CleanLaw 67

Jody Freeman and Richard Lazarus on West Virginia v. EPA–March 31, 2022

To return to our website click here.

Hannah Perls: Welcome to CleanLaw from the Environmental and Energy Law Program at Harvard Law School. In this episode, Harvard Law professors Jody Freeman and Richard Lazarus discuss the Supreme Court case West Virginia v. EPA. The Court's decision in this case will address the scope of EPA's authority to regulate greenhouse gas emissions from the power sector, potentially impacting future EPA rules. We hope you enjoy this podcast.

Jody Freeman: Welcome to this episode of CleanLaw. This is Jody Freeman. I am delighted today to be joined by my colleague, and friend, and partner in crime, Richard Lazarus. Richard, welcome.

Richard Lazarus: Thanks, Jody.

Jody: We are doing a special episode today. The two of us thought it would be really interesting and timely to talk about the West Virginia case, the Supreme Court case about the breadth of EPA's authority to set standards for the power sector, a very important environmental law, climate, and regulatory case that we heard... Well, the Court heard oral argument earlier this year, and we're waiting for the decision. We thought in the interim, it would be interesting to talk about the case, the implications, and who better than to have Richard with me to do this? So this will be really fun, Richard, and I thought before we got into the case itself, we might give listeners a little bit of background on you, and a little bit about me, and how we work together, and what we get up to in our role as Harvard Law professors. So can you give us a little bit of that background and tell us a little about yourself?

Richard: Sure, Jody. Happy to do so and really delighted to participate in the program. So I'm on the faculty with Jody. As she said, we consider ourselves partners in crime, not formally, but as a popular sense of the term. So I've been on the faculty for about a decade, taught at several schools before then. My background really is in environmental law and Supreme Court advocacy. Those are my two areas of greatest interests, both in terms of scholarship, and teaching, and service work. I do outside of the law school. I've argued about 14 cases before the Supreme Court. I've written briefs for the government, environmental groups, both federal and state government, in about 40 cases, and I follow the Court pretty closely. I've done that for years. Years ago, I was in the Solicitor General's Office, US Department of Justice, where I really cut my teeth in arguing before the Court.

Richard: Jody and I do a lot together, which is fun. We do heaps informally and a bunch formally. As she mentioned, as good friends and also close professional colleagues. Informally, I never had a colleague I've been in communication as much frequently as with Jody. We're in constant communication about students, classes, recent developments like the West Virginia cases. One thing we share in common, we both take our teaching very seriously as we do our engagement with students, and we pride ourselves in be engaged in the world, environmental law and policy making. We're not at all distant academics.

Richard: More formally, that lends itself to programs, talks we give like this one, meetings with folks on hot topics. One thing I think we both pride ourselves together, Jody, you can elaborate if you want, is we convene people together. We bring folks together, and we're also in constant consultation with environmental groups, governments as honest brokers. We don't have clients. We're not being advocates in that sense. We're really giving people straight advice, and sometimes we have been advocates, and we file briefs together. It's also fun because I think we have different perspectives on things. We share a lot in common, but I'm mostly more of a litigator, I think, than Jody is.

Jody: Yes, that's an excellent summary, and I'll just add that I think our perspectives are complimentary. We've always worked together so well. You're more a litigator. I guess I think more about the regulatory dimension of things, and I have my experience having been in the Obama administration in the White House, working on climate and energy policy. So I think about the executive branch and how the agencies approach these things, and I teach administrative law in addition to environmental law and climate. So I bring a general perspective about doctrines of deference and regulatory doctrines that are highly relevant to environmental law. So the combination of us I think is... I'll just speak for myself. I think is a wonderful combination. We've had a terrific time together over all these years at HLS, and now let's turn to the topic at hand and see if we can bring that expertise to bear.

Jody: The West Virginia case has been extraordinary from start to finish. I'll give a little bit of background on how this matter began, and then we'll turn to Richard to talk about how the Supreme Court granted review most recently. The origins of the case really began back in 2015. In the Obama administration, the EPA issued for the first time a standard for carbon pollution coming from power plants and not just new power plants, but existing power plants. So the old natural gas and coal-fired fleet of plants. That rule was significant, and it took an approach that has been controversial from the beginning. I'll just give the very basics of it because we'll get into the details when we talk about the litigation.

Jody: The approach the EPA took, which came to be known as the Clean Power Plan, that was the name of this rule. The approach really was based on reading the relevant section of the statute in a particular way. So the relevant section of the statute tells the Environmental Protection Agency to set standards based

on the best system of emission reduction that the administrator of the EPA has determined has been adequately demonstrated, taking into account cost and some other considerations.

Jody: So the key question is, what is the meaning of the phrase "best system of emission reduction" because EPA must determine that system as the basis for performance standards that the states will set and apply to individual sources of pollution in the power sector. So EPA's answer to this question was, "Well, the best system of a mission reduction should really reflect what the interconnected power plants can do as they really operate in the real world on the grid." The way the grid works is that grid operators, grid managers, these regional transmission organizations and other managers can actually ramp up some sources of energy and ramp down others. So they can pull more renewable power, less natural gas, more coal, more natural gas, et cetera. EPA's approach was to say, "Let's set the best system of emission reduction based on what this interconnected grid can actually accomplish," and taking that broad view, they could set much more stringent standards that allow for larger emissions reductions.

