

# Supreme Court Limits on Regulatory Responses to Climate Change: How Limits to EPA Authority Disproportionately Harm Vulnerable Communities

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## I. Introduction

As early as the 1950s, climate scientists knew about the significant risks that releasing greenhouse gasses (“GHGs”) into our atmosphere could have for both people and the natural world.<sup>1</sup> Yet more than half of industrial emissions have been released since 1988, ten years after evidence showed that major representatives of fossil fuel companies knew about carbon emissions’ contributions to the greenhouse effect.<sup>2</sup> And the U.S. Environmental Protection Agency (“EPA”) did not begin to assess policy solutions to climate change until 1983.<sup>3</sup> Even today, without any change in current policy, global temperatures are projected to rise 2.8 degrees Celsius above pre-industrial levels.<sup>4</sup> To keep emissions under the 2-degree goal set by the Paris Agreement, emissions must decrease rapidly and continue decreasing.<sup>5</sup> Beyond requiring current emitters to decrease emissions, this goal requires an economy-wide transformation of energy production.<sup>6</sup>

Meanwhile, the risks associated with a warming climate are felt disproportionately by low-income and marginalized communities. People in low socioeconomic communities are more at risk for adverse health conditions related to air pollution due to their proximity to sources of

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<sup>1</sup> *The Climate Deception Dossiers*, UNION OF CONCERNED SCIENTISTS (July 2015), <https://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf>.

<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> *Emissions Gap Report 2022: The Closing Window – Climate Crisis Calls for Rapid Transformation of Societies*, UNITED NATIONS ENV’T. PROGRAMME (Oct. 2022), <https://wedocs.unep.org/20.500.11822/40874>.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

pollution and other underlying conditions such as poor nutrition and stress.<sup>7</sup> Black, Hispanic and Latino, American Indian and Alaska Native, and Asian Americans are all more likely to live in areas that are projected to have climate-driven risks such as increased pollution, rising sea levels, or increased natural disasters such as flooding.<sup>8</sup> Issues such as income inequality and systematic racism mean that people of color and people living in poverty face a disproportionate amount of climate-related risk.<sup>9</sup> For instance, Black individuals are 41–60% more likely than non-Black individuals to live in areas with the highest projected premature mortality due to adverse health caused by fine particulate matter and ground-level ozone.<sup>10</sup> Similarly, the national poverty rate is 11.9%, but the poverty rate near coal plants nationwide is 12.9%.<sup>11</sup> And near peaking power plants (“peakers”)<sup>12</sup> the disparity is even greater.<sup>13</sup> For two-thirds of peakers, at least 29% of surrounding households are low-income.<sup>14</sup> Peaker plants located in areas where people of color make up 65% or more of the population have emission rates that are 44% higher than average for nitrogen oxide, which can cause severe respiratory damage and other adverse health conditions.<sup>15</sup>

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<sup>7</sup> *Research on Health Effects from Air Pollution*, U.S. ENV’T. PROT. AGENCY (Feb. 16, 2022), <https://www.epa.gov/air-research/research-health-effects-air-pollution>.

<sup>8</sup> *Climate Change and Social Vulnerability in the United States*, U.S. ENV’T. PROT. AGENCY (Sept. 2021), [https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability\\_september-2021\\_508.pdf](https://www.epa.gov/system/files/documents/2021-09/climate-vulnerability_september-2021_508.pdf).

<sup>9</sup> Aneesh Patnaik, Jiahn Son, Alice Feng & Crystal Ade, *Racial Disparities and Climate Change*, PRINCETON STUDENT CLIMATE INITIATIVE (Aug. 15, 2020) <https://psci.princeton.edu/tips/2020/8/15/racial-disparities-and-climate-change>.

<sup>10</sup> *Id.*

<sup>11</sup> Jared Saylor, *Communities of Color, Poverty Bear Burden of Air Pollution*, EARTHJUSTICE (May 27, 2011), <https://earthjustice.org/news/press/2011/communities-of-color-poverty-bear-burden-of-air-pollution>.

