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NCLA Amicus Brief Tells SCOTUS the Clean Air Act and the Constitution Disallow EPA’s Power Grab

West Virginia, et al. v. Environmental Protection Agency, et al.

Washington, DC (December 20, 2021) – The New Civil Liberties Alliance, a nonpartisan, nonprofit civil rights group, filed an [amicus brief](#) with the U.S. Supreme Court today in *West Virginia v. EPA*, supporting the Petitioner States’ challenge against giving EPA vast power over entire economic sectors through a misreading of the Clean Air Act (CAA). NCLA argues that the judgment of the U.S. Court of Appeals for the D.C. Circuit should be reversed. The Constitution vests all legislative power in Congress. This means that national policy decisions are to be made by Congress, not by administrative agencies. The decarbonization of the energy industry—which the decision below authorizes EPA to impose—is a major national policy decision that Congress has not expressly made. Further, Congress may not delegate its legislative power over this decision for EPA to make in its stead.

The Environmental Protection Agency argues that the CAA grants the agency a license to undertake virtually any program it deems appropriate to address climate change. If construed so broadly, the CAA would divest Congress’ power to legislate on air-quality issues, weakening the Constitution’s separation of powers. NCLA’s brief offers several textual and structural reasons why the CAA did not—and Congress could not—divest legislative power.

For starters, in 2009, Congress addressed the issue of carbon dioxide emissions. The House narrowly passed legislation intended to address global warming and transform the way the nation produced and used energy. The Senate, however, chose *not* to pass the bill. Claiming questionable authority under Section 7411 of the CAA anyway, EPA ignored Congress (bicameralism be damned!) and formulated the Clean Power Plan (CPP), which determined that the “best system” to reduce carbon emissions was “generation shifting”—effectively replacing all fossil fuel-based electricity with “electricity generated from zero-emitting renewable-energy sources.”

Opponents of the breadth of this regulation initiated a lawsuit. It was argued that Congress had not authorized EPA to impose generation shifting of such industry-reshaping magnitude. On February 9, 2016, the Supreme Court stayed the CPP. Under the last administration, EPA then repealed the CPP and replaced it with the Affordable Clean Air Energy Rule (ACE Rule). On January 19, 2021, the D.C. Circuit vacated the ACE Rule. It concluded that the promulgation of the ACE Rule and the embedded repeal of the CPP “rested critically on a mistaken reading of the Clean Air Act.” EPA, the court said, had acted within its powers to issue the CPP.

NCLA released the following statement:

“The core principle of the Constitution is that sovereignty resides in the American People. This means that only the People can enact laws that restrict their liberties or otherwise bind them. Article I, section 1 of the Constitution, vested the power to enact laws in Congress, and in Congress alone. The decision under challenge allowed EPA to bypass the Constitution’s bicameralism requirement for laws to pass both houses of Congress—and thus to bypass the People’s right to self-government. NCLA urges the Supreme Court to reverse this decision as permitting an unconstitutional divestment of Congress’ legislative power.”

— **Brian Rosner, Senior Litigation Counsel, NCLA**

ABOUT NCLA

[NCLA](#) is a nonpartisan, nonprofit civil rights group founded by prominent legal scholar [Philip Hamburger](#) to protect constitutional freedoms from violations by the Administrative State. NCLA's public-interest litigation and other pro bono advocacy strive to tame the unlawful power of state and federal agencies and to foster a new civil liberties movement that will help restore Americans' fundamental rights.

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