Jody: So that's what EPA did in the Clean Power Plan in 2015. They produced that rule, issued it, and it was immediately challenged by West Virginia and other Republican-led states that said that EPA's approach was not correct, that it was a misreading of the statute, and this began to wind its way through the Courts, and then the Supreme Court did something quite surprising, which was they issued a stay. So the rule never went into effect. It was never implemented, and that stay came even before the case was heard by any federal Court. So the litigation proceeded in the DC Circuit, and before a decision could issue, DC Circuit did hear oral argument. It was a marathon case. Richard and I were both there, but the decision was never issued because the 2016 presidential election brought President Trump into office. I think at that point, I'll leave it there, and I'll let Richard take over and discuss the sort of process that went on from there.

Richard: Well, basically, what happened. So, as Jody mentioned, it's one head-snapping event after another. So we have the Trump election, the Trump repeal of the Obama Clean Power Plan. This is after the Supreme Court takes this unprecedented step of staying the Clean Power Plan, and then the repeal itself by Trump is challenged. Not surprisingly challenged by the states who had supported the Clean Power Plan. It's challenged by the environmental groups who had supported the Clean Power Plan.

Richard: So that's argued during the Trump administration. Then Joe Biden wins. He wins the election, right, in November 2020, and everyone is getting ready for the Biden administration to come in. They assumed the Biden administration will try to put back in place, basically, everything the Trump administration has tried to unravel for the Obama administration with the centerpiece, of course,

being the Clean Power Plan. One of the most important climate rule makings of the Obama administration.

Richard: Then, literally, the day before the inauguration. Inauguration is set for January 20th, 2021. The day before, January 19th, the DC Circuit which had heard the argument on the validity of that Trump repeal, they actually heard it early that fall. Nine hours of oral argument in that case. That's nine hours instead of the normal 30 minutes. The DC Circuit on January 19th issued this stunning ruling invalidating the Trump repeal of the Clean Power Plan, invalidating the Trump replacement of the Clean Power Plant with a much weaker rule called the Affordable Clean Energy Rule and a decision which looked like an unbelievably timely gift to the administration.

Jody: Let me intervene there just for a moment because I think it's worth pointing out as you make that point about the gift to the administration. It's important to know that the Trump replacement rule, what the Trump administration had done, right, was put in place this extremely weak set of standards for the power sector, which would've reduced emissions even by their own estimate at best 1%. So it was a nothing regulation, right? It really gave huge discretion to the states. It was really a totally ineffective power sector standard compared to the Clean Power Plan, right, which had been quite ambitious setting standards that would've accomplished a 32% reduction of emissions by 2030. So it's important, right, to note that the Trump rule, if it had survived, would've been extraordinarily weak.

Richard: Absolutely. So the Trump rule was a nothing burger, and the Clean Power Plan at the time when it came out was very ambitious on October 2015. So the DC Circuit decision comes down on January 19th. It strikes down the Trump replacement rule, and it strikes down the Trump repeal of the Clean Power Plan. Well, in the normal course of events, that would've meant for the Biden administration coming in happy days are here again. The Clean Power Plan is back. The signature climate rule of the Obama administration, which many of the Biden people as part of the Obama administration, obviously, Joe Biden himself, had heralded and championed. So you would've thought that it's a great gift. They wouldn't have to, themselves, undo the repeal. They wouldn't, themselves, have to bring back the Clean Power Plan. Instead, the normal consequence of the DC Circuit ruling and its mandate would instead have been to revitalize automatically the Clean Power Plan. It'd be back, saving EPA enormous amount of time, but what's really striking to see is the Biden administration did not see that as a gift. They instead saw it as a disaster. Here's why.

Richard: They saw it as a disaster because they knew that January 2021 was not, right, the fall of 2016. While they're willing to fight, right, tooth and nail in 2016 to defend the Clean Power Plan and clean up before the United States Supreme Court, we're so optimistic they could succeed there, they knew that Court was not the same. In the fall of 2016, they had good reason to think that, right,

Merrick Garland will become a justice on the Court replacing Antonin Scalia, giving the Supreme Court its first potential progressive majority in 50 years.

Richard: But now it's January 2021. Hillary Clinton had not won, Trump had won the prior election, and there were three new Trump appointees on the Court, and the Biden people could look at that Court, and they could count not just to five, but they could count to six, and they could see that there was no way they could reliably defend the Clean Power Plan in front of the Supreme Court, which meant that Trump's repeal of the plan would undoubtedly be upheld the DC Circuit reversed. They were so confident about that and how bad news it was the DC Circuit ruling that just within about two weeks of taking office, they filed an amazing request to the DC Circuit. They said, "Stay your mandate. Don't revive the Clean Power Plan. Don't let it come back into place."

Jody: So, Richard, let me just ask for a little clarification here because we really need listeners to appreciate the subtlety here. The agency is really engaging here in an act of self-discipline, right? What it's essentially seeing ahead is that at least some elements of the Clean Power Plan, which really took into account that there could be generation shifting between natural gas and coal, or renewable energy, and coal, and natural gas, that the aspect of their rule that took that into consideration and was based on an expectation about that generation shifting, that that could be very vulnerable in the newly constituted Court.

Jody: So what you're describing I think is the agency being very cautious in not wanting the Clean Power Plan to automatically snap back. Just to make sure we understand the legal mechanism here, the Court's judgment when the DC Circuit struck down the Trump Affordable Clean Energy Rule and also struck down the repeal of the Clean Power Plan that came along with the Trump rule, what would that have meant, Richard? They, essentially, therefore, would've mandated vacating the repeal of the Clean Power Plan. That's what would've come with your...