<sup>12</sup> Power plants that run for 15% or less of the time to meet peak energy demand. Though run less often than other plants, these plants produce high levels of pollutants typically on hot days when air quality is often worse.

<sup>13</sup> Seth Mullendore, *Mapping the Inequities of Fossil Peaker Power Plants*, CLEAN ENERGY GRP (Apr. 21, 2022), <https://www.cleaneenergy.org/mapping-the-inequities-of-fossil-peaker-power-plants/>.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

Without large-scale policy changes, low-income and marginalized communities will continue to face the increasingly adverse effects of climate change. However, recent Supreme Court decisions have made regulatory action more difficult to address these concerns.

## II. Legal Background

Over the past two decades, decisions by the Supreme Court have established regulatory action as the proper venue for relief for climate-related harms<sup>16</sup> but also limited the regulatory authority of the EPA to respond to climate change.<sup>17</sup> In *American Electric Power Co., Inc. v. Connecticut*, the Court ruled that the Clean Air Act (“CAA”) displaced federal common law nuisance claims.<sup>18</sup> In doing so, the Court encouraged regulatory action over direct action.<sup>19</sup> However, in *Utility Air Regulatory Group v. EPA* and *West Virginia v. EPA*, the Court found that the EPA lacked the authority to implement a proposed system of regulations and denied the EPA’s interpretation of the statute.<sup>20</sup> Both decisions together demonstrate a trend of increasing skepticism of agency power, less agency deference, and less flexibility in statutory analysis. In turn, marginalized communities will bear the worst harm from these and future limitations on the EPA’s authority to address the worsening conditions of climate change.

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<sup>16</sup> *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 425 (2011).

<sup>17</sup> *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 321 (2014); *W. Virginia v. Env’t Prot. Agency*, 142 S.Ct. 2587, 2610 (2022).

<sup>18</sup> *Am. Elec. Power Co.*, 564 U.S. at 415.

<sup>19</sup> *Id.* at 425, 427-28.

<sup>20</sup> *Util. Air Regul. Grp.*, 573 U.S. at 321; *W. Virginia*, 142 S.Ct. at 2610.

## A. American Electric Power Co. v. Connecticut

In *American Electric Power Co. v. Connecticut*, the Court barred one potential avenue of redress for individuals and communities suffering from the effects of climate change by ruling that the CAA displaced federal common law nuisance claims.<sup>21</sup>

In *American Electric Power*, multiple states and non-profits sued five major power companies on a public nuisance claim for contributing to climate change and thus interfering with public rights.<sup>22</sup> The Court faced the question of whether the CAA displaced a federal common law claim.<sup>23</sup> In *Massachusetts v. Environmental Protection Agency*, the Court held that the CAA authorized the EPA to regulate GHGs emissions in new motor vehicles.<sup>24</sup> In response, the EPA began regulating GHGs in motor vehicles and set GHG emission limitations for fossil-fuel-fired power plants.<sup>25</sup> In *American Electric Power*, the Court found that the CAA authorized the EPA to regulate powerplants and that this authority displaces any federal common law right to “seek abatement of carbon-dioxide emissions for fossil-fuel fired powerplants.”<sup>26</sup>

Overall, the Court is showing a preference for regulatory action over federal common law action regarding climate change issues. In the *American Electric Power* decision, the Court deferred to agency decision-making and encouraged regulatory action.<sup>27</sup> First, the Court indicated that the federal judge should generally defer to the agency if possible by referring to the “expert administrative agency” as the first decision maker under the CAA and the federal judge as the second.<sup>28</sup> The Court also acknowledged that by commissioning scientific studies and

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<sup>21</sup> *Am. Elec. Power Co.* 564 U.S. at 415.

<sup>22</sup> *Id.* at 418.

<sup>23</sup> *Id.* at 423.

<sup>24</sup> *Massachusetts v. E.P.A.*, 549 U.S. 497, 532 (2007).

<sup>25</sup> *Am. Elec. Power Co.*, 564 U.S. at 417.

<sup>26</sup> *Id.* at 424.

<sup>27</sup> *Id.* at 425, 427-28.

