How does a recent Supreme Court ruling apply to the EPA's implementation of TSCA?

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Lynn L Bergeson, managing partner of the law firm Bergeson & Campbell, says there's little doubt that West Virginia v EPA will be used to seek to limit the agency's authority in implementing the 2016 amendments to the law

Since the US Supreme Court issued its blockbuster ruling in West Virginia v EPA, 597 US _ 2022 WL 2347278 (30 June 2022), many are asking whether the Court's amplification of the 'major questions doctrine' (MQD) might be used to seek to limit the US EPA's authority in implementing Congress's 2016 amendments to TSCA, the Frank R Lautenberg Chemical Safety for the 21st Century Act (Lautenberg).

The answer is yes. West Virginia will henceforth be cited with predictable regularity in claiming the EPA, or any federal agency for that matter, has taken final agency action in what detractors will claim is an "extraordinary case" with outsized "economic and political significance" that, as Chief Justice John Roberts somewhat glibly noted, "raise[s] an eyebrow".

It has already begun. On 11 July, a mere 11 days after West Virginia was decided, the Texas attorney general submitted comments on the agency's proposed TSCA risk management rule on chrysotile asbestos to the EPA on behalf of Texas and 11 other states. In his comments, Ken Paxton said "a flat ban on the use of asbestos is a question of major economic significance" and "it is hard to see how the EPA can use the general language of the TSCA to impose a flat ban on all commercial uses of the substance". And so it begins.

Given the breadth of the majority opinion and its disturbing lack of legal analysis, litigants wishing to limit an agency's administrative authority will routinely cite West Virginia in arguing that all but the most modest of regulatory actions lack "clear congressional authorisation". As many commentators have already stated, West Virginia addresses a Clean Air Act rule issued by the EPA. However, its reach extends far beyond the EPA and the Clean Air Act.

Indeed, the MQD had its most emphatic origins in recent unsigned Supreme Court decisions involving other federal agencies. In Alabama Association of Realtors v Department of Health and Human Services, 594 US _

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(2021) (per curiam), the Court concluded the Centers for Disease Control and Prevention (CDC) could not institute a nationwide eviction moratorium to help prevent the spread of disease in response to the Covid-19 pandemic. In National Federation of Independent Business v Occupational Safety and Health Administration, 595 US _ (2022) (per curiam), the Court invalidated the Occupational Safety and Health Administration's (Osha)'s mandate that large employers require their employees to get vaccinated or undergo weekly Covid-19 testing on the grounds that in Osha's "half-century of existence" it had never "relied on its authority to regulate occupational hazards to impose such a remarkable measure". That the pandemic is the most consequential public health crisis in a century seemingly is irrelevant.

The majority opinion offers plenty of citable pushback for any advocate arguing an agency action is well beyond its jurisdictional reach. This much is clear. Whether you believe the majority opinion reflects sustained conservative efforts to blunt the "administrative state" or, as Chief Justice Roberts notes, is merely assigning a moniker to a "body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted", the result is the same. Litigants now have a new, supple and powerful weapon to blunt agency action.

That brings us to Lautenberg. The MQD will be relied upon often to challenge the EPA's interpretation of it. As noted, advocates seeking to limit the agency's action under TSCA have already seized the opportunity. Advocates for years to come will cite the majority opinion and Justice Neil Gorsuch's better-reasoned, concurring opinion often and with relish. There are plenty of memorable phrases to quote to delegitimise agency actions that, but for West Virginia, would have seemed safe under what Justice Elena Kagan characterises in her dissenting opinion as "normal principles of statutory interpretation".

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What is far less clear is whether Lautenberg's youth, enacted a mere six years ago, and TSCA's celebrated and somewhat litigious history will blunt the success of those efforts. Many of the issues the EPA is seeking to address in implementing Lautenberg are hardly new, and the agency's authority under TSCA to address risks deemed unreasonable is well settled, including its authority to restrict or ban uses of a chemical substance the agency has determined poses unreasonable risks.

West Virginia will, of course, find its way into advocacy in seeking to limit many such expressions of the EPA's TSCA authority, as well as its reliance on a range of evolving TSCA policies in its rules. These include the whole chemical approach, the scope of Lautenberg's utility in addressing environmental justice through the EPA's definition of potentially exposed or susceptible subpopulations, and what exactly "reasonably foreseen" conditions of use are for purposes of TSCA Section 5 new chemical and significant new use review.

What is unclear is the success of such efforts. Does any such effort really fit in West Virginia's conceptual construct of being an impermissible exercise of agency action Congress could not have reasonably be understood to have granted the EPA just six years ago? A strong case can be made that the answer is no. That will not, however, limit the inclusion of MQD arguments in comments and briefs, or temper the enthusiasm of zealous advocates asserting these claims, particularly those to the tune of conservative courts.

Industry advocates, based on a review of comments submitted on many rulemakings implementing Lautenberg, may find little need for West Virginia. Given the highly technical nature of Section 5 new chemical and significant new use reviews, Section 6 risk evaluations, and the EPA's first-ever risk management proposed rule for a chemical (chrysotile asbestos) that underwent Lautenberg risk evaluation, reliance on more traditional tactics may be sufficient to challenge the EPA's actions. Advocates will continue to challenge the agency's scientific rationale based on the record, and to challenge whether the EPA's actions are defensible and supported by best available science and aligned with Lautenberg. These more routine measures would seem to go a long way in ensuring the EPA's rulemaking records are defensible without having to launch the MQD grenade.

Regardless of the ultimate success of an MQD challenge to a Lautenberg rule, there is legitimate cause for concern with the destabilising implications of West Virginia generally. Agencies struggle now to address the Herculean problems Congress directed them to solve. At a time of

sadly sustained Congressional inaction and dysfunctional behavior on an epic level, federal agencies need all the help they can get, having defaulted into the role of problem-solver-in-chief. The additional burden West Virginia imposes is regrettable and it could portend catastrophic agency inaction on challenges too urgent to ignore.

The views expressed in this article are those of the author and are not necessarily shared by Chemical Watch. The author transparency statement can be seen here.