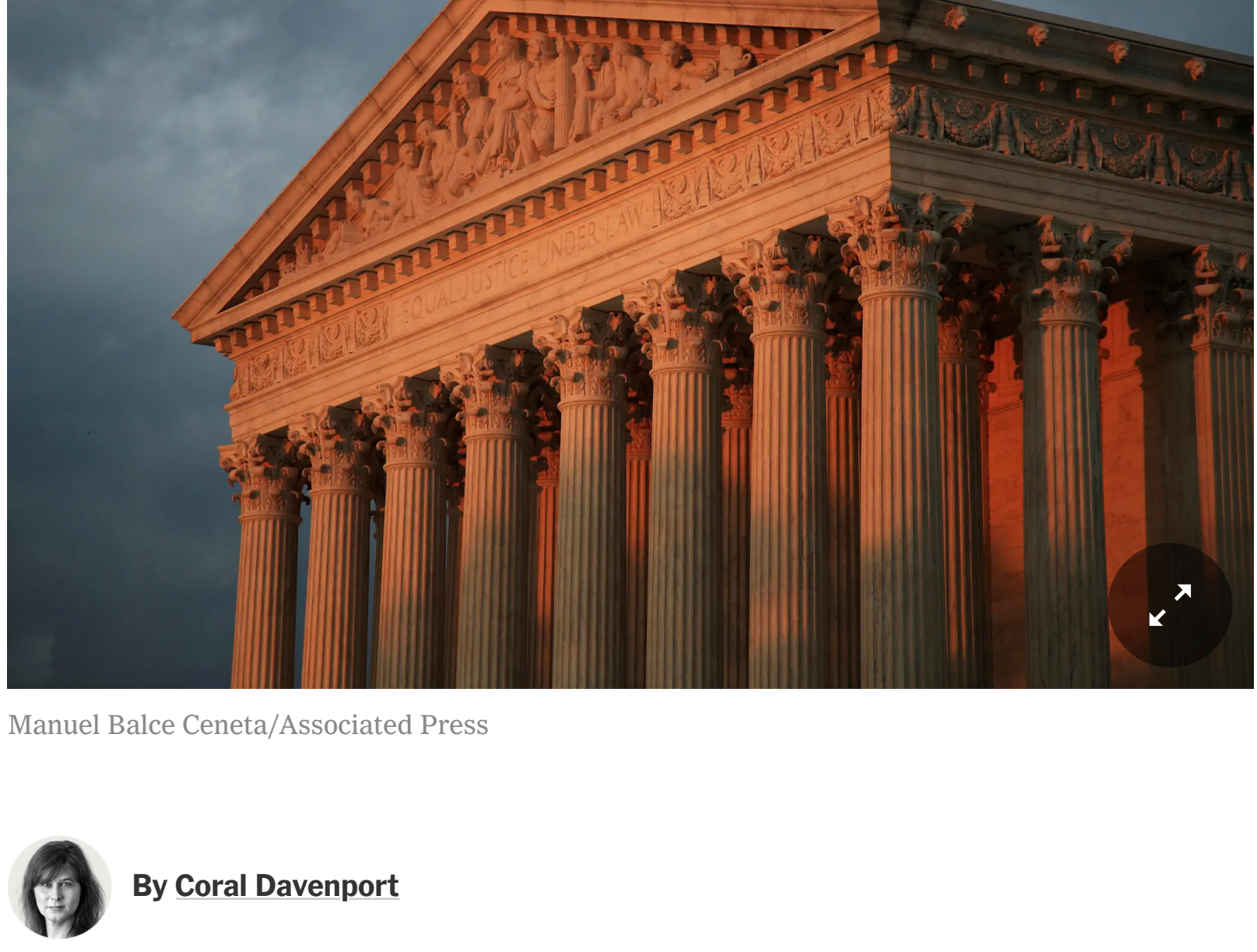


Supreme Court Will Hear Biggest Climate Change Case in a Decade

The court could handcuff President Biden's climate change agenda — and restrict federal agencies from enacting new regulations governing health, workplace safety and more.