<sup>28</sup> *Id.* at 427.

seeking expert advice, agencies are better positioned to make decisions on the regulation of GHGs.<sup>29</sup> Second, by denying a right of action through federal common law and instead emphasizing the possibility of enforcement actions or petitions for rulemaking, the Court is encouraging private parties to seek relief through these regulatory methods over the common law.<sup>30</sup> Therefore, the Court is establishing regulatory action as the proper venue for relief.<sup>31</sup> However, later decisions such as *West Virginia* and *Utility Air* limit how regulatory action can respond to climate change.

### **B. Utility Air Regulatory Group v. Environmental Protection Agency**

After *Massachusetts v. EPA* held that the EPA has statutory authority to regulate the emission of GHGs in new motor vehicles,<sup>32</sup> the agency looked to the regulation of GHGs in stationary sources. Under the CAA, permitting requirements for stationary sources apply to stationary sources that emit 100 or 250 tons per year.<sup>33</sup> The EPA found that using the same applicability levels for GHGs would result in unreasonable burdens for state and local permitting authorities because GHG emissions are orders of magnitude greater than any air pollutants previously regulated.<sup>34</sup> To avoid unmanageable regulation and overly burdensome permitting requirements for small sources, the EPA tailored the threshold emissions to 100,000 or 75,000 tons per year.<sup>35</sup> The EPA estimated that doing so would require permitting two additional sources per year and 915 sources seeking modifications.<sup>36</sup>

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<sup>29</sup> *Id.* at 428.

<sup>30</sup> *Id.* at 425.

<sup>31</sup> *Id.*

<sup>32</sup> *Massachusetts*, 549 U.S. at 532.

<sup>33</sup> Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31514-01 (June 3, 2010).

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

However, in *Utility Air Regulatory Group v. EPA*, the Court found that tailoring threshold emissions were not permissible under the CAA.<sup>37</sup> The Court agreed that triggering permitting requirements at 100 or 250 tons of GHG emissions per year would produce absurd results.<sup>38</sup> Therefore, Court interpreted the CAA to allow for the regulation of GHG emissions only for stationary sources that were already being regulated due to the emissions of a previously recognized pollutant (the Court referred to these as “anyway sources”).<sup>39</sup> *Utility Air* was a small victory because it confirmed the EPA’s authority to regulate GHG emissions for stationary sources but disallowed the agency to expand its authority and gradually include regulation of sources for their GHG emissions alone.<sup>40</sup>

The Court’s decision in *Utility Air* found less flexibility in the language of the CAA than had been found in previous cases. In *Massachusetts*, the Court recognized that the CAA was written to define an “air pollutant” broadly and recognized that the Act was intended to have regulatory flexibility to react to new understandings of air pollutants and their inherent risks.<sup>41</sup> In *Utility Air*, however, the Court ruled that the EPA could not tailor threshold emissions and thus limited the very flexibility they found necessary in *Massachusetts*.<sup>42</sup> By denying EPA’s proposed approach, the Court substituted its own approach for EPA’s with no clear explanation for doing so.<sup>43</sup> The Court thus expanded the power it had previously used to strike down impermissible statutory interpretations made by regulatory agencies to substitute its own interpretation.<sup>44</sup> By

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<sup>37</sup> *Util. Air Regul. Grp.*, 573 U.S. at 321.

<sup>38</sup> *Id.* at 320.

<sup>39</sup> *Id.* at 332-33.

<sup>40</sup> *Id.* at 333-34.

<sup>41</sup> Matthew R. Oakes, *Questioning the Use of Structure to Interpret Statutory Intent: A Critique of Utility Air Regulatory Group v. EPA*, 124 YALE L.J. F. 56, 57 (2014).

<sup>42</sup> *Util. Air Regul. Grp.*, 573 U.S. at 325; *Massachusetts*, 549 U.S. at 532.

<sup>43</sup> Matthew R. Oakes, *Questioning the Use of Structure to Interpret Statutory Intent: A Critique of Utility Air Regulatory Group v. EPA*, 124 YALE L.J. F. 56, 57 (2014).