Richard: Right. It would've put the Clean Power Plan automatically right back to life and made it legally effective.

Jody: So the judgment from the Court would've left that possibility?

Richard: Yeah. It's the mandate. It's actually part of the... It's the mandate of the Court.

Jody: Yeah. So now where we are is the EPA is asking the Court to stay the mandate to vacate the CPP repeal. I know how complicated this sounds, but we have to say it because when we get to Supreme Court, it matters.

Richard: It makes a big difference, but you have to understand the Biden administration had just taken office. They were just getting their first people in office, but it was so obvious to them that the Clean Power Plan, which they had fought for, was now basically a meaty target for the conservative justices on the Court that

they rushed in the first few days in office to file a motion in DC Circuit and said, "Stop. Stop what you're doing. Stay the mandate." They did that basically for one reason only, which you've forecasted, Jody. They did it to kill... They thought they could kill the likelihood of Supreme Court review, and they're willing to basically bury the Clean Power Plan.

Richard: They had motion to stay the mandate and said publicly, "We're not going to go back to the Clean Power Plan. We're going to start from scratch. There'll be no regulation of existing coal-fired power plants now." They did that quite extreme action because they did not want the Supreme Court to hear the case because they were so worried what the Court would do. What's amazing about this is guess what the environmentalists, how they reacted? Silence. No environmental groups complained at all because they could count to six too. They could see six conservative justices on the Court, and they all were in quick agreement. "We've got to keep this case away from the Supreme Court."

Jody: So, in fact, nobody opposed this motion from EPA, right, to stay the mandate, to vacate the CPP repeal, which essentially translates into the Clean Power Plan would not snap back into place. The Biden administration would write a new rule for the power sector on a clean slate. Okay. I think it's important now to start moving forward and discuss why that strategy turned out not to work and the Court granted review anyway. Richard?

Richard: Well, it should have worked. It should have worked. If the Court were acting in its normal routine way, they would have once industry petitioned for Supreme Court review of the DC Circuit decision, which they did. Everyone knew they were going to do it, and the red states who were challenging the plan, defending the repeal would do it. The Court should have routinely denied review because there was no Clean Power Plan anymore. There was no regulation at all. So it was actually a very good strategy by the Biden EPA.

Richard: But then, in October, late October 2021, the Court granted review anyway. The solicitor general opposing the request for the Supreme Court review explained what they had done, explain there was no regulation of the coal-fired power plants anymore, explain how the Clean Power Plan wasn't effective, explain everything, and most people, including people in the industry privately thought, "That's it. The Court won't grant review. They'll wait until EPA does something new and industry can challenge it." But the Court granted review anyway. They took several weeks to do it, but I can tell you the handwriting was on the wall once they granted review.

Jody: Richard, just to make sure this is really crystal clear, there's no rule at the time. Meaning, nobody could claim to be suffering any legal harm. I mean, the argument is there's no standing, and it's even sort of clearer than that. The Clean Power Plan couldn't actually, as a practical matter, snap back because the deadlines for states to file plans under that rule had long passed. Right? The rule wasn't even in the federal register. It had literally been rescinded by

the Trump administration. So no one was being regulated at all under any federal rule affecting power plants. Right? That's what made it so extraordinary.

Richard: Absolutely. It's currently what's true then and true now. No regulation of the Clean Air Act of those power plants, those existing coal-fired power plants under that provision of the statute.

Jody: So let's move now to the petitioner's arguments, the respondent's arguments, and get into the assessment of the oral argument that we both listen to in the Supreme Court. First of all, let me briefly describe the key issues here. The Supreme Court only granted review on one question. The question presented was really about the scope of EPA's authority. This has been the underlying controversial question all along, which is really about whether the agency can take its broad approach to best system of emission reduction that looks at the interconnected grid and figures out how much a mission reduction can be accomplished with all the tools grid managers use to use different kinds of energy, substituting some cleaner energy for dirtier energy, or whether the EPA is more limited in its authority to setting standards that are based on an understanding of best system that is limited to steps individual plants can take locally at the source individually limited to their physical locations.

Jody: So there are starkly different views of what best system of emission reduction means, and that's essentially the question that the Court granted review of. But there are really three issues in the case, and we'll talk about all of these. The first, Richard already described, and we discussed a little bit, which is the question of standing. The petitioners, this is the West Virginia and other Republican-led states, and the coal and mining industry on the petitioner's side of the litigation. They have to show that they meet the constitutional test for standing, which requires showing injury, and the argument really is about whether they can satisfy that test. Is there any harm if there isn't a current rule in place?

Jody: The other issue I guess I would categorize is the textual issue. It's really about the meaning of Section 111 of the Clean Air Act. What does this language, "best system of emission reduction adequately demonstrated," mean? What does it entitle the agency to do? How broadly can the agency interpret it? There are textual arguments that petitioners are making here that say, "If you read this correctly and you read it in context, these standards must be applied at and to a source." So they can only be based on things that individual plants can do themselves, and they can't be based on what this grid-wide notion could accomplish.

Jody: The third issue or category of question I would identify that was raised in this litigation is about something called the Major Question Canon. This is an interpretive principle that says that when agencies try to do sweeping things based on language and a statute that isn't specifically authorizing to do that

precise thing, that they are really trying to extract something from a statute that isn't there and that the agency needs to go back to Congress to have a clear statement about their authority to undertake that regulation.

