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MJB&A Summary ■ January 21, 2021

D.C. Circuit Vacatur and Remand of Affordable Clean Energy (ACE) Rule

On January 19, 2020, in *ALA v. EPA*, D.C. Circuit Judges Millett, Pillard, and Walker issued a per curiam decision[1] vacating the Environmental Protection Agency's (EPA or Agency) Affordable Clean Energy (ACE) Rule, remanding it to EPA for further proceedings consistent with the opinion. The question before the Court was whether EPA "acted lawfully" in adopting the ACE Rule as a means of regulating greenhouse gas (GHG) emissions from power plants. The Court states that although EPA has the legal authority to adopt rules regulating GHGs, "the central operative terms of the ACE Rule and the repeal of its predecessor rule, the Clean Power Plan, hinged on a fundamental misconstruction of Section [111(d)] of the Clean Air Act." Thus, the Court concludes that "[b]ecause the ACE Rule rests squarely on the erroneous legal premise that the statutory text expressly foreclosed consideration of measures other than those that apply at and to the individual source…EPA fundamentally 'has misconceived the law,' such that its conclusion 'may not stand.'"

In rejecting EPA's reading of Section 111(d), the Court states that:

> EPA's new reading of Section [111] would atrophy the muscle that Congress deliberately built up. The EPA asserts it lacks authority to curb a pollutant that the Agency itself has repeatedly deemed a grave danger to health and welfare but that eludes effective control under other provisions of the Act. We do not believe that Congress drafted such an enfeebled gap-filling authority in Section [111].

The Court also holds that "the ACE Rule's amendment of the regulatory framework to slow the process for reduction of emissions is arbitrary and capricious," and the Court vacates the amendments to the implementing regulations that extend the compliance timeline.

While Judge Walker agreed with the vacatur of the ACE rule, he explains in his dissent that he disagreed with the Court's basis for that vacatur. Rather, he would vacate the rule on the grounds that coal-fired power plants are already regulated under Section 112 of the Clean Air Act (CAA), and Section 111 of the CAA "excludes from its scope any power plants regulated under Section 112"; thus, EPA has "no authority to regulate coal-fired power plants under Section 111."

As a result of the opinion, under the Biden-Harris Administration, EPA will undertake a new rulemaking to replace the ACE Rule consistent with the Court's opinion.

Background

The Court's opinion includes an overview of the CAA framework for the regulation of air pollutants, as well as the history of the regulation of GHGs from stationary sources.

[1] While Judge Walker agreed with the vacatur of the ACE Rule, he disagreed with the Court's reasoning for that vacatur.

The Court notes that Congress intended Section 111(d) "to ensure that there were 'no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare'" following the regulation of stationary source emissions through the National Ambient Air Quality Standards (NAAQS) under Section 110 and Hazardous Air Pollutants (HAPs) under Section 112.

The Court notes that to regulate sources under Section 111, EPA must first determine that a particular category of sources "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare" and then publish regulations establishing standards of performance for new sources in that category. Once standards are set for new sources, EPA can regulate existing sources.

The Court explains that the regulation of existing sources differs from that of new sources in that the CAA requires a "cooperative federalism" approach involving three sets of actors—EPA, states, and the regulated industry—that each have "a degree of leeway in the choice of control measures" under "three distinct steps":

1) EPA determines the "best system of emission reduction" (BSER) that is "adequately demonstrated" and takes into consideration "cost, any non-air quality health and environmental impacts, and energy requirements." This step results in EPA issuing emission guidelines that quantify the "degree of emission limitation achievable through the application of the [BSER]."

2) States issue standards for existing sources that comply with the EPA's emission guidelines. The Court notes that while the standards must "reflect the achievable degree of emission limitation set in those guidelines," they do not have include the methods. Instead, "[s]tates have flexibility in determining the specifics of the standards they issue so long as they accomplish the 'degree of emission limitation' the EPA calculated."

3) Operators of regulated sources implement measures to comply with the standards set by the state.

The Court notes that the 2009 "endangerment finding provided the essential factual foundation—and triggered a statutory mandate—for the EPA to regulate [GHG] emissions from both new and existing power plants." The Court cites *American Electric Power Co. v. Connecticut*,[2] in which the Supreme Court stated "that the significant [GHG] pollution caused by fossil-fuel-fired power plants is subject to regulation under [Section 111 of the CAA]," and that EPA is "best suited to serve as primary regulator of [GHG] emissions."