<sup>44</sup> *Id.*

giving up the regulatory flexibility that the Court had previously used to interpret the CAA, the Court has required that Congress use clear and unambiguous language in new regulatory schemes.<sup>45</sup>

### C. *West Virginia v. Environmental Protection Agency*

In *West Virginia v. EPA*, the Court determined that the EPA did not have the authority to implement the Clean Power Plan (“CPP”).<sup>46</sup> The CPP sought to tackle climate change by utilizing generation shifting to substitute coal-fired power with lower-emitting natural gas and renewable energy sources.<sup>47</sup> In deciding whether the EPA had the authority to implement regulations that would result in generation shifting, the Court found that this was a “major questions case.”<sup>48</sup> The major questions doctrine had been used previously to curtail regulatory action where an agency was stepping out of its usual area of control, where a “misfit” existed between agency action and the statute.<sup>49</sup> However, here, the EPA was regulating GHGs just as cases such as *Massachusetts* and *American Electric* upheld its authority to do so.<sup>50</sup>

Rather than finding that there was a “misfit” between the agency’s actions and the statute, the Court’s main issue with the EPA’s proposed regulation was that the agency had interpreted the best system of reduction to include generation shifting.<sup>51</sup> The Court found that generation shifting was not a system but a grid-wide change.<sup>52</sup> One that the EPA did not have the authority

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<sup>45</sup> *Util. Air Regul. Grp.*, 573 U.S. at 324.

<sup>46</sup> *W. Virginia*, 142 S.Ct. at 2615-16.

<sup>47</sup> Fact Sheet: Overview of the Clean Power Plan, U.S. ENV’T. PROT. AGENCY (May 9, 2017), <https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html>.

<sup>48</sup> *W. Virginia*, 142 S.Ct. at 2610.

<sup>49</sup> Frances Williamson, *Implicit Rejection of Massachusetts v. EPA: The Prominence of the Major Questions Doctrine in Checks on EPA Power*, 23 HARV. J.L. & PUB. POLY PER CURIAM 1, 4 (2022).

<sup>50</sup> *W. Virginia*, 142 S.Ct. at 2641 (dissent).

<sup>51</sup> *Id.* at 2615-16.

<sup>52</sup> *Id.* at 2628 (dissent).

to make.<sup>53</sup> Where the Court found regulatory flexibility in *Massachusetts*,<sup>54</sup> it failed to do so here. Instead, the Court found that this was just too big of a move for the EPA to make.<sup>55</sup> The Court's main test for whether a major question existed was that it "raised an eyebrow."<sup>56</sup> It is unclear how this ambiguous ruling will affect later cases, but the door has been opened for future challenges to agency authority based on the major questions doctrine.<sup>57</sup>

The dissent in *West Virginia* illustrates major flaws in the decision of the Court. First, the dissent pointed out that, unlike previous cases where the major questions doctrine has been used, the EPA is not doing anything outside of its wheelhouse.<sup>58</sup> Unlike the Food and Drug Administration interpreting its authority over "drugs" to extend to nicotine and cigarettes as in *FDA v. Brown & Williamson*, the EPA had already regulated GHGs.<sup>59</sup> In fact, *Massachusetts* and *Utility Air* upheld that the EPA's power of authority did encompass GHGs.<sup>60</sup> This case simply does not have the kind of conflict with current law or authority to warrant use of the major questions doctrine.<sup>61</sup>

Second, the dissent also pointed out that even without generation shifting, market behavior would result in a shift similar to the one the EPA was trying to implement.<sup>62</sup> Due to the high cost of increasing efficiency in coal-burning plants, a regulatory plan that required increased efficiency of plants would likely lead to more of them shutting down and alternative energy

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<sup>53</sup> *Id.*

<sup>54</sup> *Massachusetts*, 549 U.S. at 532.

<sup>55</sup> *W. Virginia*, 142 S.Ct. at 2613.

<sup>56</sup> *Id.* at 2633 (dissent).

<sup>57</sup> Jeff Wood, Esq., Debra Jezouit, Esq., Jen Golinsky Baseman, Esq. & Evan Neustater, Esq., *EPA faces 'major questions' test*, WESTLAW TODAY (Aug. 31, 2022).