Jody: That Major Question Canon issue, whether the agency here is trying to do something too sweeping, that the Court should read the statute as precluding it. That is what I would call a separate issue that could really dwarf the textual interpretation. In other words, the Court could conclude that they're going to read the statute narrowly because the question at issue is just too important, and they could deploy the Major Question Canon to basically narrow EPA's authority. So I would divide it that way, and Richard may want to approach it differently, but I would say there are justiciability issues standing. There are the strictly, narrow textual issues about how to read Section 111, and then there is the question of what role, if any, should the Major Question Canon or principle play in determining the scope of EPA's authority? Richard?

Richard: Yeah. I think it's a pretty fair description. What's interesting though, if you look at the briefs... I'm going to mention the petitioner's briefs just quickly, then focus on the respondents. If petitioner's brief read very confidently... I spent a lot of time reading Supreme Court briefs. They're pretty confident they're going to win this case and for good reason, and so I think they're swinging for the fences. They're not trying to win this case on the plain meaning of the statute. They don't want to have the Court just rule that the plain meaning of the Clean Air Act doesn't allow the Clean Power Plan. That would be a win, but they think they've got a Court they can win bigger than that, and so they're trying to get the Court to opine not just on the meaning of the statutory language, but actually to basically move to that third issue that Jody was talking about. They want the Court to rule that EPA loses this case, the Biden EPA loses this case because of the Major Questions Doctrine, and I'd also add the Non-Delegation Doctrine, which strengthens the Major Questions Doctrine.

Richard: As Jodi indicated, the Major Questions Doctrine says that if it's a rule of vast economic and political significance, then Congress really has to provide specific evidence in the language that contemplate allowing the agency to do this. They really see specific congressional intent to that extent because otherwise, it would violate the Non-Delegation Doctrine, which doesn't allow Congress to delegate the agency's broad lawmaking authority. So if you look at petitioner's brief in this case, they spend a lot of time in the opening briefs really talking about that Major Questions Doctrine, Non-Delegation Doctrine, and then there's some amicus briefs, which go even further than that.

Jody: I think it's worth mentioning the amicus briefs. When you say swinging for the fences, this is really true of the amicus briefs. If you read the collection of briefs on the side of the petitioners, I mean, they're not just asking to narrow EPA's authority. There is a request lurking in there that says that EPA shouldn't possess any authority under Section 111, that in fact, Congress has already done all that it can do to regulate and provide for subsidies and credits to deal

with power plant pollution, and that all of that congressional activity is the clear statement about what Congress means to do here. Essentially, it should lead the Court to determine that EPA doesn't have any authority under 111.

Jody: That swinging for the fences flies in the face of the Court's own decisions, right? Richard. The MA versus EPA case, which says the Court has authority over greenhouse gases as a pollutant, but more specifically, the AEP case where the Court said Congress has delegated to the EPA the authority to set standards for power plants among other sectors. Yet, you see in the briefs, right, Richard, this effort to say, "Well, Congress has already done all it can do," and therefore, really, the Court should backtrack here, and I guess in the extreme, strip EPA of its regulatory authority.

Richard: I think that's right. That's what they're doing by swinging for the fences, say, "Look at the language. It doesn't come close in terms of what Congress would have to do. So the Clean Power Plan repeal is valid." There are few amicus briefs though that swing even further than that. I don't think the Court will do it, but there are few briefs would say that even if Congress included that language in and try to authorize EPA to do it, that that would be unconstitutional, that that would violate the Non-Delegation Doctrine, that Congress itself has to make those decisions for itself and can never delegate it to EPA. This briefing really brought out some pretty extreme arguments all over the place. John Eastman, who wrote the memo approving of the insurrection, Trump's ability and Pence's authority to reject the vote of the electoral say... He filed an amicus brief in this case. So this case brought out everybody.

Jody: Richard, the other thing I think is worth pointing out is just the combination of the Major Questions Canon and the Non-Delegation Doctrine. Now, this is getting even nerdier than we've already been. The combination of those two doctrines is really quite stunning, and you saw an early inkling of this if you think back to the vaccine mandate case that the Court heard earlier in the term, and you saw in Justice Gorsuch's concurrence the very combination you're talking about, Richard, right, where he said basically the sweep of this vaccine mandate or testing requirement that OSHA has issued, the breadth of that has two problems.

Jody: One is it's too major, it's too consequential, a rule to rest it on the language, the broad language of the OSHA act. But he also said even if Congress had authorized the agency to do that, to issue a sweeping rule, to regulate workplace hazards and new dangers on an emergency basis, Congress having done that would've violated the Non-Delegation Doctrine. In other words, issuing that sweeping authority would've been beyond what Congress can constitutionally do. So I thought, Richard, that we saw an early sign of that potency of that combination in the earlier vaccine mandate case.

Richard: Absolutely. The vaccine mandate case may well be the precursor. We'll see it cited all over the place. The majority opinion in the West Virginia case. In the

vaccine mandate case, the OSHA case decided in January, six justices invoked the Major Question Doctrine to say, "There's not enough evidence of congressional intent here to support what OSHA did." Then, three justices wrote a separate concurrent opinion. Justices Thomas, Alito, and Gorsuch saying that even if they had, that wouldn't have been necessarily constitutional.

Jody: So let's move now to the respondent's arguments, the government's response here, and the power sector on the side of the government. This is one of the striking things about this case, Richard, isn't it, that we saw most of the power industry. The trade association for the investor-owned utilities filed a brief. We saw almost without exception the industry on the side of the government defending the notion that EPA possesses the authority under 111 to regulate the power sector and also arguing that there is no standing.

