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CleanLaw 69

Jody Freeman, Jay Duffy, and Kevin Poloncarz on Key Takeaways from the West Virginia v. EPA Supreme Court Decision – July 15, 2021

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Jay Duffy: Having really smart attorneys who are parsing every word that these Justices say and have said, and insisting on intellectual honesty is really critical now more than ever. And all the time that anyone is spending on, even if it's a narrow loss, a narrow loss may be what a victory looks like nowadays, but doing the absolute best to defend progress is never wasted time.

Hannah Perls: That was an excerpt from Jay Duffy, an attorney at Clean Air Task Force who represented public health and environmental organizations in the Supreme Court case West Virginia versus EPA. In this episode of Clean Law, EELP's founding director, Jody Freeman [who is also an independent director of ConocoPhillips] speaks with Jay and Kevin Poloncarz, a partner at the law firm, Covington & Burling, who represented the power companies that intervened in support of EPA.

Hannah: Jody, Jay, and Kevin discuss what the court's decision means for their clients and the potential implications for reducing greenhouse gas emissions from the power sector. This is our second episode discussing the court's decision in West Virginia versus EPA. For more background on the case and a review of the court's opinion, be sure to check out our episode West Virginia versus EPA Part 1: Breaking Down the Court's Opinion with Jody Freeman, Richard Lazarus, and Carrie Jenks. We hope you enjoy this podcast.

Jody Freeman: Welcome to Clean Law. I'm Jody Freeman, professor of law at Harvard Law School. And I am joined today to discuss the West Virginia versus EPA case by two terrific guests, Kevin Poloncarz and Jay Duffy. Welcome to both of you.

Kevin Poloncarz: Wonderful to be here.

Jay Duffy: Thanks for having me.

Jody: First, I want to get into who you guys are and the role you played in this case, just by way of background. Of course, the West Virginia versus EPA case was decided by the Supreme Court this term. It's the most important climate case to have been decided in about 15 years. It's gotten a lot of coverage, a lot of press focusing on its implications. And today we'll talk about those implications, but in particular, from the perspective of Kevin and Jay's clients, they both participated in this case. By way of background, first, let me introduce each of them and then

we'll get some thoughts from them and key takeaways on what West Virginia means.

Jody: Kevin is a partner at Covington. He co-chairs the firm's environmental and energy practice group, energy industry group, and its ESG practice. He represents electric utilities and in particular, he's an expert on the utility sector and the transition toward decarbonization. In this case, he represented the power company respondents, basically in support of the government's position. So, Kevin will talk about his role representing the power industry in this case.

Jody: Jay Duffy is an attorney with the Clean Air Task Force. He works on power sector and transportation, GHG rules, and appellate litigation. And in West Virginia, he represented public health and environmental organizations and participated in the briefing, and argued below I think, Jay. Right?

Jay: That's right.

Jody: Welcome, first of all, again, to both of you and thank you for coming. And Jay, let me start with you. You wrote a great blog post called, The Good, The Bad, and The Ugly, which I thought summarized the case well. And while some of our listeners may know about the essential upshot of the Supreme Court's decision, why don't you review for us, maybe the good, the bad, and the ugly.

Jay: Sure. I'd be happy to. So in the wake of the opinion, I saw a lot of hyperbolic news coverage about what West Virginia did and what it didn't do. And I tried to present a little bit more of a nuanced version in the blog post. So the good, the bad, and the ugly. The good: so EPA still has authority to choose the best system of emission reduction for greenhouse gases from power plants, and to set binding emission limits. Massachusetts versus EPA remains good law and EPA's basic authority is still intact and it's untouched. And even in some places it's solidified.

Jay: Next on to the bad: the power sector has been reducing emissions most efficiently and effectively for decades by shifting its generation from higher emitting fossil fuels to lower emitting fossil fuels, as well as zero emitting generation. And the court took this kind of most efficient and effective measure off the table as the basis of standards. And it limits EPA to looking only at traditional bolt on pollution controls as far as setting the standard.

Jay: So onto the ugly: the court expanded the major questions doctrine for the first time stated as its own doctrine. And based on a number of vague factors, if the court determines that the rule is major, the agency is going to have to point to a clear statement authorizing that precise rule. And that's not really how legislation has worked in the past. And I'm sure we'll get into the repercussions of the major questions doctrine, as we discuss them more.

