President Donald Trump's Affordable Clean Energy rule, it has the potential to open the door for the high court to directly tackle major administrative law questions. The parties appealing the D.C. Circuit's ruling have laid out a spectrum of legal arguments that the high court's conservative majority could use to limit the EPA's power, said Cara Horowitz, the co-director of the UCLA Environmental Law Clinic and a contributor to an amicus brief in support of the agency.

"So many people are watching this because if the court wanted to, it really could take the case in a very broad direction in a way that affects EPA's authority and other agencies' authority," Horowitz said. "Or it could take it in a more narrow, sort of 'soft landing' direction. And we're just not sure where it's headed."

Here, Law360 breaks down the key legal arguments at issue in Monday's oral arguments.

### Major Questions Doctrine

The petitioners have focused on the major questions doctrine in their briefing, which says that regulatory initiatives with broad economic or societal impacts must be explicitly articulated by Congress and cannot be grounded in vague, minor or obscure provisions of law. In this case, the D.C. Circuit held that Section 111(d) of the Clean Air Act allows the EPA to impose "beyond the fenceline" emissions control techniques such as generation shifting — changing a plant's power source from coal to

something cleaner, including natural gas.

The Trump administration rule struck down that provision, saying the law does not allow it. The petitioners echo that position.

The major questions doctrine — which is more broadly about the power of executive branch agencies to make policy — has taken more precedence in the case than questions about climate change or limiting carbon dioxide emissions, said Amanda Shafer Berman, a partner at Crowell & Moring LLP.

She noted that the argument is ripe, especially in light of the high court's decision to stop a controversial emergency COVID-19 vaccine rule from the Occupational Safety and Health Administration. In *National Federation of Independent Business v. Department of Labor*, a 6-3 majority found that OSHA had overstepped its mandate as defined by Congress. In a concurrence, Justices Neil Gorsuch, Clarence Thomas and Samuel Alito explained why they believe the rule ran afoul of the major questions doctrine.

"There are a number of conservative justices who are fans of the major question doctrine and who are looking to expand it," Berman said.

Horowitz said if a majority of justices on the court decide the case based on that doctrine, there could be a sweeping finding such as that the EPA can't regulate GHGs from power plants, at least under the Clean Air Act provisions at issue in the case, because the effect would be so far-reaching and Congress didn't specifically direct it.

### **Nondelegation Doctrine**

Somewhat related to the major questions doctrine is the nondelegation doctrine, another legal theory that's been floated by the petitioners to support their call to overturn the D.C. Circuit's ruling. The doctrine prohibits Congress from delegating legislative functions to executive agencies without a guiding principle.

The petitioners assert that the nondelegation doctrine requires lawmakers to clearly spell out if they intend to allow agencies to use tools like generation shifting.

The argument is rooted in the idea that at agencies like the EPA, laws that have been on the books for a while may not serve their current needs well. The Clean Air Act, for example, was passed in 1970, but it was only in 2007 that the Supreme Court ruled in a 5-4 decision in *Massachusetts v. EPA* that greenhouse gases could be regulated under the act.

And since Congress has not passed any major legislation that directly addresses climate change issues in recent years that might guide new regulatory actions, applying this doctrine in this case could result in an even broader impact than what a major questions doctrine-based ruling could bring, according to Horowitz.

But that's seen as the less likely path for a majority of justices to follow when deciding the case, Horowitz said.

"The nondelegation doctrine in some ways is much more powerful and much more sweeping," she said. "That's partly why it's been so rarely used over many, many decades. It would be a real power play by the Supreme Court."

## Statutory Interpretation

If the justices can't agree on a ruling that's based on the major questions or nondelegation doctrines, they could still curtail the EPA's power by just taking a narrower view of what the Clean Air Act permits the agency to do, according to Liz Williamson, a partner at Williams Mullen who contributed to an amicus brief in support of the challengers.

While the D.C. Circuit said the Trump administration based the Affordable Clean Energy rule on an improperly tight reading of the law, Williamson said the Supreme Court could reverse that and say the Trump administration was closer to the truth by focusing on the traditional tools of statutory construction by looking at the text and context.

"Regardless of the major questions doctrine, they could ask, 'What does section 111(d) really allow states or EPA to do?'" Williamson said. "Do they need to actually create an emission limitation at the unit itself, or can they do something that's more of an industry-wide standard or trading system or some kind of balance of units that would allow generation shifting?"

Horowitz said the EPA and its supporters would probably see this as a more favorable type of ruling since it would continue to allow the agency to regulate GHGs from power plants, even if beyond-the-fenceline techniques might be taken off the table.

## Standing

For its part, the EPA has argued that the D.C. Circuit's decision means there's no currently active GHG rule for power plants — the Obama-era Clean Power Plan, the Affordable Clean Energy rule or any other replacement rule — so the petitioners lack standing to seek Supreme Court review.

Granting the challengers' request to limit the scope of the EPA's Clean Air Act authority to regulate power sector GHGs would amount to an advisory opinion that federal courts aren't allowed to give, according to the EPA as well as clean energy and environmental advocates that are supporting the agency.

"Petitioners in substance request an advisory opinion about the types of measures a future rule could permissibly contain — but federal courts are not authorized to render advisory opinions," the EPA said in a brief.

If the Supreme Court doesn't dismiss the petitions outright for lack of standing, the EPA said the justices could alternatively vacate the portion of the D.C. Circuit's ruling holding that Section 111(d) doesn't unambiguously preclude beyond-the-fenceline regulations.

That move "would ensure that judicial review of a future EPA greenhouse-gas rule is unconstrained by the precedential effect of the decision below, without the issuance by this court of any anticipatory ruling on the merits of the disputed legal issues," the EPA said in its brief.

--Additional reporting by Vin Gurrieri and Keith Goldberg. Editing by Steven Edelstone.