Richard: That's right. The reason so much industry is on the side of the Biden EPA here is they're not politicians. They're business people, and they can see the climate science handwriting on the wall, and they know where business needs to go. So they're actually not fighting this kind of regulation. They're supporting it. If one reads the briefs for respondents, and as you say, they include the Biden EPA. They include states support tougher regulation. They include a lot of industry folks and leaders, and they include the environmental groups. There's one thing in common among all their briefs, and that is they still know they're likely to lose, and what they're trying to do is lose well.

Richard: In the world of Supreme Court advocacy, it's referred to as soft landings versus hard landings, and they were trying their best to get the Court to give them a loss that is a soft landing, and they're trying their hardest to avoid What's called a hard landing. The difference is this. A soft landing lets you lose the case, but live to play again. A hard landing can be potentially disastrous. So how do we see this in the briefing? We see it in the respondent's briefing in two ways. First, they spend a lot of time on the jurisdictional argument, arguing there's no standing in this case because there's no existing regulation. The Clean Power Plan is basically done and buried. This case is moot. They argue every way they can. There's no jurisdiction.

Richard: Now, the reason why that's so revealing is, of course, they made these same arguments at the jurisdictional stage, and the Court granted review anyway. Normally, you abandon those arguments then on the merits, but they're not abandoning them. Why? Because they know that if they get to the merits, they're likely to lose. So they instead have tried to bolster those arguments and maybe wake the Court up a bit because it was so stunning that they took this case when there really was no reason to do so. So they all spent a lot of time telling the Court, "Dismiss this writ for lack of standing, for mootness, and as a gift, get rid of the DC Circuit opinion. Vacate the judgment. Go ahead and do that. Get rid of it." Then, they move to the merits, and on the merits of the case, this is where they'd like to lose it on a narrow way. There's a soft landing here, a medium landing here, and a hard landing here.

Jody: Before you get to the soft versus hard landing, just to provide a little context, I think it's worth pointing out that there are a range of outcomes possible, and people don't always appreciate that. There are a range of outcomes possible in terms of how the Supreme Court rules on EPA's authority, right? So it's possible that they could decide that certain aspects of the Clean Power Plan went beyond EPA's authority, but still leave the agency lots of room to maneuver when setting standards. For example, still allowing the agency to do things like base standards on carbon capture and sequestration or base standards on what power plants can do to co-fire with lower polluting fuels.

Jody: In other words, there's a basket of things that EPA wants to be able to consider when setting these standards, and the industry most directly affected, the power industry, also wants the agency to have that flexibility because it will help everyone to keep cost down. So I think as you just describe soft versus hard landing, Richard, right, it's important for people to understand that there is quite a range of where the Court can come down.

Richard: That's right. Actually, I've laid out detail. I'm not going to do it here today. It's like Dante's Inferno. There are actually nine circles of hell here in terms of different possible rulings. The softest landing is dismiss the writ based on lack of standing. The medium landing, which one you just described, is that the Court says that the Clean Power Plan is not supported by the plain meaning of the statute. "Repeal is valid. Let's get rid of it." But if they do that, that kind of ruling, while a loss, would allow EPA on remand to go back to the provision of the Clean Air Act, Section 111(d), do a different rule, which didn't rely on the first instance and what you described before as generation shifting, just regulate the facility itself based on existing technology and existing techniques like perhaps carbon capture and sequestration. Then, those that are regulated stringently by EPA, they could choose to decide to do generation shifting. They can choose to do the very things as a matter of discretion that the Clean Power Plant contemplated. That would be a loss, but that's a medium landing.

Richard: The response we're trying to do here is either lose with a soft landing, which is dismiss the writ, get rid of the DC Circuit opinion, and EPA gets to start from scratch, or lose from a medium landing, which says, well, the plain meaning of the statute rejects the Clean Power Plan. We have lots of other ways you can regulate power plants, which might as a practical matter lead the states and industry to do what they actually think is the cheapest way to lower greenhouse gas emissions, and that is, of course, through generation shifting, just not mandated by EPA in the first instance. That's what their briefing is trying to do, and they're trying to avoid the hard landing.

Richard: Here, there's a hard landing, and there's a hardest landing, and this is what they don't want. They don't want the hard landing, which goes back to how petitioners here are swinging for the fences. They don't want to lose on something where the Court says in the first instance, "The Major Questions Doctrine is invoked. We look in the first instance to see whether Congress

provided specific language, contemplating the agency could do this. In absence of that, the agency can't do it, and therefore, the Clean Power Plan in invalid."

Richard: That's a hard landing because it implicates not just what the agency can do on remand, in this case, on the Clean Air Act, but in all kinds of instances and all kinds of statutes for climate and everything else EPA does. That, of course, is the hardest landing of all, and as the Court goes with that separate concurring rationale you mentioned before of Gorsuch, Alito, and Thomas, and the COVID vaccine case, and the Court says that Congress can never delegate it to EPA on the Non-Delegation Doctrine. That would be truly disastrous.

Jody: Richard, given that there is this range of possibilities, and we could handicap them, I think before we do that, I think it's worth talking about what happened at oral argument and how that informs our sense, what we think is most likely to happen in this case. It was a really compelling oral argument. For people who haven't listened to it, I really recommend it. The first thing I want to say about it is it was really high quality.