Jody: Yes, we'll get into that. And we'll also come back to the pathways you alluded to that are still open for EPA. But Kevin, I should say before asking you for your sort

of key takeaways, that you've been on CleanLaw before. You did a terrific podcast with our executive director, Carrie Jenks, when the cert petitions had been filed about whether the court would take this case and why it might or might not take the case. Since then, you've become not just the top lawyer in your field, the leading national lawyer for the utilities, but you also, as I understand it, are an academic now, so you're teaching climate law and policy at Stanford next year. So, welcome to the academic fold.

Kevin: Thank you.

Jody: But tell us about your key takeaways. So you, again, represented the power sector respondents. That's kind of interesting for many listeners to think about, that the power sector, at least some parts of it, would be in the case basically on the side of the government, not supporting undoing EPA authority. So, tell us a little bit about the case from your perspective and the key takeaways.

Kevin: From my perspective, the key takeaways are that the Chief Justice probably brokered a deal to drive a stake as close to the heart as he could in the administrative state, by pronouncing this major questions doctrine as a doctrine and rooting it in the separation of powers. And making clear that this is a predicate step prior to doing textual analysis, we lawyers always assumed we started with the text. But the trade off was, the majority opinion only takes one tool off the table from EPA, and leaves a lot of questions unanswered as to the true scope of EPAs authority.

Kevin: Most significantly from my perspective, the majority opinion does not endorse the Trump EPAs view of the scope of EPAs authority. One of the reasons my clients sued is because, not only did they take away, the Trump EPA, take away the cost effective means of just adding more renewable generation as a means of reducing emissions from the power sector, but they found that even old tried and true emission reduction systems, like emissions trading, were off the table. And the power sector has very capably used emissions trading, given its interconnected nature of all power plants on the grid to achieve reductions in the past.

Kevin: And we highlighted in our brief, a 2005 rule that the Bush administration enacted, promulgated under this same provision of the Clean Air Act, the Clean Air Mercury Rule, which would've established a cap and trade program for mercury emissions from power plants. And that rule was vacated on other grounds, but it demonstrated that EPA had trod this pathway before of allowing flexibility for compliance, and in fact, setting the standards in a way in that rule's case. Yes, it was premised upon available technologies, but EPA very clearly said, "We don't need to make sure that every plant can install the technology in order to deem it the best system of emission reduction because we're providing these compliance flexibilities of a trading program." We thought that was a really important point and stood in contradistinction to the other types of statutory terms that emphasize that controls must be technological.

Kevin: In fact, in that 2005 rule, the reason it was invalidated is because EPA had taken power plant hazardous air pollute and emissions out of Section 112 regulation, and put them in 111 because of the flexibility afforded under one 111(d), which 112 didn't afford. And the court speaks of the clean air mercury rule in its opinion, as different from what the Clean Power Plan did, but in a way that suggests that would be a plausible interpretation that it could uphold of a system like that. And so from my client's perspective, that opens up a lot of opportunity for EPA to set standards and for the power sector to go about achieving those standards using many of the tools they've used before.

Jody: So Kevin, in a way, I think what you're saying is, you kind of won something big here. Because the Chief Justice's majority opinion definitely leaves on the table the prospect that for compliance purposes, anyway, the industry can be left to use cap and trade and other mechanisms that will help the rules be more cost effective. The agency in theory, could offer those as options to the states when the states go to design their state plans.

Jody: And you can correct me if I'm wrong in saying any of this, but I think you're also saying even in the process of setting the power sector standards now, it may be possible for EPA to use an approach that not every plant or every unit at every plant could actually do itself technologically. But if enough plants or units can adopt the approach and then there can be a cap trade system to bring into it, the ones that couldn't for whatever reason, whether because it's too expensive for them or they're located in the wrong place, there's some potential, I think you're saying, for the EPA to even use a cap and trade system to set the standard. Is that right?

Kevin: Yes. That is the opportunity that the majority's opinion presents, in my view. And particularly for carbon capture and sequestration, that we think is important, because there are physical geographic in other limitations on implementation of that technology at any individual source.