203



Manuel Balce Ceneta/Associated Press

By Coral Davenport

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WASHINGTON — In the most important environmental case in more than a decade, the Supreme Court on Monday will hear arguments in a dispute that could restrict or even eliminate the Environmental Protection Agency's authority to control the pollution that is heating the planet.

A decision by the high court, with its conservative supermajority, could shred President Biden's plans to halve the nation's greenhouse emissions by the end of the decade, which scientists said is necessary to avert the most catastrophic impacts of climate change.

"They could handcuff the federal government's ability to affordably reduce greenhouse gases from power plants," said Michael Oppenheimer, a professor of geosciences and international affairs at Princeton University. The power sector is the second largest source in the United States of the carbon emissions that are driving climate change.

But the outcome could also have repercussions that stretch well beyond air pollution, restricting the ability of federal agencies to regulate health care, workplace safety, telecommunications, the financial sector and more.

"If the court were to require the E.P.A. to have very specific, narrow direction to address greenhouse gases, as a practical matter it could be devastating for other agencies' abilities to enact rules that safeguard the public health and welfare of the nation," said Richard Lazarus, a professor of environmental law at Harvard. "It would restrict the enactment of regulations under any host of federal statutes — OSHA, the Clean Water Act, hazardous waste regulation. In theory it even could limit the Fed's authority to set interest rates."

Climate Forward

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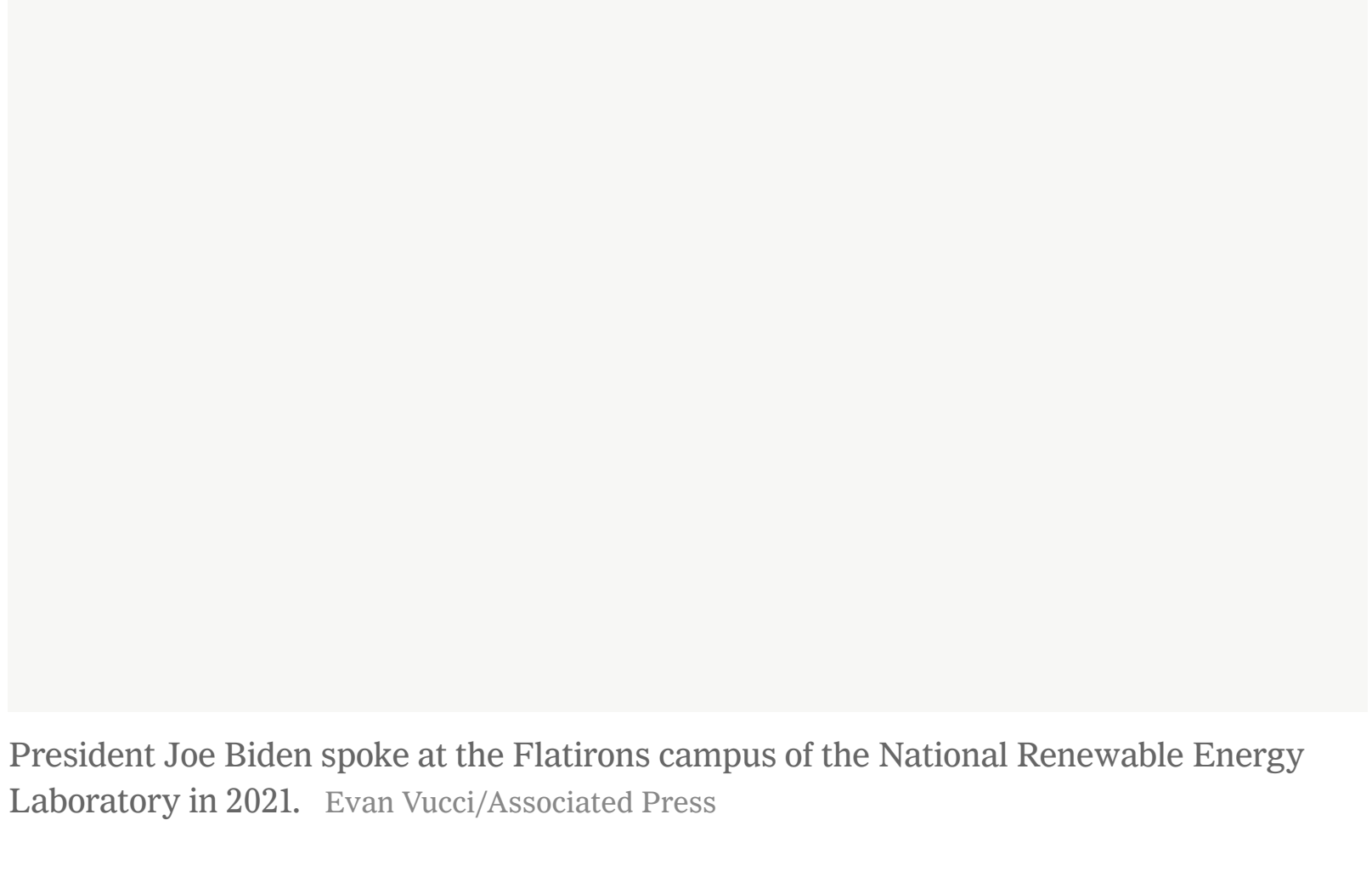
At issue is a federal regulation that broadly governs emissions from power plants. But in a curious twist, the regulation actually never took effect and does not currently exist.