Jody: Lindsay See, who is the Solicitor General for West Virginia who argued for the petitioners, she's a product of our law school. So I feel compelled to say that she did a magnificent job for her side. I thought she was terrific for her side. Of course, I don't agree with the petitioner's position in the case, but she did a really good job. Same with Elizabeth Prelogar, the Solicitor General of the United States for the respondents, and same with Beth Brinkmann who represented the power sector interest in the case. I think it was a terrific display of advocacy, and I think, Richard, this is right. This is the first time we've had three women arguing in the Court. Am I right about that?

Richard: I don't know. It's certainly unusual. I don't know if it's the very first time we've had three, but it was striking to look at it and to see how diverse some of the Supreme Court bar is. We're talking about really excellent advocates. I mean, I thought Lindsay See... I wasn't rooting for her side. I thought she was spectacular. She did a really good job, and Prelogar, the solicitor general is just a magnificent Supreme Court advocate, really just stunningly good, and then Beth Brinkmann is a veteran. She's done probably 30, 40 arguments, and she's terrific too.

Jody: With the compliments though made, let's turn to the argument. Maybe give us your most telling moments, and I'll chime in with some of my impressions too.

Richard: Jody, the most telling moment was really at the very beginning a petitioner's argument, and that was the complete silence from the conservative justices. What respondents we're hoping to hear in the first few minutes and once the questions began was some conservative justices, some of those six expressing interest in the respondent's argument that this case should be dismissed for lack of standing or for mootness. Those are the classic kinds of arguments that normally conservative justices like, but instead, when Lindsay See stood up for

West Virginia and she argued, they didn't challenge her at all. There was no mention by any of them until the very end. Justice Gorsuch brought it up in a way, and raised it, and didn't do any follow-ups. That was very systemic because what that meant was they were not going to get their soft landing, and they knew that even before they stood up themselves to argue. Unless those conservative justices thought there was something to it, it had no legs.

Richard: So that was it. That meant soft landing was out. At that point, what the Solicitor General and Beth Brinkmann had to worry about was that they could get a medium landing. So they continued to argue the jurisdictional point, but it was quite clear they weren't going to get it. They weren't going to prevail. Even Justice Breyer didn't seem to buy it, and that just means you can't count to five if you're not going to get Breyer's vote. I think they're not going to win on that one, and that's unfortunate because I think they should, but the Court wasn't interested in it.

Richard: So I thought that was the most telling moment. The second thing that was most telling was the obvious effort by the Chief Justice Roberts about Justice Kavanaugh to get the Court to address the Major Questions Doctrine before they considered the plain meaning of the statute. In other words, both the Chief and Justice Kavanaugh, who are I consider to be the more moderate of the conservative group, they weren't seeming to want the medium landing. They wanted to get the Court out there on the Major Question Doctrine. So that was a bad sign for the respondents in this case and a reminder about how conservative this Court truly is.

Jody: Yeah. I think all of us were struck by the fact that there seemed to be, as you say, no interest in justiciability at all. Just no uptake of it. I was struck by a couple other things too. First of all, I think the justices, including Justice Thomas with his first question picked up on the idea that this distinction people draw between EPA regulating inside the fence line, meaning locally at the facilities, setting standards just based on what you can do locally at the facility versus EPA setting standards based on outside the fence line, meaning looking at what the whole grid can accomplish. I think Justice Thomas and others picked up on it, and Justice Kagan really picked up on it that that distinction, either way, if EPA regulates either in or outside the fence line, they can have major impacts on the industry. So that if you're going to use the Major Question Canon to say, "Well, EPA can't do this because it has major implications," that the inside, outside fence line isn't a good fit for that.

Jody: There are two ways you can interpret that. I interpret it pessimistically. I worry that Justice Thomas' question when he said, "Well, does this really make a difference?" seems like no matter how you regulate, you can have a major impact. I thought that was a signal of, "Well, gee, maybe that means we ought to curtail EPA's authority to do any of this because it all has a major implication," and I saw Justice Kagan is trying to say Major Questions Canon doesn't fit this case and basically, in her questions, trying to make that point.

Jody: The other thing I'd say is just... Picking up on your point, Richard, about the chief treating the Major Questions Canon as a screening tool and contrast that with Justice Kagan treating the Major Questions Canon as what you do only after you've concluded a statute is ambiguous. It's a tiebreaker canon. There's a lot of disagreement and I think confusion and unclarity among the justices on what this canon is. They asked the advocates to clarify, "Well, how do you see the Major Questions Canon in this case?" and there were several versions of it.

Jody: I think there is just a lot of uncertainty still, even after oral argument, and I suspect it might be quite hard to write this case in a way that would clarify agreement on how to use the canon. I mean, there are questions on when should it be used. At what stage of analysis should it be used? What it should focus on? What has to be major? Is it the rule itself? Is it the understanding of the agency's authority? So I think there's a question about when to use it, how to use it, and over what to use it. I just see a lot of disagreement, and Justice Kavanaugh seems to have his separate approach, which seems to me like a congressional intent view of the Major Questions Canon that is you should use it to try to discern what Congress meant here and not stretch a statute beyond the bounds of what Congress thought you should use that statute for.

Jody: The old elephants in a mousehole. You shouldn't hide elephants in a mousehole, and that's why I think Justice Kavanaugh kept asking questions and making points about all the other statutes in which Congress had approved, let's say, a cap and trade program. All the other things, all the other signs and signals that maybe what the agency was trying to do here doesn't fit. It stretches beyond. So I thought there was a lot going on on the Major Questions Canon that one of my takeaways was I don't think the Court knows what it thinks about it yet.