In 2015, EPA promulgated GHG standards for new stationary sources, and that regulation reaffirmed that GHGs "endanger public health, now and in the future." EPA then finalized GHG standards for existing sources under the Clean Power Plan (CPP), which determined that a combination of existing methods of GHG reductions, including heat-rate improvements and the prioritization of "lower-emitting plants" ahead of "higher-emitting plants" (e.g., generation shifting), constituted BSER.[3] EPA then set emissions guidelines for states based on the specific emission reductions achievable by application of the BSER. Under the CPP, states had the flexibility to determine the measures, approaches, or technologies to achieve the emission reductions.

In 2019, EPA issued the ACE Rule, which repealed the CPP and replaced it with new GHG standards for existing stationary sources. In the ACE Rule, the Court notes that "EPA expressly acknowledged its continued adherence

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[2] 564 U.S. 410 (2011).

[3] Under the CPP, BSER included: (1) heat-rate improvements; (2) the "substitut[ion of] increased generation from lower-emitting existing natural gas combined cycle units for generation from higher-emitting affected steam generating" power plants, which are mostly coal-fired; and (3) prioritization of "the use of electricity generated from zero-emitting renewable-energy sources over electricity from the heavily greenhouse-gas-polluting fossil-fuel-fired power plants."

to the 2015 endangerment finding." However, EPA decided it was "statutorily compelled" to repeal the CPP because the "plain meaning" of Section 111(d) "unambiguously" limits BSER to only those measures "that can be put into operation at a building, structure, facility, or installation" (e.g., at a source). Thus, because "generation shifting and emissions trading physically operate off the site of the coal-fired power plant," those could not be included in the BSER. EPA's new BSER under the ACE Rule "relied solely on heat-rate improvement technologies and practices that could be applied at and to existing coal-fired power plants" and "excluded…other suggested methods of reducing emissions, including (1) natural gas co-firing, repowering, and refueling; (2) biomass co-firing; and (3) carbon capture and storage technologies." The Court also notes that under the ACE Rule, the emission guidelines EPA provided to states were "suggestions" communicated in a chart with "ranges" for each of the heat-rate improvement technologies.

In 2019, 12 petitions for review of the ACE Rule were filed: (1) seeking review of the ACE Rule's conclusion that Section 111 only permits emission reduction measures that can be applied "at the source"; (2) challenging the ACE Rule as unlawful, arguing that EPA failed to make a specific endangerment finding, that EPA's regulation of power plants under Section 112 precludes the regulation of GHGs under Section 111, and that EPA should have regulated carbon dioxide under the NAAQS program; and (3) objecting to the ACE Rule's determination states cannot count biomass co-firing as a method of complying with numerical emission limits.

Summary of Court's Decision

The Court holds that "promulgation of the ACE Rule and its embedded repeal of the [CPP] rested critically on a mistaken reading of the [CAA]." The Court states that:

> Policy priorities may change from one administration to the next, but statutory text changes only when it is amended. The EPA's tortured series of misreadings of Section [111] cannot unambiguously foreclose the authority Congress conferred. The EPA has ample discretion in carrying out its mandate. But it may not shirk its responsibility by imagining new limitations that the plain language of the statute does not clearly require.

Thus, the Court vacates the ACE Rule and remands it to EPA. The Court also vacates the amendments to the implementing regulations, which extended compliance timelines, stating that EPA "failed to justify substantially extending established compliance timeframes, including deadlines that it has had in place since 1975" and "failed to consider an important aspect of the problem," mainly "the environmental and public health effects of the [ACE] Rule's compliance slowdown."

This summary outlines the major conclusions in the Court's decision. As discussed more fully below, Judge Walker filed an opinion concurring in part, concurring in the judgment, and dissenting in part.

Emission Reduction Measures

The Court concludes that Section 111 does not limit emission reduction measures only to those that can be applied "at the source." To support this conclusion, the Court states that the "traditional tools of statutory interpretation reveal nothing in the text, structure, history, or purpose of Section [111] that compels the reading the EPA adopted in the ACE Rule." The Court explains that the only limit Congress imposed on the selection of BSER is that it be "adequately demonstrated" and "take into cost, non-air quality health and environmental impact, and energy requirements." Thus, the Court holds that Section 111 "simply does not unambiguously bar a system of emission reduction that includes generation shifting." The Court notes that "all three" of EPA's recent

actions under Section 111(d)[4] included emissions trading or generation shifting components, which shows that EPA has "previously embraced beyond-the-source measures of emission reduction as authorized by the statutory text."