The legal wrangling began in 2015 when President Barack Obama announced the Clean Power Plan, his chief strategy to fight climate change. Citing its authority under the Clean Air Act, the Obama administration planned to require each state to lower carbon dioxide emissions from the electricity sector — primarily by replacing coal-fired power plants with wind, solar and other clean sources. Electricity generation is the second largest source of greenhouse gas emissions in the United States, behind transportation.

But the Clean Power Plan was never implemented. After a barrage of lawsuits from Republican states and the coal industry, the Supreme Court put the program on hold. Once President Donald J. Trump took office, he instituted a new plan that [was effectively the same](#) as no regulation. But on the last full day of Mr. Trump's presidency, a federal appeals court found that the Trump administration had "[misconceived the law](#)" and vacated the Trump plan. That cleared the way for the Biden administration to issue its own regulation, which it has yet to do.

It is highly unusual for the Supreme Court to take up a case that revolves around a hypothetical future regulation, legal experts said.

"Trying to figure out the contours of E.P.A.'s authority to regulate greenhouse gases when there's no regulation being defended is just kind of a weird thing for the court to consider," said Jonathan Adler, a law professor at Case Western Reserve University. "I was surprised when they took the case."



President Joe Biden spoke at the Flatirons campus of the National Renewable Energy Laboratory in 2021. Evan Vucci/Associated Press

The plaintiffs in the case, West Virginia v. Environmental Protection Agency, want the high court to block the kind of sweeping changes to the electricity sector that defined the Obama Clean Power Plan.

Instead, Republican attorneys general in 18 states and some of the nation's largest coal companies will argue that the 1970 Clean Air Act limits the E.P.A. to dictate changes only at individual power plants, not across the entire power sector.

Conservatives have long argued that the executive branch routinely oversteps the authority granted by the Constitution in regulating all kinds of economic activity.

"This is really about a fundamental question of who decides the major issues of the day," said Patrick Morrissey, the attorney general of West Virginia, speaking at an event in Washington earlier this month, ahead of his appearance before the Supreme Court on Monday. "Should it be unelected bureaucrats, or should it be the people's representatives in Congress? That's what this case is all about. It's very straightforward."

Others maintain that Congress delegated authority to the executive branch to broadly regulate air pollution under the Clean Air Act. The legislature makes the law; the executive implements it through regulation, they say.

"Just because the opponents are particularly shrill in their objection doesn't change the fact that this regulation is no different than hundreds of regulation that the agencies have produced since the New Deal — just as Congress intended them to do," said Richard Revesz, who teaches environmental law at New York University and filed a brief in support of the administration.

With the stakes high, each side has drawn legal backing from an array of supporters. Significantly, many of the nation's largest electric utilities — the companies that would be subject to environmental regulation — have filed legal briefs in support of the government. They are joined by 192 members of Congress, the U.S. Conference of Mayors, climate and public health advocates and tech giants like Apple, Google and Netflix.