Kevin: The other thing the majority opinion gave us, Jody, is it was very clear that incidental generation shifting, i.e., shifting of generation to lower emitting units that happens as a consequence of the standards EPA implements, could be acceptable as well. There was some concern that the majority's opinion was going to say that anything EPA does that creates a standard for the power sector and results in reduction in coal fire generation or fossil generation was per se, stepping out of EPA's lane.

Kevin: They didn't say that because the reality is, and we made this point, however EPA sets a standard, whether it's based on technology or not, the end result because of the interconnected nature of the electricity grid, is that generation is going to shift to the lower emitting units. And so, that's an important point as well. And frankly, what I've been telling folks is, once cert was granted and we knew the court wanted to decide this case, we got away with about 80 or 90% of the flexibility that we possibly could have gotten away with. And so, yes, it might

sound sour grapey, but we got a lot out of this opinion and we're happy about that.

Jody: It's kind of a refreshing point of view. And Jay, let me turn back to you and see if you agree with that in your assessment of the pathways left open for EPA. We might want to back up Jay, a little bit and just explain, when we talk about pathways left open, explain a little bit, what does it mean to take quote, generation shifting off the table? I mean, I don't want to go back and describe everything the Obama Clean Power Plan had in it. But essentially they took what away from EPA and essentially in your view, they left what do you agree with Kevin on that?

Jay: There's a lot of steps to coming up with greenhouse gas standards for power plants under Section 111. First, EPA comes up with, they look around and they say, "What is the best system out there? What is the industry using?" And then they determine that's the best system based on a number of factors, costs, and achievability and things like that. They set an emission limit and then the states determine how they are going to comply with that. They set up plans and then the power plants can meet those emission limits however they seem fit.

Jay: And as Kevin was mentioning, the Trump administration went so far as to say that all along those steps, how we set the standard, how you comply with the standard, everything needs to be this bolt on control that's applied to or at an individual source. And of course, that language can't be found in the Clean Air Act. So the court here, didn't address the to or at an individual source, it just said what the Clean Power Plan did, which was to base the system on what the industry had been doing, shifting generation from higher emitting sources to lower emitting sources, could not be the basis of the standards. It leaves the door open, as Kevin mentioned, to generation shifting and trading and flexibilities on the compliance side.

Jody: Yeah. I mean, this is what I always say to people and for those who kind of want to get into, "Well, what did the Obama Clean Power Plan do? What did the Trump replacement rule do?", give a listen to the earlier CleanLaw podcasts that we have done, especially the one with Kevin earlier on the cert petitions. But also Richard Lazarus and I have done a couple explaining this. The essence though, is that the court took off the table what Jay and what Kevin of both said, the idea that EPA can project how much clean energy could be substituted for dirtier energy.

Jody: And based on a projection like that, set a tougher standard. And even though grid operators do dial up and dial down coal, natural gas, wind, solar, et cetera, as Kevin knows probably better than any of us, "It's not available.", says the court, to fit within the idea of deciding what a best system is. It's not available to EPA to basically project what the entire grid taken as an interconnected system could accomplish. Especially when, and I think you guys can correct me if I'm reading this wrong, when no single unit, no plant can do this on its own. It requires the system to change. And it would require some units to be subsidizing others,

Jody: In other words, subsidizing their competitors. I think the court was offended in essence, and viewed that as overreach and characterize that approach really as out of EPA's lane, because the courts could characterize that as energy system management, which wasn't in the court's view, the agency's core expertise. And also has federalism implications sort of stamped on it because the states are thought to be running and organizing their energy mixes. And so for all these reasons, I think it especially tweaked the court, this example.

Jody: And what I say to people is that, I think I'm echoing Kevin here a little bit in his reaction, which is, there are a lot of silver linings. And Jay, you alluded to them at the top too and I just want to reinforce them before we go on, which is to say, case could have done a lot of bad things that it didn't do. Right? The decision... And I think, Kevin, you started by saying there was some deal you think, somewhere in this to go only so far. I view this as the Chief Justice's opinion exercising some restraint. Nobody even tiptoed up to overruling Mass versus EPA, and deciding that after all, EPA can't regulate greenhouse gases. Some of the headlines from the case suggested that was the holding. That's not true. And the fact that it's EPA that sets the best standard of emission reduction determines that under Section 111 has been reinforced. And it's not the states that do it, it's EPA that does it. That's a good thing.