Richard: I think that's right. I mean, they invented the thing. The whole thing is concocted by Justice Lee. It's not like there's written anywhere like, "Let's look at the constitution and find the Major Questions Doctrine anywhere." No. I think what you've said is absolutely right, and this is what we're going to look for in the opinion. I think what's fairly clear to me right now, I'd be happy to be wrong on this, is an outsized majority, probably six justices, is going to conclude the Trump repeal was valid. They're not going to do the jurisdictional out, dismiss the writ. They're not going to rely just on the plain meaning of the statute. Instead, they're going to rely on the Major Questions Doctrine. You're right. Then, the question becomes, how exactly do they describe their Major Questions Doctrine? How they describe what the trigger for the Major Questions Doctrine is? How big does the rule have to be, or is it not the rule itself? Is it a legal theory underlying the rule, which is the major question? To what extent is congressional and action relevant or not?

Richard: So that's what we're going to look for in the opinion. If they do a very narrow Major Questions Doctrine, it might have fewer longer-term implications. They do a very broad, muscular Major Questions Doctrine, which suggests that the

congressional guidance has to be really specific, that could have dramatic implications because, of course, as a practical matter, Congress doesn't pass anything, and these statutes were enacted decades ago when everyone thought that broad, capacious language, statutory language will be enough to authorize agencies to do things.

Richard: That, of course, is what makes the Major Questions Doctrine so hard. As a matter of democratic theory, it makes some sense. If you're going to have a really important question of law decided, sure, it makes a lot more sense to have it decided by the most democratically accountable branch, and that's Congress. The problem is, what do you do if the most democratically accountable branch, Congress, doesn't pass anything anymore, which has been true for environmental law for the past three decades?

Richard: Last time they amended the Clean Air Act, 1990, the water act, '87, Dangerous Species Act, '73. So the problem is what to do, and if the Court here says the guidance has to be specific in the language, that's going to be a very tough hurdle to overcome. So we're looking for is not so much the ruling. I think we know what the judgment of this Court is going to be. It's the opinion. It will come out right before summer recess, end of June, beginning of July. The chief justice as a senior justice for the majority, get to decide who writes it. That's going to be very important. My best guess is he'll write it himself, and then we have to look at the language of it to see exactly what it means.

Richard: One thing that I thought when I was watching the argument is that people often referred to the Court by the name of the chief justice or the swing justice. So that would make it either the Roberts Court or I guess Justice Kavanaugh, the Kavanaugh Court. I don't think it's either of those, Jody. I think this is the Scalia Court. Ironically, Justice Scalia who's been, right, passed away and left the bench, but in 2016, 6 years ago, he's more powerful, influential in the Court today than he ever was when he was alive and on the Court with so many justices trying to emulate what he thought. He's the author of the most important Supreme Court opinion closest on point. That's Utility Air Regulatory Group case several years ago where he invoked the Major Questions Doctrine, interpreting the Clean Air Act. So this is a big case. It's really fun to talk about, but it's also a case that worries me a lot.

Jody: Let me also... just to reinforce, Richard. It sounds like a little bit of a sense of gloom about the outcome. I think the Court is in a mood, and I'm interested in your view. I mean, I think if you put together some of these warning signs you and I talked about earlier, I would include not just the vaccine mandate or test case, which is the National Federation against Department of Labor case about OSHA's authority, but also the CDC decision to extend the moratorium on evictions and the Court rejecting the CDC's authority there. Both those cases are indicators of a mood. I mean, the Court is very willing to find that agencies have exceeded their authority in not just easy cases, but in cases where it should be hard to find that agencies have exceeded their authority. I think

there's earlier signals about wanting perhaps to raise the specter of the Non-Delegation Doctrine to reign in what Congress can do to delegate authority.

Jody: As we said earlier, when you combine those hints, those clues, and you see an emerging mood from the Court, I think we're at a moment here where this case could be an expression, another expression of the Court's reluctance to give agencies much running room under broad grants of authority, whether for non-delegation reasons or for Major Questions Canon reasons, whatever the rationale or a combination of those two. Richard, as you said, this has implications well beyond this case and not just for environmental law. It has implications for federal agency regulatory authority under old statutes that were broadly drawn precisely to give agencies flexibility. So I think you and I really agree about the potentially negative worrying implications of this.

Jody: I want to just say a couple more things and get your thoughts, Richard, on them. I mean, getting back to practicalities for the environmental protection agency and the Biden administration's agenda on climate change, this case is big because regulating the oldest, dirtiest power plants in the country and making sure they reduce their emissions is a big share about a third of the problem of US GHG emissions. So if you think practically about a decision here that constrains the agency from setting ambitious standards, that has some pretty big implications for your climate agenda if your climate agenda is based on EPA issuing rules to regulate the transportation sector, the power sector, the oil and gas sector because Congress has not passed a climate bill.

Jody: If you put it in that larger context, the case has really immediate, practical implications for the Biden administration's pledge to the Paris Agreement to deliver on US reductions of up to 52% by 2030. So, Richard, just your thoughts on that. Do you see it the same way that this has? Depending on the hardness of the landing as you described it, it really can create some obstacles for the Biden team.

Richard: I think it could, and I think it likely would. I do think it's gloomy, as you said, but perhaps not in all ways. Here's what I just want to maybe close a little bit with. As troubling as I find the likelihood of a Supreme Court ruling adverse to the Biden EPA in this case, there are a few things also to consider. One is that coal can't survive the marketplace on its own anyway. It's not as though there's anyone out there building new coal-fired power plants in the United States and for good reason. It's losing it in the marketplace, and even Donald Trump, when he sought for four years to try to promote coal, couldn't do it because it's just not competitive as much with renewables as it once was.