In terms of generation shifting, the opinion rejects EPA's grammatical reasoning and states that "EPA rewrites rather than reads the plain statutory text." Further, the Court states that a "best system 'for' a source thus might entail a broader array of controls that concern but are not immediately physically proximate to the source—such as, for instance, generation shifting." The Court also focuses on the distinction between the regulatory structure for new sources versus existing sources and criticizes the ACE Rule for "failing to appreciate that difference." The Court notes that "industry practice demonstrates that better, lower-emitting, reliable, and cost-effective systems for reducing emissions from existing power plants typically also shift generation away from higher-emitting, fossil-fuel-fired capacity when renewable or lower- or zero-emitting generating is an available substitute."

Additionally, the Court states that EPA extended "the same incorrect textual interpretation of the [CAA]" to the states in excluding compliance measures that are not applied at the source, including averaging and trading and biomass co-firing. While EPA argued that a system of averaging and trading could result in "asymmetrical regulation," the Court notes that "carbon dioxide emissions do not pose localized concerns at the site of emission" due to their global nature, and further, "the statute imposes no requirement that such limitations be uniform across the regulation of different pollutants." Thus, "[EPA's] practical concern about asymmetrical regulation could not, in any event, support the exclusion of biomass co-firing or averaging and trading in the particular context of carbon dioxide emission regulation."

Additionally, the Court explains that because EPA contended that "its current interpretation is 'the only permissible interpretation of the scope of the EPA's authority,'" the Court could not consider agency deference in its decision on the points above, as deference "is not appropriate when the agency wrongly believes that [its] interpretation is compelled by Congress." Ultimately, because EPA "based its decision on an erroneous view of the law," the Court vacates and remands the ACE Rule to EPA "to interpret the statutory language anew."

Major Questions Doctrine

In defending its statutory interpretation, EPA had argued that the "major questions doctrine" applies, which the Supreme Court has raised in some recent cases as a doctrine that asks "whether it is implausible in light of the statute and subject matter in question that Congress authorized such unusual agency action." However, the Court concludes that the major questions doctrine does not apply and distinguishes the regulation of GHGs from prior Supreme Court cases.

EPA's Regulatory Mandate

Specifically, the Court concludes that "there is no question that the regulation of [GHGs] by power plants across the Nation falls squarely within the EPA's wheelhouse," and "'Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from power plants' through a 'Section [111] rulemaking[.]'" Furthermore, the Court highlights that the Supreme Court directed EPA to either make an endangerment finding or "explain why it would not do so." Thus, once EPA complied and issued the endangerment finding, which it has consistently reaffirmed, the Court states that "EPA has not just the authority, but a statutory duty, to regulate

[4] The Court references the Clean Air Mercury Rule in 2005, the NOx emission requirements for municipal solid waste combustors, and EPA's CPP.

[GHG] pollution, including specifically from power plants." "In that way," the Court concludes, "the pollution measures in the [CPP] do not fit the major-question mold of prior cases."

The Court further explains that "[u]nlike cases that have triggered the major questions doctrine, each critical element of [EPA's] regulatory authority on this very subject has long been recognized by Congress and judicial precedent." In *Brown v. Williamson Tobacco Corp.*,[5] the Court notes that "the major question was whether the agency had authority to regulate tobacco at all," but explains that question of agency authority to regulate "was absent for the [CPP]." The Court further notes that the Supreme Court, in *Massachusetts v. EPA*,[6] "rejected the analogy between regulation of GHGs as a pollutant under the [CAA] and regulation of tobacco as a drug under the Food, Drug, and Cosmetic Act." In that case, the Supreme Court stated that "[t]reating tobacco as a drug would have been wholly novel, requiring the agency to ban virtually all tobacco products—a result the Court suspected Congress did not intend". By comparison, the D.C. Circuit states that "[GHGs] are air pollutants that fall squarely within the [CAA's] coverage, and the Act would subject such pollutants, if the agency makes the necessary findings, only to regulation, not prohibition." The Court also notes that the CAA contains limits on regulation, such as requiring EPA to consider available technology and the cost of compliance, which shows that "Congress designed the [CAA]'s processes for regulating air pollution to adapt to 'changing circumstances and scientific developments' without imposing unreasonable technological or financial burdens on industry."