Jody: The other thing that happened, I think that people sort of have missed here is, the court put this question of Section 111 versus 112 to bed. For aficionados and people who've studied this as this case is migrated ever since 2015 up through the courts, there's been this open question about, "Hey, can EPA even regulate CO2 under section 111 because power plants are already subject to regulation under a different provision, 112?" And that question was resolved. The court just blew right by it. So in addition to all the things we're saying about pathways left open, there are a number of kind of nice things in this decision that could have been worse. Do you guys... Kevin, do you think I'm fairly characterizing the silver lining or am I overstating it?

Kevin: No. I agree with you. And when I say the Chief bartered a deal, I think the deal was to make that pronouncement on the major questions, and to bring the language that had never been in a majority opinion before forward into a majority opinion, rooting this principle within the separation of powers and saying that this was statutory interpretation, but with a constitutional dimension. And I think if you read Justice Gorsuch's concurrence, that was important. And that was the win he got in order to support the majority opinion.

Jody: So let's talk about the major questions doctrine. Since in the end, it may have more long term impact in a way, than this restriction on EPA's ability to set power sector standards. I mean, there's an argument that, that's the real impact of this case. And let's talk about that, Jay. I don't know which part of the brief you take credit for, for the NGO and environmental organizations, but surely you were around the briefing on that. And give us your sense of how the major questions doctrine might affect future rules, not just from EPA but other agencies.

Jay: Right. Certainly. Yeah. I was certainly involved in that. And in the middle of briefing, the decision, the shadow docket decision on the COVID restrictions, the vaccine or test mandate came out, which really threw a wrench into everything in the last moments of briefing and caused some late nights. So, I'm really worried about the major questions doctrine. I completely agree with Kevin that, there are pathways forward. There is an alternative path for setting standards for greenhouse gases from power plants here. But there may not be alternatives for other problems.

Jay: Congress writes these broadly worded statutes, setting goals and instructions for expert agencies to deal with these really big and important problems. Like here, Congress told EPA to come up with the best system considering demonstration and costs and other factors. And this section is applicable to a number of source categories, a number of pollutants. There isn't a preapproved pollution control system list that we can look to. And of course not, because pollution problems and solutions, they evolve over time. And we want EPA to be able to survey what's going on in the industry and tailor the appropriate solution to the problem.

Jay: And now if they aren't able to point to, if the solution is too good or too big, or these kind of vague grab bag of factors that were listed in the case, if they trip over that threshold and they can't then point to a pollution control measure in the Clean Air Act, they're out of luck. There's now this looming major questions cloud hanging over agencies. And one thing I'm really concerned about is how lower courts will apply the West Virginia quote, unquote test. It's really, as I said, kind of this grab bag. They may be... They will likely apply it kind of inconsistently and liberally in cases.

Jay: And the other thing I'm really concerned about is that agencies are going to be fearful to address pressing problems in too meaningful of a way. I don't think folks realize how much we rely on the experts at agencies to protect us---from the food we eat, the air we breathe, cars we drive, factories we work in. The doctrine makes it harder for agencies to do these important jobs that Congress assigned to it. And we may never know actually the full cost, because agencies might not even propose meaningful regulations, for fear that they get caught up in this major questions web.

Jody: So Kevin, the Chief Justice, building on what Jay just said, the Chief Justice did associate this notion of, you can't address important questions without explicit, clear, textual authority. It's a clear statement rule. We're going to need Congress to speak again. Did associate that idea with the constitutional doctrine known as the nondelegation doctrine. And I think cozied up to the idea that the separation of powers, the idea that Congress needs to make the big decisions, not the agencies, and broad capacious, vague grants of authority to quote, protect the public interest, or quote or establish the best system or whatever it may be, just aren't sufficient cover. Aren't really sufficient authority for the agency to then go do whatever the court sees as too big, too important, too impactful.

Jody: And that lodging or association of the, can't do important things without clear authority idea, with the, Congress needs to make the important decisions idea that's at the heart of the non delegation doctrine, that's a very powerful association. And I know you just said, that's kind of a win for Justice Gorsuch and his concurrence articulating it even more powerfully as a kind of separation of powers idea. But help us, for those who don't really get the inside baseball of these decisions, help us understand why would Gorsuch write that concurrence, if the chief was really in his corner on that already? Why do we see some daylight between the majority and the concurrence on this question of how the majored questions doctrine works or what its source is?

