

SUPREME COURT

19 states make 'long-shot bid' to curb EPA climate authority

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The Supreme Court. Francis Chung/E&E News

The Supreme Court is unlikely to grant a petition from red states asking the justices to review EPA's authority to regulate carbon emissions, environmental lawyers say.

But the petition — filed yesterday by 19 Republican-led states — offers a preview of the legal challenges awaiting President Biden's EPA once it proposes a new greenhouse gas rule for power plants.

"As a general matter, the Supreme Court's more likely to take a case if there's an actual regulation that will impose a burden on those challenging it," said Jonathan Adler, a law professor at Case Western Reserve University.

"You don't have that here. So it's a long-shot bid," he added.

Led by West Virginia Attorney General Patrick Morrisey (R), the states' [petition](#) urges the nation's highest bench to overturn a January ruling by the U.S. Court of Appeals for the District of Columbia Circuit ([E&E News PM](#), April 29).

The Supreme Court accepts about 1% of cases that come its way.

The D.C. Circuit ruling — issued one day before Biden's inauguration — tossed out former President Trump's Affordable Clean Energy (ACE) rule ([Climatewire](#), Jan. 20).

The ACE rule, which replaced the Obama-era Clean Power Plan, took a much narrower view of EPA's authority to regulate carbon emissions from stationary sources such as coal-fired power plants.

The decision gave the Biden administration a clean slate to craft an aggressive new greenhouse gas rule for power plants. EPA has already stated it does not intend to revive the Clean Power Plan.

Michael Gerrard, executive director of Columbia Law School's Sabin Center for Climate Change Law, said he wasn't shocked to see West Virginia's petition, given Morrisey's support for the coal industry.

"It's not surprising that West Virginia's attorney general, a staunch defender of coal, would make this attempt to cut off one of the Biden administration's possible legal tools under the Clean Air Act to reduce greenhouse gas emissions, even before the new administration has announced the specific ways it will use the Clean Air Act to regulate the power sector," Gerrard said in an email to E&E News.

Other legal experts also called the bid to involve the high court premature.

Taking the case at this point would be "awfully activist" of the Supreme Court, said Robert Percival, director of the Environmental Law Program at the University of Maryland's Carey School of Law.

"It's quite clear that the Biden administration is going to adopt its own replacement rule and doesn't want to stick with the ACE rule," Percival said.

Biden's rule

Once Biden's EPA proposes its rule, the same red states will likely launch a new legal challenge, Adler said.

If the new lawsuit eventually reached the Supreme Court, the 6-3 conservative majority could be sympathetic to states' claims, he said, noting that the high court previously stayed the Clean Power Plan before it could take effect.

"It's not clear the EPA has the authority to adopt a much broader rule or to adopt a rule even as broad as the Clean Power Plan," Adler said.

"Going forward with that sort of regulation is a high-risk strategy by the Biden administration," he added. "I would not expect this court to be particularly sympathetic to a really broad interpretation of EPA authority to regulate greenhouse gases."

Even if the Supreme Court does reject this case, there will be ample opportunity for the justices to come back to the question of greenhouse gas regulation at EPA, said Hana Vizcarra, a staff attorney at Harvard Law School's Environmental & Energy Law Program.

"The scope of options EPA has on the table is going to be an issue for the courts to consider in the next few years," Vizcarra said. "That makes me wonder whether the court would be interested in addressing this now, or seeing how the current agency sees the issue before addressing the topic."

An EPA spokesperson told E&E News the agency doesn't comment on pending litigation.

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