Lining up behind the plaintiffs are 91 members of Congress and some of the nation's most powerful conservative groups, including Americans for Prosperity Foundation, a group affiliated with the [libertarian Koch family](#) and their billions.

Mr. Morrissey suggested that he was encouraged by the 6-3 split on the court between conservatives and liberals, including a trio of Trump appointees. "We have optimism about the result we're going to get," he said.

Biden administration officials and environmentalists concede that given both the composition of the court and its recent decisions against federal rules, such as [blocking a federal vaccine mandate](#) and ending Mr. Biden's [eviction moratorium](#), Mr. Morrissey's optimism is probably well-founded.

"This is certainly a court that is not friendly to government action," said David Doniger, a lawyer for the Natural Resources Defense Council. "But there are some reasons why we have a fighting chance."

A spokesman for the Justice Department declined to discuss the case ahead of the oral arguments. But in its brief to the court, the Biden administration urged the court to dismiss the case, noting of the plaintiffs that "the current absence of any federal greenhouse gas regulation causes them no tangible harm."

That argument may resonate with Justice Brett Kavanaugh, one of the conservatives on the court, who [first heard the West Virginia](#) case against the Obama power plant regulation when he was a federal appeals judge in 2015.

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That appeals court dismissed that case because the rule was only in draft form and not yet final. At the time, Mr. Kavanaugh told the West Virginia lawyers: "For us to get in the middle of it before it happens seems highly unusual."

The Biden administration will be joined in its oral arguments by some of the nation's largest private and public power companies, which support a broad regulation of their greenhouse pollution.

The power companies have said they prefer the kind of flexibility offered under the Obama plan that would allow them to lower emissions by making changes across the electric grid — shutting down some plants, making others more efficient, and expanding wind and solar. They don't want to be required to make highly prescribed changes to individual power plants, which the plaintiffs argue is the only type the administration can mandate, because they say it would drive up costs.

"The regulated industry itself is saying that they are not fighting the authority of E.P.A.," said Jody Freeman, a lawyer at Harvard and former climate official in the Obama White House. "The court will be attentive, I think, to what the industry says," she said, noting that in a recent case over the Biden administration's Covid vaccine mandate for large employers, the Supreme Court blocked the mandate except in the case of health care workers, who requested the regulation.

And it was Justice Kavanaugh who made that point, noting in the arguments for the vaccine mandate, "the people who are regulated are not here complaining about the regulation."

Smokestacks at a coal power plant near Emmett, Kan., last year. Charlie Riedel/Associated Press

Lawyers for the E.P.A. will be listening closely, because they are expected to propose the power plant climate regulation as soon as next month.

The Supreme Court is hearing the case on the same day that scientists convened by the United Nations plan to release a report that is the most exhaustive look yet at the dire threats that global warming poses to human civilization.

As the impacts of climate change are already being felt in the form of devastating floods, wildfires, drought and rising seas that in the past year alone have killed people and cost billions in damage across the United States, Mr. Biden has pledged to aggressively to cut greenhouse gases. The United States is [historically the country that has pumped the most](#) planet-warming pollution into the atmosphere.

But Mr. Biden's climate legislation is stalled on Capitol Hill and could collapse if Republicans win control of one or both houses of Congress in this fall's midterm elections.

That has placed more emphasis on the power, authority and reach of regulations. After it introduces power plant regulations later this year, the E.P.A. plans to announce tough new limits on auto pollution next year that are intended to speed up the shift from gasoline-powered cars to electric vehicles.

And that is why, the plaintiffs argue, their case is not premature, even though the details of the coming rules are not yet known.

"The threat is very real," said Mr. Morrissey, the attorney general of West Virginia. "It's imminent right now."

Legal experts on both sides said that they see it as the first of many cases that address the growing authority of federal agencies at a time when a gridlocked Congress has failed to pass new laws on issues ranging from climate change to immigration to gun control.

"Congress gets the fancy pins and nice offices because they're supposed to legislate, but they don't do it," said Mr. Adler, the professor at Case Western Reserve University. "There has been a long trend of the executive branch trying to fill the gap left by Congress's failure to act and each administration gets more aggressive on this than the previous one. And there's this larger question of whether the courts should be OK with that."

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