Kevin: My suspicion, Jody, and the way these opinions get written is that Justice Gorsuch wrote that concurrence hoping to get that language into the majority opinion. He wanted to articulate the parameters of the major questions doctrine more clearly. And he wanted to make it clear that this is a form of the non delegation doctrine. And that's where the daylight exists between what the Chief Justice was willing to say on that point in the many, many pages that show up in Justice Gorsuch as concurrence, which only Justice Alito was willing to sign on to.

Jody: So, what is it that the majority didn't agree with necessarily? How far did they not go, let's say, with this idea of the major questions doctrine?

Kevin: Where they didn't go was to really provide guidance on how and when this doctrine is triggered of the sort that appears in Justice Gorsuch's concurrence. They left that for another day. It's still perhaps, just as dangerous of a doctrine and a precedent, but without the details that the court provides that might help guide, as Jay said, lower courts in deciding how this doctrine applies. The majority opinion says, "It's truly only extraordinary cases." What's extraordinary? And those are questions that we're going to be thinking about and are going to be actively litigated in years to come. And you can bet on that. It's already being litigated and it's going to come up time and time again with lots of different agencies and lots of different contexts.

Jody: Yeah. And I'll turn back to Jay in a moment, but this is what I say to folks about this. There are lots of versions of, what's a major question. What's something that's so important that a broad delegation isn't enough to give the agency the power? What's the trigger? Right? And I think we saw in this majority opinion, various potential triggers. And as you were saying, Kevin, and Jay, you said this earlier too, we don't know which trigger needs to be pulled. Do all the triggers need to be pulled? In other words, if it has a major economic impact... And so many rules have multibillion dollar impacts, right? The Clean Air Act is historically, the law that gives rise to the most expensive regulations, the most costly ones, multibillion dollar regulations. But they also have commensurate benefits. And so if the test for majorness, which makes it so important the agency can't do it without clear, explicit authority, is just many billions of dollars of impact, that's a lot of rules.

Jody: And then there are sort of a series of other possible triggers. Is it an elephant in a mouse hole? Did the agency try to kind of fit a big authority in a small provision? Is it an old provision, a long extant provision, is the phrase, right, that nobody ever used. The agency didn't really use, or it was little used and suddenly they're using it to a significant effect. Are they out of their lane? Are they doing something the court would characterize as, not in their main expertise? Do you have to add all these things up and then come to the conclusion, "Oh, it qualifies as a major question. This is extraordinary now."? Or can any one of those things bump the agency's exercise of authority into the major category?

Jody: I think that for we administrative law scholars, this is sort of a Whac-A-Mole game. How are we going to know? And isn't this really just huge optionality for the lower courts and the Supreme Court ultimately, to just decide they know it when they see it? So just react. I know that was a long riff by me, but Jay, does that capture the fear, or do you have something else in mind when you're worried? Or what's your take on this?

Jay: No, I think that's right. I think the vagueness, the number of factors, I think that's a feature, not a bug. It was clear in the opinion that they were saying that the reason the major questions doctrine has essentially been invented is because agencies are doing more and bigger things. And that there's a feeling amongst the court that they need to reign them in. And so, I think having a number of factors that raises fears amongst the agencies that they might be going too far is exactly what is the intent of the doctrine.

Jody: Kevin, I wanted to ask you to expand on something you said earlier. I'm curious, that idea that there was sort of a deal or the Chief Justice came down in a place and left something to others, I'm not sure I get it fully. Because we have six justices who probably support some version of the major questions doctrine. And we've got six who wanted to kind of clip the wings of the EPA and deny it the flexibility to use this system-wide approach to set power sector standards. So, why would the chief have to negotiate with anybody? Why didn't he just write the opinion he wanted?

