

Supreme Court Decision Portends Greater Judicial Scrutiny of FCC

By a 6-3 majority, the U.S. Supreme Court in [West Virginia v. Environmental Protection Agency](#) held that the Environmental Protection Agency's (EPA) efforts to regulate greenhouse gases by making industry-wide changes violated the major questions doctrine. The Court found that this doctrine requires that if Congress wants to grant a federal agency the authority to make "decisions of vast economic and political significance," it must do so clearly. The Court's doctrine places a new level of restraint on the administrative law authority of federal agencies, including that of the Federal Communications Commission (FCC). As a result, the FCC will need to be more cautious in adopting new rules and policies and exercising enforcement authority where the agency's delegated authority to do so is not clear or has been rarely used.

Background

Since its publication in 1984, the Court's decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* has served as the federal judiciary's foundational legal test for determining whether to grant deference to a federal agency's interpretation of its own organic act. Under *Chevron*, courts are required to engage in a two-step analysis: at step one, the court considers whether the statute speaks directly to the precise question at issue, and if it does not, the court must proceed to step two, which generally requires the court to defer to the agency's interpretation so long as it is reasonable.

For decades, the Court has decided a [number of cases](#) based on principles that scholars, commentators, and certain members of the judiciary have described as the major questions doctrine, but *West Virginia* marks the first time the Court formally invoked the major questions doctrine by name as the basis for striking down an agency rule. While the ruling did not eliminate *Chevron* deference, its reasoning will make it harder for agency rules to survive judicial scrutiny where there is not a clear congressional directive to consider what the courts deem to be issues of great economic and political importance.

The Court has traditionally treated the major questions doctrine as a limited exception to the *Chevron* doctrine, but in *West Virginia*, the exception effectively swallows the rule. Indeed, as Justice Elena Kagan framed it in her dissenting opinion, joined by Justices Stephen Breyer and Sonia Sotomayor, "[t]he Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening."

Implications for the FCC

The decision in *West Virginia* is therefore likely to pose a challenge to efforts at the FCC to adopt broad and novel solutions to issues the agency believes to be within its authority under its organic act, the Communications Act of 1934, as amended. This could be the case, for example, in connection with the FCC's efforts to address orbital debris and to enhance review under the National Environmental Policy Act (NEPA) for satellite deployments. However, even decisions in areas in which the FCC has historically exercised regulatory authority may be subject to challenge if, for example, the FCC were to seek to resolve matters of great economic or political import without sufficient statutory foundation. Efforts to revive net neutrality regulations, reform media

ownership rules, update rules regarding Universal Service Fund (USF) funding, and impose new or more onerous license transfer conditions during merger reviews could all be subject to greater judicial scrutiny.

The *West Virginia* decision may also affect the FCC's enforcement actions. For example, where the FCC takes an aggressive position on a rarely enforced rule or otherwise relies on a novel interpretation of its authority, such actions could be vulnerable under the major questions doctrine.

In addition, because the Court in *West Virginia* did not provide an exhaustive definition of what may constitute an issue of "vast economic and political significance," it will likely be up to future courts to determine what kinds of issues may and may not fall within its scope.

With its current equally split roster of two Democratic and two Republican commissioners, the FCC is unlikely in any event to take regulatory actions lacking a well-established statutory foundation. (The nomination of Gigi Sohn, a Democratic nominee for the fifth seat, remains pending as of the date of this update.) The decision in *West Virginia* is likely to have its greatest impact on the FCC when it has a full slate of commissioners because the majority's efforts to take bold actions will be hampered by this new ruling.

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