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For more information,  
contact:

Elizabeth Taber  
+1 713 276 7304

Mandie Cash  
+1 713 276 7362

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**King & Spalding**

Houston  
1100 Louisiana Street  
Suite 4100  
Houston, Texas 77002-5213  
Tel: +1 713 751 3200

## West Virginia v. EPA: The Forecast is Cloudy for Environmental and Agency Regulation

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The United States Supreme Court recently issued its long-awaited opinion in *West Virginia v. EPA*, significantly restricting the Environmental Protection Agency's ("EPA") authority to combat climate change and regulate carbon emissions on a national scale. At issue in the case was the EPA's authority to enact the Clean Power Plan ("CPP"), which included a nationwide mandate for power plants to shift energy sources from fossil fuels to natural gas and renewables.

### MAJOR QUESTIONS DOCTRINE

In a 6-3 opinion, authored by Chief Justice John Roberts, the Court invalidated the CPP, holding that the EPA exceeded its statutory authority under Section 111(d) of the Clean Air Act in setting performance standards based on the power generation shifting system outlined in the CPP. The Court invoked the "Major Questions Doctrine," a scarcely used body of case law prohibiting agencies—except in "certain extraordinary circumstances"—from making "decisions of vast economic and political significance"<sup>1</sup> without an express delegation of authority from Congress. The Court reasoned that Section 111(d) of the Clean Air Act did not contain a clear delegation of power that would permit the EPA to "force a nationwide transition away from the use of coal[.]"<sup>2</sup>

The Court did not outline a specific test for what constitutes an "extraordinary case," but discussed certain factors including whether an agency relied on "a long extant statute" to claim a "transformative expansion" of regulatory authority, whether the agency's authority was gleaned from ancillary provisions "designed to function as a gap filler", and whether the agency adopted a regulatory program that "Congress conspicuously and repeatedly declined to enact itself."<sup>3</sup>



## EFFECT ON CURRENT AND FUTURE REGULATION

While the *West Virginia v. EPA* decision, by itself, does not restrict a federal agency’s ability to promulgate rules, it does create a thorny precedent. The Court does little to define the contours of the Major Questions Doctrine, and its repeated use of vague terms like “economic and political significance” and “extraordinary cases” provide little guidance.

The Court’s reliance on the Major Questions Doctrine also provides a powerful tool for litigants to challenge rules of administrative agencies. The Texas Attorney General’s Office has already cited the Court’s decision in a letter to the Fifth Circuit, regarding an appeal of the federal government’s jurisdiction over nuclear waste storage.<sup>4</sup> In addition, the Department of Labor is facing two new legal challenges regarding its use of administrative law judges<sup>5</sup> and the effect of a rule permitting a lower minimum wage rate for tip-earning workers.<sup>6</sup> Questions have also arisen about future regulation and whether the Court’s decision could compromise the U.S. Securities and Exchange Commission’s authority to adopt and enforce its proposed Enhancement and Standardization of Climate-Related Disclosures for Investors (33-11042) (published on March 21, 2022),<sup>7</sup> as the proposed climate-related disclosure rule arguably suffers the same deficiencies as the EPA rule.

By invoking the Major Questions Doctrine, the Supreme Court has signaled a skepticism of administrative action that could open the floodgates for legal challenges to any significant agency decisions. Just how far the Major Questions Doctrine will be stretched remains to be seen. K&S is actively monitoring developments and is uniquely positioned to assist in all phases from initial advisory through dispute resolution by engaging teams across numerous practices, including regulatory and administrative specialties, governmental advocacy and investigations, as well as litigation and dispute resolution.

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<sup>1</sup> *West Virginia v. Environmental Protection Agency*, 142 S.Ct. 2587, 2605 (U.S. Dist.Col., 2022)



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<sup>2</sup> *Id.* at 2616.

<sup>3</sup> *Id.* at 2595.

<sup>4</sup> <https://www.exchangemonitor.com/wp-content/uploads/2022/07/20220706-texas-new-authority.pdf>

<sup>5</sup> Sun Valley Orchards, LLC v. DOL, D.N.J., No. 21-cv-16625, complaint filed 9/8/21 (Plaintiff invoked the Major Questions Doctrine to argue that the Congress never authorized the DOL's use of administrative law judges—rather than federal court judges—to adjudicate enforcement actions).

<sup>6</sup> Restaurant Law Center et al v. DOL (Plaintiffs invoked the Major Questions Doctrine to challenge a DOL rule allowing employers to pay tip-earning workers \$2.13 instead of the typical minimum wage rate of \$7.25).

<sup>7</sup> [https://www.kslaw.com/attachments/000/009/544/original/SEC\\_Proposes\\_Rules\\_Standardizing\\_Climate-Related\\_Disclosures.pdf?1647986779](https://www.kslaw.com/attachments/000/009/544/original/SEC_Proposes_Rules_Standardizing_Climate-Related_Disclosures.pdf?1647986779)