Similarly, the Court contrasts the current case with *Utility Air Regulatory Group v. EPA*,[7] where the Supreme Court held that, "without clear statutory grounding, the EPA's effort to extend permitting requirements to literally millions of small sources of [GHG] pollution but of no other regulated pollutants—sources like schools, hospitals, churches, and shopping malls—overshot its statutory authority." The Court explains that "the [CPP], by contrast, regulated the very entities the EPA was told by the Supreme Court in *AEP* and *UARG* to regulate—fossil fuel-fired power plants. And it employed statutory tools that were 'suitable' for application to the long-regulated power industry."

The Court acknowledges that regulation of GHGs "is no doubt a significant task for the EPA," but states that it is "not because of any agency overreach," but rather "the product of Congress' charge that the EPA regulate air pollution nationwide." "And with respect to regulating [GHG] pollution in particular," the Court states, "it reflects the fact that fossil fuel-fired power plants predominate the power industry and are spread across the Nation."

BSER

In response to EPA's argument that federal standards may encourage generation shifting, which would require an express statement from Congress, the Court concludes that "the major questions doctrine does not apply there either for a number of reasons." The Court explains that the design of the statute:

> significantly reins in the EPA's judgment by requiring the Agency to (1) "tak[e] into account the cost of achieving such reduction," (2) factor in "any non-air quality health and environmental

[5] 529 U.S. 120 (2000).
[6] 549 U.S. 497 (2007).
[7] 573 U.S. 302 (2014).

impact," (3) balance the effect on "energy requirements," and (4) ensure that the system has been "adequately demonstrated[.]"[8]

The Court also notes the cooperative-federalism design, giving states "broad discretion" in achieving emission limitations laid out by EPA. Thus, the Court concludes that "EPA's scientific and technological identification of the [BSER] cannot bear the major-question label," because "[d]etermining the system is a task expressly and indisputably assigned by Congress to the EPA and requiring specialized agency expertise," and "states retain the choice of how to meet those guidelines."

Regarding the imposition of generation shifting, the Court concludes that "the major questions doctrine does not provide any basis for concluding that the [CAA] *categorically* forecloses the EPA's consideration of even those generation-shifting measures that are already widely in use by States and power plants and have been demonstrated to be reasonable, reliable, effective, and not unduly disruptive to the regulated industry." The Court again compares the case to *UARG*, noting that the Supreme Court "rejected that challenge [that the CAA provision was unsuited to GHG emissions]," explaining that "the EPA's guidance contemplated both 'end-of-stack'-type controls *and* energy efficiency measures," and there were important limitations that would mitigate concerns about "'unbounded' regulatory authority." Similarly, the D.C. Circuit highlights that the "numerous substantial and explicit constraints on the EPA's selection of a [BSER]…foreclose using the major questions doctrine" to prohibit regulation of GHGs under Section 111.

Additionally, in contrast to *UARG*, the Court points out that "[w]hile power plants are significant players in the American economy, they have been subject to regulation under Section [111] for nearly half a century," "their emission of massive amounts of carbon dioxide has long been known," and "the source of the EPA's duty to regulate that [GHG] pollution from power plants was the plain statutory text and Supreme Court precedent, not something the EPA pulled out of a hat."

Thus, the Court concludes that because the CAA "expressly confers regulatory authority on the EPA to set standards for reducing [GHG] emissions from fossil-fuel-fired power plants nationwide," "Congress knew both the scope and importance of what it was doing," and "it cabined the EPA's authority with concrete and judicially enforceable statutory limitations," application of the major questions doctrine here does not apply.

Regulatory Consequences

In response to the argument that the major questions doctrine was triggered because of its economic implications as well as the "perceived shifting of regulatory authority between federal agencies and the States," the Court states that even if the concerns and implications prove true, they are "a product of the greenhouse gas *problem*, not of the best-system's role in the solution." The Court notes that meaningful regulation "will necessarily affect a broad swath of the Nation's electricity customers," and "so too would a *failure* to regulate those [GHG] emissions." The Court further notes that the CPP's "significant economic impact was not atypical for [CAA] rulemakings by the EPA."