<sup>58</sup> *W. Virginia*, 142 S.Ct. at 2633 (dissent).

<sup>59</sup> *Id.* at 2634 (dissent).

<sup>60</sup> *Massachusetts*, 549 U.S. at 532; *Util. Air Regul. Grp.*, 573 U.S. at 334.

<sup>61</sup> *Id.* at 2641 (dissent).

<sup>62</sup> *Id.* at 2638 (dissent).



sources taking their place.<sup>63</sup> Therefore, regulatory plans that did not require generation shifting would likely lead to the same result as the one the EPA proposed. In fact, without even implementing the plan, market pressures had caused the emission reduction goals to be met.<sup>64</sup> Thus, the CPP itself was obsolete before the Court even handed down the verdict.

Considering these flaws in the Court's decision, it is difficult to understand the Court's reasoning for limiting the EPA's authority. The result of this case will nonetheless have a significant impact on future litigation as it continues the trend of agency skepticism, less agency deference, and less flexibility in statutory interpretation.

### III. Analysis

The effect of these cases together severely limits available remedies for those suffering from the effects of climate change listed in Section I. The Court in *American Electric* increased public reliance on regulatory action to combat climate change by ruling that federal nuisance claims were preempted by the CAA.<sup>65</sup> However, by giving up the regulatory flexibility found in *Massachusetts*<sup>66</sup> and lessening agency deference from *Chevron*,<sup>67</sup> the Court is limiting what regulatory action can even do for these communities.

When the CAA was enacted in 1970, climate change was just beginning to be understood as a global issue.<sup>68</sup> And the EPA did not begin addressing climate change until 1983.<sup>69</sup> Until now,

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<sup>63</sup> *Id.* at 2639 (dissent).

<sup>64</sup> *Id.* at 2627 (dissent).

<sup>65</sup> Marriam Lin, *Defogging the Future: The Effect of American Electric Power on Future Lawsuits*, 19 J. ENV'T. & SUSTAINABILITY L. 179, 210 (2012).

<sup>66</sup> *Massachusetts*, 549 U.S. at 532.

<sup>67</sup> Cissy Jackson & David M. Loring, *West Virginia v. EPA—Will Chevron go the Way of the Dinosaurs?*, FED. LAWYER (Sep./Oct. 2022).

<sup>68</sup> *The Climate Deception Dossiers*, UNION OF CONCERNED SCIENTISTS (July 2015), <https://www.ucsusa.org/sites/default/files/attach/2015/07/The-Climate-Deception-Dossiers.pdf>.

<sup>69</sup> *Id.*

the EPA has used broad statutory interpretation to address new risks as scientific understanding evolves to understand them.<sup>70</sup> The Court, by limiting flexible statutory interpretation also limits the ability of the EPA to respond to new and evolving risks of climate change.<sup>71</sup> Risks that directly affect marginalized communities who are without an individual method of redress after *Utility Air*. Although the EPA still has the authority to regulate GHGs, after *West Virginia*, any new plans are likely to be challenged by the major questions doctrine and at least delayed if not struck down.<sup>72</sup>

Congress could enact new amendments to the CAA giving the EPA clear authority to implement generation shifting. However, the 117<sup>th</sup> Congress is divided,<sup>73</sup> and pressures from fossil fuel companies mean that statutory change will be slow if it happens at all.<sup>74</sup> On the other hand, the Senate recently passed the Inflation Reduction Act (“IRA”) meant to move the country away from fossil fuels and towards renewable energy.<sup>75</sup> The IRA is the largest climate legislation ever passed by the United States.<sup>76</sup> But it is still not enough to reach President Biden’s goal of net zero carbon emissions by 2050, which would be required to prevent global temperatures from rising above 1.5 degrees Celsius.<sup>77</sup> The IRA alone will not sufficiently protect low-income and marginalized communities. By limiting regulatory authority, the Court has

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<sup>70</sup> *W. Virginia*, 142 S.Ct. at 2632 (dissent).