Kevin: I think there was an interesting dynamic that during oral argument, a really interesting dynamic played out when Justice Kagan seemed to be on roughly the same page with Justice Thomas, that if this question were a major question that inside the fence line, outside the fence line dichotomy wasn't the demarcation of whether something could be a major question or not, because EPA could do really big things inside the fence line. And so, that dichotomy just kind of fell away, as the basis for them striking it down. And Thomas didn't seem to be in agreement that what was offensive was that it went beyond the source in the way that the Trump Administration had argued and the way that the case was argued by the petitioners on the other side. And so the deal that was struck was, "Well, I can't agree with you that this major questions doctrine is triggered at the fence line of an individual source. But I can agree with you that we know when we see an

agency is acting beyond the scope of the authority that we can reasonably imagine Congress delegated to them in a statute."

Kevin: And the really remarkable thing about the opinion and the factors that aren't laid out or are laid out, is that it's diffused with all this, what we would ordinarily consider, extraneous information, press releases, Gina McCarthy saying, "This isn't about pollution control at all." And I believe what followed that was, "It's about changing the way we generate electricity in this country." All of those press releases and all of the noise that went to the fact that Congress tried to enact a cap and trade program, but failed. Usually the things that Congress fails to enact don't inform how we interpret the things that it does enact. But the court look to that as relevant.

Kevin: And in Gorsuch's concurrence, the pen and phone analogy shows up. And that refers to the fact that President Obama said, "Congress, if you don't pass this comprehensive climate change bill, I've got a pen and a phone." And then he went out into the east room at the White House and he pounded his chest and he said, "This is monumental. This is not bread and butter of what the agency does. This is the biggest thing we've ever done on climate change." The court looked to all of that and ultimately where it landed is, there's this colloquy between Justice Kagan's dissent and the majority opinion about the raised eyebrow test. That's essentially what we're left with. How much does it raise your eyebrows?

Jody: Yeah, it really is. That's such a nice way of summarizing it, Kevin, that there's a sort of Potter Stewart with pornography, you know it when you see it kind of test where... And you saw Justice Kavanaugh, even in the early days when the Obama Clean Power Plan was being challenged, litigated in the DC circuit en banc and Kavanaugh kind of looked out at council and said, "Really? Really? You can really do this transformative thing, which you, your administration has said is transformative," as you pointed out, Kevin, "which you have characterized as transformative. You can really do that with Section 111, the best system [inaudible 00:29:59]? Really?" And that's sort of the raised eyebrow sort of in action.

Jody: They were just skeptical. Kavanaugh was skeptical when he was on a DC circuit, the Justice of Supreme court were skeptical. It's why they stated in the first place, the Obama Clean Power Plan before it ever took effect. And the skepticism survives as the test. And that keeps us all guessing. And Jay, tell me now, this is the question I have going forward. We're worried about other agencies being chilled from producing rules under broad delegations. Are there any in particular you might have in mind that you think might run into trouble right now, whether they're climate regs or other regulations?

Jay: Sure. I mean, we've seen it come up in comments on the SEC climate disclosure rule. I'm in a light duty vehicles case where the statement of issues raises thinking about transitioning away from the internal combustion engine towards zero emitting vehicles that, that's too big. That's too much of a transition and kind of

exceeds EPAs authority to think about. And we saw it even in a premature case about, it's too big of a question for the executive branch to even think about what the social cost of carbon is.

Jay: So, I think it's going to pop up everywhere and we're seeing it. We're seeing 28 J letters, kind of these letters that explain that there's new authority in a case. They're popping up all over the country right now with West Virginia and it's like, me too. Me too. I'm also a major question. I think that we are going to see it. Some have joked that major questions are just questions that deal with the pandemic or with climate change. So, I do think we'll see it more in those areas. But yeah, I'm concerned that it is just going to be used as a, as Justice Kagan said, a get out of text free card.

Jody: Yeah. It's interesting that, and Kevin, you remarked on this earlier, the justices in this case did not perform textual analysis. They used the major questions doctrine as the place to start and the place to stop. And if it's major, that's it, we're not deferring. And we don't really care what the agency thinks. As I always say, as an administrative of law professor, this turns Chevron deference on its head. So, we have this sort of established notion that if a statute is ambiguous, the agency essentially should have some freedom to interpret it, to interpret the ambiguity, and deference is appropriate in that instance. This sort of approach here in West Virginia turns that on its head to say, "A broad delegation, if the agency's doing something big with it, attracts no deference, it's a case where we want Congress to speak again."