The opinion also notes that the CPP "was aimed not at regulating the grid, but squarely and solely at controlling air pollution—a task at the heart of the EPA's mandate." The Court recognizes that any regulation of power

[8] The Court explains that to be "adequately demonstrated," the BSER "must be shown to be reasonably 'reliable,' 'efficient,' and 'expected to serve the interests of pollution control without becoming exorbitantly costly[.]'"

plants—even at the source—could impact costs, which could in turn impact order of dispatch and lead to generation shifting. The Court explains that

> Congress' carefully calibrated system—involving scientific and technological evidence-gathering, close study of existing industry practice, constrained discretion, divided regulatory authority, collaboration with States, and judicial review—leaves no room for the unauthorized agency overreach that the EPA fears.

The Court notes that in *AEP*, the Supreme Court explained that EPA must consider the "Nation's energy needs and the possibility of economic disruption" in formulating GHG regulations, and that this "cannot suddenly become a forbidden major question when the EPA regulates what it was told to do."

Thus, the D.C. Circuit concludes that "EPA's consideration of already-in-use generation shifting as part of the [BSER] does nothing to enlarge the Agency's regulatory domain," and "[t]he major questions doctrine cannot rescue the ACE Rule's mistaken interpretation of Section [111](d) as categorically confining the [BSER] to physical adjustments made only 'at' and 'to' the power plant."

Federalism

Similar to its conclusion regarding the major questions doctrine, the Court concludes that the federalism clear-statement rule, which prevents direct federal intrusion into areas of traditional state responsibility unless Congress has made such intent explicit, does not support EPA's interpretation of Section 111(d). The Court states that the CPP directly regulates the "amount" of GHG emissions, which is "an area of unique federal concern" given that "air pollution is transient, heedless of state boundaries." The Court notes that "[t]he inability of individual [s]tates to redress the problem of interstate air pollution…was among the very reasons for the enactment of the [CAA]." The Court explains that under the CPP and the ACE Rule, "the only direct obligation imposed on states is federally set emissions guidelines," and states are "free to choose the compliance measures that best fit the needs of their [s]tate and industry."

While EPA had argued that "the clear-statement rule operates with particular force here because the [CPP] imposed uneven regulatory burdens weighted toward [s]tates with more high-emitting power plants," the Court disagrees. The Court notes that regulations often affect states differently, and the opinion includes several examples of differing regulatory impacts depending on the types of businesses present in the state (e.g., automotive, mining) or what natural resources may be present (e.g., navigable waters). Therefore, the Court concludes that the principles of federalism are not implicated when states whose industries "pollute the Nation's air and so harm the public's health more will, in turn, be affected more by emission controls."

Authority to Regulate Carbon Dioxide Under Section 111

The Court also rejects certain petitioners' arguments that EPA failed to make a specific endangerment finding and that EPA's regulation of power plants under Section 112 precludes the regulation of GHGs under Section 111.

Endangerment Finding

First, the Court concludes that EPA made the requisite endangerment finding in 2015 as part of the New Source Rule,[9] and that the ACE Rule "expressly retained that finding." In response to petitioners' argument that Section 111(b) requires a pollutant-specific endangerment finding for each stationary source category, the Court declines to address this issue, stating that "[e]ven assuming that Section [111](b) requires a source-specific endangerment finding for each pollutant, the EPA made a sufficient finding in the New Source Rule." The Court notes that "[b]ecause of their substantial contribution of greenhouse gases, 'under any reasonable threshold or definition,' carbon dioxide from fossil-fuel-fired power plants represents 'a significant contribution' to air pollution." The Court also notes that a "precise numerical value" is not required as part of a contribution finding, so "EPA need not establish a minimum threshold of risk or harm before determining whether an air pollutant endangers." Thus, the Court holds that "the New Source Rule's endangerment finding provided a sufficient basis for the EPA's promulgation of the ACE Rule.

Regulation Under 111 and 112

Second, the Court concludes that Section 112 does not preclude the regulation of GHG emissions from power plants under Section 111. The opinion explains the legislative history of the technical amendments from the Senate and House that accompanied the 1990 CAA amendments to address Section 111(d)'s carve-out of pollutants already regulated under the Section 112 HAPs program. The language of Section 111(d) reads as follows, with each of the technical amendments listed:

> The Administrator shall prescribe regulations . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or…
>
> > [Under the Senate technical amendment]: …112(b).
> >
> > [Under the House technical amendment]: …emitted from a source category which is regulated under section 112 [of the CAA].

The Court notes that the Conference Report included both of these technical amendments after being passed by both chambers of Congress and signed by the President, and they both became part of the Public Law. However, Congress' Office of the Legal Revision Counsel, who is tasked with compiling and codifying the public law and publishing it in the U.S. Code, selected the House Amendment to publish in the U.S. Code. As a result, the petitioners argued that the House amendment, which is codified in the U.S. Code, "categorically and unambiguously exclude[s]" from Section 111 not the pollutants regulated under Section 112, but any stationary sources regulated under Section 112.