Richard: The Clean Power Plan's goals have already been met even without the Clean Power Plan ever being there because of those market trends. EPA, as much as it does need a very strong clean air, clean water rule it's got a lot of tools, and there are a lot of laws. Those existing coal-fired power plants have their

tripwires all over federal environmental law for those, which can be focused on them I think quite fairly.

Richard: So I think there's still a lot that EPA can do, a lot that Department of the Interior can do, a lot that other agencies can do, a lot that agencies like the Securities Exchange Commission can do to send the right signals in the marketplace. The challenge is that time is not fungible when it comes to climate. We don't have forever to wait to bring down these emissions. We need to as quickly as possible, and a loss in the Supreme Court would hurt that.

Richard: I think this case, as you suggested though, does have very long tentacles beyond even climate. The OSHA and Eviction Moratorium cases, those were the first for the showing this very skeptical Supreme Court. They were both based on expedited briefing, and argument, and rulings. This case won't be. So this is more likely to be a more full Supreme Court sort of opinion on these, and the great irony I find is that in the name of democratic accountability, saying that the most democratically accountable branch should be the one to answer these questions, Congress, you've got the least democratically accountable branch trying to tell the most democratically accountable branch, Congress, how to do its job.

Richard: Congress did its job. They passed these laws deliberately of broad capacious authority. These laws, they're not mice. The Clean Air Act, the Clean Water Act, these are elephants. We actually see the Supreme Court is trying to stick an elephant in a mousehole, and that's just, I think, really unfortunate. I hope maybe somehow the Court between now and end of June will decide to take a step back.

Jody: The only thing to add to that assessment I think is, again, on a note of relative optimism is the fact that the Court gave the industry petitioners from the power sector argument time I think was very significant. I think, Richard, you would agree, right, that having the industry there, arguing to the Court, injecting some reality about how the electricity system operates and how they already do all of the things that EPA was taking into account when setting their standards, and in fact, letting the Court know that the industry favors comprehensive EPA regulation, doesn't want EPA's wings clipped too severely so that very cost-effective options like averaging and trading among plants to cost-effectively reduce carbon emissions, they don’t want those things off the table, and I think it's very significant that the Court gave the industry some argument time. I think it listened to the healthcare industry, to the hospitals in the COVID vaccine mandate or testing case. I think it was interesting that in that companion case, the mandate vaccine or testing was left in place for hospitals. I think likewise here, the industry's role could make a difference, and it could give pause to the Court so that the Court doesn't go quite as sweeping as it might otherwise.

Jody: My big fear, as you and I have both discussed already, my big fear is that this is just a very good vehicle for the Court to try to lay out a very far-reaching understanding of the Major Questions Canon that says agencies can't do big things, and they can't do big things even when statutes give them lots of breadth and room to maneuver. In fact, by the way too much breath implicates the Non-Delegation Doctrine. That's my big fear about the potential that the case is just too tempting for the Court as a vehicle and that too many of the justices are eager to embrace one or another version of the Major Questions Canon.

Jody: I think we've covered the pessimism and the optimism fairly well. Is there anything, Richard? You're a such a close Supreme Court watcher and so insightful. As we look forward to the next term, I think we're all anticipating another case that could be far-reaching, which has to do with the Clean Water Act. So before I close it out, is there anything you see on the horizon here that we ought to be watching for in addition? After we digest this opinion, what else are you on the lookout for?

Richard: Well, I mean, two things. One, as you say, the Sackett v. EPA case. This is a Clean Water Act case that as big for the Clean Water Act as West Virginia is for the Clean Air Act. The Sackett case involves the geographical scope sweep of the Clean Water Act. To what extent one can broadly rather narrowly define the term "navigable waters." The Clean Water Act bars all discharge of pollutants without a permit in navigable waters in the United States. So we're going to look for that one. It'll probably be argued the first Monday or so, certainly, the first week in October, and the Court goes back into the session.

Richard: I'm looking for that one as well, and then I'm going to look forward to a new justice on the Court. Justice Breyer, my Ad Law professor here from Harvard Law School as we all know is retiring, and I expect we're going to see Justice Jackson on the Court. She looks like she'll be a terrific justice. I've looked a little bit at her background, her rulings as a district Court judge. She strikes me like Justice Breyer and Justice Ginsburg did when they were lower Court judges, and that is really good judges, really good lawyers. You could see opinions she wrote for environmentalists, but probably more against them than for them probably on the merits in terms of the strength of the case. It strikes me as a really good justice and judge, and I look forward to seeing a new person on the Court.

Jody: Well, that is something to look forward to, the hearings. Of course, we're recording this on the first day of the hearings for what could be the future Justice Jackson. Maybe we'll do a podcast, another podcast together. If she's confirmed, we can talk a little bit about how the Court will and won't change with the new justice, but we look forward to those hearings. Richard, this has been a terrific conversation. Fun for me. Thanks so much for doing it with me. I hope for the audience, it gave you a sense of how this important case reached the Court, how the Court reacts in complicated, interesting cases like this in

oral argument, the kinds of questions it poses, and the way that the advocates respond to those questions, and then gives you a sense of what we might expect to see. Richard, it has been a pleasure. Thank you.

Richard: Thanks a lot, Jody. Folks often say we should stop meeting like this. I think the opposite. True. We should do more of this. Thanks a lot.

Jody: Thank you.

To return to our website click here.