I am a health policy expert. I'm a lawyer by training, I write a blog for the health policy journal Health Affairs, I think that's where most people know me, pretty much anything related to the Affordable Care Act, I write about it. And I'm most interested in this case, which you will note, if you're here, it has nothing to do with the Affordable Care Act, and maybe arguably nothing to do with health policy, because it is a Climate Change Case. But as we know, I think, you know, obviously, social determinants of health, we all care about climate change. The reason I'm so interested in this case is because of the huge potential implications it has for agency rulemaking, and as someone who does Affordable Care Act, and no surprises act in anything health policy, we know that, you know, Congress will pass a law, the federal agencies implement that law. And increasingly, there's litigation over whatever the federal government does. This case, West Virginia versus EPA really has the potential to dramatically shift both what Congress can say to agencies, and then what agencies can do in response to the directives that Congress gives it. And so it is, you know, technically about climate change technically about sort of other issues. But for me, this is a real watershed moment, it potentially, we'll see what the court does, I think the fact that we haven't seen the decision come out yet suggests they might be doing something big, they sort of hold their bigger, more influential decisions to the end. And and I launched right in, you know, I think there were several big cases issued today, I have not taken a close look at the guns case. But it seems pretty devastating. Based on a first pass, I don't know if folks have caught that it's, it's all over your Twitter feed at this point. So I think there's going to be a lot to unpack there. But in the wake of Uvalde, and everything else, a real devastating decision, and I'm expecting some maybe some more devastating decisions, including potentially this one. So I feel like so far it has been everything has been very uplifting. And I'm here to kind of pull things a little bit back down and talk about the courts. So if you haven't been able to tell already, I'm quite informal. So if folks have questions like please raise your hand, I guess it would be helpful to like our most people, or is anyone in the room a lawyer? A few lawyers are focused mostly in like the climate change space or environmental space. Okay. All right. So some of as a health care person, you all are probably going to know even more about the climate change pieces than I do. And so forgive me for being I think, maybe a little bit general or anything like that. So again, please just contribute, ask questions. We're here to chat. And so what I was thinking to do, I sort of gave the kind of why we care at a high level, we care
about climate change. But we also care about what agencies are able to do and what Congress can tell them to do. In the meantime, I'm just going to sort of summarize the case for you summarize the arguments and then talk about, I think, what the potential outcomes could be and what those implications might be. And again, we might see a decision as soon as next week. So this lawsuit is crazy. It's gonna sound crazy. We are all do the build up. This litigation dates all the way back to regular Well, I should even step further back. This is all about the Clean Air Act. So the Clean Air Act was a law passed by Congress. I mean, there's a very old statute, a lot of our environmental laws are quite old. They're designed to sort of be flexible, and to allow the EPA to step in and say if technology has changed, or other things have changed. We have these mounting tests go forth. But they sort of lay out the structure, I would say of how the agency is supposed to do things and say go forth. So some of these statutes date to the 1960s 1970s. I think the last time the Clean Air Act was amended was in 1990. So very old, sort of staid statutes that don't get updated a lot. So what the agency can do to interpret those statutes matters quite a bit, because Congress really doesn't touch them very often. And so this all goes back to the Clean Air Act. The litigation itself stems from two regulations issued by the Obama administration in 2015. So we are talking seven years ago, we are still fighting about what the Obama administration did. This is all about whether the EPA could do what it wanted to do on regulating greenhouse gas emission, so carbon dioxide as an air pollutant, under the Clean Air Act. And so this regulation, there were two regulations. One was sort of hear the new standards going forward for greenhouse gases for new power plants and new factories, new sources of emissions. The one that we're fighting over is called the Clean Power Plan. And the clean the Obama administration's clean power plan laid out the way that it works is EPA sort of comes up with the structure, they set some targets, they're supposed to come up with the language from the statute is the best system and they come up with performance standards. And then what they do is they turn it over to the states and say, We're federal government, we're setting standards, states need to come in and bring us their plan of how they're going to contribute and help meet those targets. If the states don't hit that plan, the federal government can step in and do it on their behalf and regulate. So it is this various sort of we call it cooperative federalism, right federal standards with state flexibility to meet those standards. Medicaid operates similarly, some of the Affordable Care Act operates Similarly, similarly, that's the structure. And so the Obama administration came in and said, we need to do better, we want to hit I think it was a 32% reduction, as of the year 2005, like come in under 2005 emissions by about a third by 2030. And here's a couple of ways in which you could do it, you could do it sort of by regulating individual power plants and individual