Jody: So let me take a quick turn back though, to talking about what we can expect for the power sector. Kevin, you work closely with your clients and are in a position to reflect on where you think the sector's going. What are we going to see about greenhouse gas emissions in this sector? How important is whatever EPA may come up with in setting these standards? Maybe EPA will call for what, Kevin, co-firing, natural gas, or hydrogen or something else with coal to reduce emissions? Maybe it will come up with a standard based on an expectation of carbon capture. Not sure the viability of those options. Where do you see things going in the sector, both under any rule they may come up with and separately, separately from any regulation?

Kevin: Well, separately from the regulation, most utilities are adopting net zero strategies and policies to achieve net zero emissions by mid-century or earlier, the president articulated a goal of having a net zero electricity sector by 2035. And if you line up all the plans that you see from major utilities across the country, you get something like that. And electricity sector is transforming so dramatically. It's just worth pointing out that the emission reduction target of the Clean Power Plan, a 32% reduction below 2005 levels by 2030, was achieved a decade in advance, even though it never went into effect. That was just because of the precipitous drops in the price of solar technology because of the availability of fracked gas, things that EPA couldn't project. When they said they were issuing

a rule that was market following, it was really market following because it would've done nothing more than the market did a decade early.

Kevin: And so the power sector continues on that trajectory. Companies, consumers all want clean energy, and that is going to continue unabated, regardless how EPA sets standards. That's not to say that there isn't a role for standards. Standards are incredibly important for the electricity sector in particular, because every source is linked to every other source within the three electricity grids. And you can't go on a state by state basis and have inconsistent policies and assure that you are going to be able to achieve your net zero target, if West Virginia is going to be able to sell underbid you with high carbon intensity electricity into your market in the competitive power markets. And so, that's the role of regulation, is bringing the laggards on board and ensuring that the net zero future is truly net zero.

Jody: Yeah. It's a level setting role, isn't it? And making sure the competition in the market is sort of fair. Yeah. Interesting. And Jay, let me ask you from the perspective of your clients, the public health and environmental NGOs, what are you looking to now? I mean, I can imagine some folks are pretty upset that a major tool EPA could have used to advance power sector rules has been taken away from the agency. And they're looking at a Congress that hasn't successfully passed any climate legislation, certainly nothing regulatory. Where do you see things going from the perspective of you and your clients?

Jay: So I can't speak on behalf of my clients as far as the future of emission regulations, just because it's such a diverse group of organizations. But I certainly can speak on behalf of Clean Air Task Force. And so, we think that there is a path forward for standards based on CCS. The standards right now for a new coal plant is based on partial CCS. In the Clean Power Plan EPA, they found that co-firing and CCS met all of the Clean Air Act factors required of a system of a mission reduction. So twice already EPA, has set that CCS can be the basis of standards. So, I think the Clean Air Act is a powerful tool. And I don't think that this court case, West Virginia takes any of that away.

Jay: The Clean Air Act is still a forward looking and technology forcing statute. As the DC circuits said ages ago, "The state of the art tends to meander along until some sort of regulation grabs it by the hand and gives it a good pull." For example, in the 70s, we were dealing with acid rain. EPA based standards there on sulfur scrubbers, which really were nascent at the time. There were three in operation, I think, and only one vendor. And by the end of the decade, there were 16 vendors and the cost of the technology was cut in half. So, compare that to where we are with CCS right now. There are 27 facilities in operation. There's about 10 vendors. So, I see a clear path forward under section 111 for stringent emission regulations. And we're talking to EPA and we're urging them to move forward as quickly as possible with that.

Jody: The other thing to think about because, always trying to look for the silver lining here, if you're interested in climate policy and clean energy, is to find whatever tools you still got left and just keep doing the work. And the EPA certainly has other regulatory instruments, other authorities that don't actually directly regulate greenhouse gases, they regulate conventional pollution. And they need to move forward with those as well. There are co-benefits that come along with greenhouse gas reductions. But if you look cumulatively at all of the tools, the agency still has, they're still capable of making a meaningful impact across all of the key sectors, transportation, power, oil, and gas, et cetera.

Jody: I try to be optimistic. And on that optimistic note, let me ask you guys something a little more personal, which is, you're kind of warriors for your clients in this litigation and related litigation. You are leading experts on greenhouse gas regulation and on the energy transition. There's a lot of bad news at the moment about the willingness of the US Congress to take meaningful action, to move in that direction. The war in Ukraine, just moving up a level to consider how the war in Ukraine has affected the demand for more fossil energy in the near term, needing to replace the natural gas that normally would flow to Germany from Russia. There are a lot of political dynamics right now that can lead one to think, "Wow, the climate agenda might be taking a backseat."