<sup>71</sup> *Id.*

<sup>72</sup> *West Virginia v EPA: Supreme Court Limits the EPA's Authority to Regulate Emissions from Existing Power Plants, with Implications for the Administrative State*, PRAC. L. LEGAL UPDATE w-036-1370.

<sup>73</sup> *Party Breakdown*, H.R. (Dec. 18, 2022), <https://pressgallery.house.gov/member-data/party-breakdown>.

<sup>74</sup> *Why it's so difficult to address climate change*, UCLA CTR. FOR INDIA AND SOUTH ASIA (Sept. 22, 2020), <https://www.international.ucla.edu/cisa/article/228473>.

<sup>75</sup> Coral Davenport & Lisa Friedman, *Five Decades in the Making: Why It Took Congress So Long to Act on Climate*, THE NEW YORK TIMES (Aug. 7, 2022), <https://www.nytimes.com/2022/08/07/climate/senate-climate-law.html>.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.*

shifted the power to respond to climate emergency to the courts and to Congress.<sup>78</sup> If Congress is too slow to respond efficiently to the urgency of climate change, the courts must act to hold the other branches accountable.<sup>79</sup> However, in the cases described above, the Court has refused to act in a way that furthers the country's climate goals. By limiting regulatory authority to respond to climate change, decisions such as *Utility Air* and *West Virginia* ensure that the climate-driven harm felt disproportionately by low-income and marginalized communities will continue.

However, improving the regulation of GHGs may not even benefit high-risk communities and those living near high-emission power sources. Solutions aimed at aggregate reductions are typically distribution-neutral.<sup>80</sup> They are not aimed at relieving those who suffer from the worst impacts of pollution, just lowering overall emissions.<sup>81</sup> In fact, the IRA, though aimed at decreasing overall emissions, because of fossil fuel subsidies may allow heavily polluting plants to remain in operation even longer.<sup>82</sup> An equitable solution would need to not just decrease emissions, but to particularly decrease emissions in high-risk areas with significant populations of poor and minority individuals.

Permitting requirements for new or modified sources should be looked at with scrutiny to ensure that changes will not exacerbate the risks posed to vulnerable communities. Cap-and-trade programs, which the CPP would have implemented, must consider what geographical

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<sup>78</sup> David Freeman Engstrom & John E. Priddy, *West Virginia v. EPA and the Future of the Administrative State*, STANFORD LAW SCHOOL BLOGS (July 6, 2022), <https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/>.

<sup>79</sup> Elizabeth Keller, *Giving the Climate a Voice: Why Allowing Suits Over Climate Change to be Heard is Not Only Constitutional, but May Be Our Only Viable Option*, 51 STETSON L. REV. (2022).

<sup>80</sup> Alice Kaswan, *Environmental Justice and Domestic Climate Change Policy*, 38 ENV'T. L. REP. NEWS & ANALYSIS 10287, 10294 (2008).

<sup>81</sup> *Id.*

<sup>82</sup> Rebecca Hersher, *The Spending Bill Will Cut Emissions, But Marginalized Groups Feel They Were Sold Out*, NATIONAL PUBLIC RADIO (Aug. 17, 2022), <https://www.npr.org/2022/08/17/1117725655/the-spending-bill-will-cut-emissions-but-marginalized-groups-feel-they-were-sold>.

scope to operate under. Trades could disproportionately affect low-income and marginalized communities if the plants in these communities increase or continue emissions while plants elsewhere lowered their emissions to meet emission goals.<sup>83</sup> Similarly, the placement of peaker plants needs to be more equitably distributed, or the energy grid redesigned so that they are not required to operate. Although large-scale policy changes are certainly needed in order to limit warming and protect communities from climate-related risks, it is important to ensure that policy also reflects the need for equitable solutions.

Although the *American Electric* decision encouraged regulatory action over common law claims for fighting climate change, *Utility Air* and *West Virginia* showed that the current Court is skeptical of regulatory power. Therefore, without further Congressional action, it will be difficult for any regulatory changes to effectively fight climate change. However, because of the progression of climate change, large-scale regulatory action is necessary to avoid severe risks of which poor and minority communities bear the biggest burden.

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<sup>83</sup> *Id.*