The Court's majority opinion concludes that the argument fails, whereas Judge Walker, in his concurrence and partial dissent, would agree with the petitioners. Specifically, the majority concludes that neither technical amendment was meant to substantially change the statutory text. Instead:

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[9] The Court notes that although EPA concluded they did not need a new endangerment finding (because the New Source Rule did not add to Section 111 a new category of sources), EPA "nevertheless went on to explain that it chose to regulate carbon dioxide emissions from electricity-generating plants specifically because [GHG] pollution endangers public health and welfare and contributes significantly to air pollution."

> The better and quite natural reading of all of the relevant enacted statutory text, structure, context, purpose, and history is one that harmonizes the House and Senate Amendments, avoids determining that one chamber of Congress smuggled dramatic and unlikely changes to the Agency's regulatory authority into the Act through miscellaneous "guidance," and instead faithfully accomplishes the legislative adjustment needed to respond to the changes to Section [112].

The decision also notes that this reading is "consistent with the EPA's consistent interpretation of the statute." For these reasons, the Courts holds that "Section [111](d) allows the EPA to regulate carbon dioxide emissions from power plants, even though mercury emitted from those same power plants is regulated as a hazardous air pollutant under Section [112]."

Conversely, in his partial dissent, Judge Walker concludes that if there is a conflict between the two technical amendments, "the House amendment controls" because it is codified, and "the codified version of [Section] 111 prohibits the regulation of pollutants 'emitted from a source category which is regulated under [Section 112].'" Because both the CPP and ACE Rule rely on Section 111 for authority to regulate, Judge Walker would find both rules invalid. Thus, he concurred in the vacatur of the ACE Rule for those reasons.

Summary of Judge Walker's Partial Dissent

In addition to Judge Walker's dissent related to Section 112 versus Section 111, he also states that "[h]ardly any party in this case makes a serious and sustained argument that [Section] 111 includes a clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting," and "because the rule implicates 'decisions of vast economic and political significance,' Congress's failure to clearly authorize the rule means the EPA lacked the authority to promulgate it." Judge Walker states that although the CPP did not "expressly say 'power plants must adopt off-site solutions,'" because the BSER, which sets the emissions limits, was based on off-site solutions, "those emission limits would likely have been unachievable or too costly to meet if off-site solutions were off the table." Further, he raises concerns that no one made a "serious and sustained argument that [Section] 111 includes a clear statement unambiguously authorizing the EPA to consider a [BSER] that includes off-site solutions or that [Section] 111 otherwise satisfies the major-rules doctrine's clear-statement requirement." Instead, he states:

> [T]he question of how to make this "the moment when the rise of the oceans began to slow and our planet began to heal"—and who should pay for it—requires a "decision[] of vast economic and political significance." That standard is not mine. It is the Supreme Court's. And no cocktail of factors informing the major-rules doctrine can obscure its ultimate inquiry: Does the rule implicate a "decision[] of vast economic and political significance"? Proponents of the [CPP] say it doesn't. They have to. If it did, it's invalid—because a clear statement is missing. And according to the Supreme Court, that is exactly what a major rule requires. To be sure, if we frame a question broadly enough, Congress will have always answered it. Does the [CAA] direct the EPA to make our air cleaner? Clearly yes. Does it require at least some carbon reduction? According to *Massachusetts v. EPA*, again yes. But how should the EPA reduce carbon emissions from power plants? And who should pay for it? To those major questions, the [CAA]'s answers are far from clear.

However, "regardless of deference to delegation doctrines," Judge Walker states the "regulation of coal-fired power plants under [Section] 111 is invalid" because the CAA 1990 amendments "forbid it," as described in the section above. Thus, he agrees that EPA was "required" to repeal the CPP but "wrong" to replace it with regulations promulgated under Section 111 because power plants are already regulated under Section 112, and

because "[Section] 111 excludes from its scope any power plants regulated under [Section] 112," he states that "EPA has no authority to regulate coal-fired power plants under [Section] 111."

Next Steps

Given that this opinion was issued the day before the inauguration, the Biden-Harris Administration will now need to undertake a rulemaking process to replace the ACE Rule consistent with the Court's opinion.

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