Jody: I just want to ask you guys, how do you stay focused? What is motivating you to do the work? Reflect a little bit on your career as sort of a... Help listeners understand how you every day get up and do the work you do. Let me go to Kevin first.

Kevin: Suffice it to say this case and these cases, I argued the main statutory point after DOJ and the en banc argument back in 2016. I argued the main statutory point in the 2020 DC circuit marathon argument. And keeping clients focused through this whole transition, through the Trump years, was a labor of love, and was something that took a lot of effort. But it also kept me focused and kept me passionate about things at times, particularly during the Trump Administration, when a lot of folks who were really concerned with the rule of law, environmental protection, were worried and hopeless.

Kevin: And I had this case to work on. I had this case to turn to, and I had to bring my clients along to say, "We are going to stand up for EPA's authority because we believe the Clean Air Act is a tool that can help move us from the right direction." And that has kept me going.

Kevin: The other thing that keeps me going are the interest of other clients broadly in addressing climate change. I have so many clients who are seeking it in technology sector and otherwise, who have net zero targets. My colleague, Carol Browner, has been quoted as saying, "Net zero went from radical to mainstream, practically overnight in advance of the COP last year in Glasgow." And that type of work, I'm going to get off the phone with you guys here, and I'm going to get on the phone with a client about a voluntary carbon market procurement through

2040 to achieve their net zero ambition. That's going to continue, and it keeps me going and it keeps me passionate. But this case really has been, for me, something that I was able to put my effort into this when other people were feeling pretty hopeless about the state of things.

Jody: That's great. It's good to hear. Jay, what about you?

Jay: Yeah. I have to admit there have been some dark days and some head in hands, not only on climate, but gun control, women's rights, many other issues where the Supreme Court opinions have just seemed to run over precedent and contorted facts in some places. So it can be discouraging, and I want to recognize that it is before I turn to my optimism. I do really, I believe in the American project and doing my small part to inch us toward that, even if, as Kevin says, it means arguing over the meaning of the word system for a decade. It's been important work to pour myself into.

Jay: And same as Kevin, my clients really keep me going. We represent organizations from the American Lung Association to Clean Air Council in Philly, the Appalachian Mountain Club, and others. And being a conduit for these important and diverse set of voices is an honor.

Jay: And the other thing, it's corny, but it's true. I have a one year old and a three year old, Ellis and Marion. And they really are a running around crazy daily reminder of how much this work matters to our future. So, I think having really smart attorneys who are parsing every word that these justices say and have said, and insisting on intellectual honesty, is really critical now more than ever. And all the time that anyone is spending on, even if it's a narrow loss. A narrow loss may be what a victory looks like nowadays. But doing the absolute best to defend progress is never wasted time.

Kevin: And I just want to add, Jody, one thing. Over the past couple weeks, I've done a number of briefings and I've spent three hours in briefings with the West Virginia Solicitor General. And one thing I'll say is that we've had lots of hopeless days. We had the January 6th insurrection. And this case, and even going to the court and being part of it in that oral argument, it just still makes me believe in this project of America. It really does. And the civil discourse we can have. And the fact that the former Solicitor General of West Virginia, the current Solicitor General of West Virginia, and Kevin Poloncarz can all pretty much be in agreement about what this case means and its importance, and its momentousness. I think that says something for civil discourse at a time when we don't see much of it.

Jody: Yeah. I think what both of you're saying is inspiring for law students, whom I teach and whom you, Kevin, are about to teach at Stanford, but more broadly for the public. I think our role and your role in particular, in participating in legal institutions, legal argumentation is really admirable and hugely important and very inspiring. So, thank you both for the work you do and have been doing and will do. Kevin Poloncarz, Jay Duffy, thank you both for being on CleanLaw and for

doing all you do every day to advance progress, not just for climate policy, but for democracy in the United States. So, thank you. And we'll hope to get both of you back sometime.

Jay: Thanks so much, Jody.

Kevin: Thank you. It's been a pleasure.

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