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The Supreme Court rejects request to stay EPA power plant GHG emissions rule

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Last week, the Supreme Court declined to stay EPA's power plant GHG emissions rule pending legal challenges in the D.C. Circuit. This order – together with the Supreme Court's denial of two other emergency stay requests of EPA rules this month – is notable given the Supreme Court's recent tendency to grant such stays and recent landmark rulings limiting agency authority more generally. However, what the order means for the fate of the legal challenge to the EPA rule remains to be seen.

On October 16, 2024, in a briefly worded order, the U.S. Supreme Court denied emergency applications from certain states, energy companies and industry groups (Petitioners) to stay the implementation of the U.S. Environmental Protection Agency's (EPA) rule to regulate (and reduce) GHG emissions from the power sector (the EPA Power Plant Rule) while the Court of Appeals for the D.C. Circuit considers Petitioners' challenge to the rule. The EPA Power Plant Rule, issued in May 2024 and previously discussed in our earlier client update, mandates a shift away from the use of fossil-fuels in the power sector and is a central pillar of the Biden administration's climate change strategy. The EPA Power Plant Rule regulates existing fossil fuel-fired steam generating power plants and new and reconstructed (mainly natural gas-fired) combustion turbines by requiring the adoption of a range of GHG reduction measures, including implementation of carbon capture and sequestration/storage in some cases. The Supreme Court's decision means that the EPA Power Plant Rule remains in effect at least until the D.C. Circuit decides on the pending challenges, which are scheduled for oral argument on December 6, 2024.

Together with two other decisions by the Supreme Court denying emergency applications for stays of EPA air emissions rules this month, the Supreme Court's order is notable in light of the approach it has taken with respect to agency rulemaking over the past decade. In 2016, the Supreme Court stayed the Clean Power Plan – a previous EPA attempt to regulate power plant GHG emissions under President Obama – while it was being challenged before the D.C. Circuit. Since that time, the Supreme Court has frequently stayed regulations issued by EPA and other agencies subject to pending legal challenges where the Supreme Court determined based on expedited briefing that the challenge was likely to succeed on the merits and threatened irreparable harm to the applicants. In addition, Petitioners' arguments for why they were likely to succeed were based on legal theories favored by the Supreme Court in recent years, including that the EPA Power Plant Rule violates the major questions doctrine and that the EPA Power Plant Rule is not based on the "best reading" of the Clean Air Act, as required by the Supreme Court's recent decision in *Loper*[1] (see here). The major questions doctrine was used by the Supreme Court to strike down the Clean Power Plan in *West Virginia v. EPA*[2] (see here) and is central to pending challenges to the SEC's recent climate-related disclosure rules.

That said, the Supreme Court's order is terse and gives no clear indication how its majority will ultimately decide on the EPA Power Plant Rule's merits. Justices Brett Kavanaugh and Neil Gorsuch supported the stay but noted in a statement that Petitioners had "shown a strong likelihood of success on the merits as to at least some of their challenges to [the EPA Power Plan Rule]," but that irreparable harm was unlikely given that compliance would not be required before June 2025, by which time the D.C. Circuit is likely to have issued a decision on the merits of the challenge. While the five other Justices that supported the order[3] did not join in this statement – including Chief Justice John Roberts and Justice Amy Coney Barrett – it would be speculative to draw any conclusions regarding the majority view on the merits of Petitioners' challenge. Instead, the denial could reflect a hesitancy by the Supreme Court to intervene in lower court proceedings on an emergency basis. In fact, in June 2024, Justice Barrett joined the Supreme Court's three liberal

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justices in a dissent in *Ohio v. EPA*[4]*,* where the Supreme Court issued a stay of an EPA rule while lower court challenges continued, stating that given the expedited nature of emergency stay requests and the complex underlying factual and legal issues, the Supreme Court "should proceed all the more cautiously… ."[5] As noted above, in recent weeks, the Supreme Court denied (without opinion) emergency applications to stay two other EPA rules that are being challenged in the D.C. Circuit, one in relation to EPA's plans to limit emissions of mercury, lead and other toxic metals from power plants and the other aimed at cutting methane from oil and gas production. Ultimately, the Supreme Court may have the opportunity to resolve this uncertainty if it decides to grant certiorari once the D.C. Circuit issues a decision on the Petitioners' challenges.

Alternatively, the fate of the EPA Power Plant Rule might be decided by the political calendar – a victory by Donald Trump in November's presidential election is expected to result in a repeal and replacement of the EPA Power Plant Rule regardless of the outcome of the proceedings before the D.C. Circuit.

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[1] *Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244 (2024).

[2] 597 U.S. 697 (2022).

[3] Justice Clarence Thomas stated that he would have granted the application for a stay and Justice Samuel Alito did not participate in the proceedings.

[4] 144 S. Ct. 2040 (2024).

[5] *Id.* at 2070.

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