sources. Or you could do it, what we through what we call generation shifting. And so they really tried to prioritize and encourage sort of a transition to renewable energy. So from higher emitting processes, to lower emitting processes, there were all these encouragement to like, if we're going to really cut emissions by 32%. By 2030, we need to make some shifts. So it was designed to incentivize investments in renewable energy, and solar and wind, while retaining these what these existing power plants were already doing. And I should have said that the Clean Power Plan is all about the existing plants that are out there. So going, we're not going to sort of regulate you out of business. But we want you to have a couple of different mechanisms and ways to pull down your emissions to, you know, meet this crisis that we're in. And so that's really what the regulation said, say, there's anything I missed from there. I think sometimes the Clean Power Plan gets characterized as like the Obama administration's like cap and trade policy. Right, they have been pretty clear, they don't think that that's it right. And the criticism, there would be Congress has been pushed to do more
on greenhouse gas emissions and come up with some system. They haven't done it. And so you know, the lawless Obama administration went forth and did this on its own right, that's sort of the argument. And I, you know, I people in this room probably could push back against that even much better than I could, knowing sort of the details of how that works. I would not characterize the power plan as that it was one option to say, you know, you can sort of do this trading, you can have offsets, you can work across state lines to do this. But we need to hit these targets and states, you have flexibility. The states who sued would say, This isn't real flexibility, we have to, you know, regulate the hell out of our power plants. But I think the on its face, the Clean Power Plan said, you know, there's a ton of flexibility, we are just incentivizing a shift partially away from fossil fuels and coal and some of the, you know, worse contributors to carbon dioxide as an air pollutant. So this was, again, the language in the statute, the best system, and the performance standards that EPA said that, then the states are supposed to go forth and fill in the blanks. Let's see. So that was in 2015, the lawsuit started almost immediately. And so in 20, sitting there were a whole bunch of them state sued. Some of the power plants sued, you know, like the energy industry, I should say, sued. And in some of this, there's energy folks on both sides of this debate, actually, some really like this idea, and they've invested in it, and to pull the rug out from under them would be harmful, you know, don't want to shift their business model at all, and don't want to be told by the government what to do. Whatever pick your side, it's a whole lot of litigation, as we've seen. And so, you know, it sort of worked its way through the courts in 2016. This went up to the Supreme Court for the first time. And in that decision, the Supreme Court didn't fully weigh in on the merits, it didn't say, we are striking down the Clean Power Plan, or we are blessing the Clean Power Plan. But what they did say was there's enough questions here, that we're going to put this on hold, we're not going to, you know, it's on. And if you're coming to a separate panel that I'm on tomorrow, which is a nice plug, you'll hear from Steve Vladek, it was on something through called the shadow docket, which is this process that the court uses to hear emergency applications. And so when I'm saying they didn't really weigh in on the merits, it was kind of like, you know, you go there, when you say, when the companies in the states were saying, Oh, my God, this is going to cost us so much money, please put a stop on it. And they did. That's what they did. They might have suggested something towards the merits, but they didn't rule. And that's one of the reasons the case is back now. So they set aside, you know, clean, the Clean Power Plan did not go into effect. Fun fact, here, this has never gone into effect from what I can tell. So again, why are we fighting about this? It's never gone into effect. Setting that aside, in 2019. And I'm giving you some I'm giving you dates here, right, because we've had so many transitions in administration. So the Supreme Court said that in 2016. You know, what happened in 2016. We all know and then into us, and so, you know, the Trump administration EPA was not going to revive or sort of take a pass at revisiting the Clean Power Plan. They let it sit on the shelf for a while. Fast Forward in 2019, they came back and said, Okay, we're risk we're revoking. We're fully rescinding this Clean Power Plan. And they went a little bit further in their rationale, which is one of the things we're fighting about in the Supreme Court right now, their rationale was the Clean Air Act, unambiguously prevents the EPA from doing what they want it to do. The agent, they were asserting the agency's hands are tied, and that with the goal, I think of never coming back, and they didn't want a future EPA to ever come back and try to adopt this, or, or even allow the system that is sort of broader base, they took the position, that the language in the Clean Air Act means you can EPA can only tell individual power plants what to do, you can sort of look at the aggregate effects, right. So I could say go in and add, I'm gonna embarrass myself in front of the real environmental people like a scrubber, right, or something that like cleans the air coming out of your factory, they could tell each
power plant to do that. But what they couldn't do is what the Clean Power Plan did, which is, you know, go forth as an industry sort of or as states and make this work to pull down emissions as a group. And so that's what the Trump administration, EPA was asserting in this 2019 rule. So they're arguing that like, you know, this 2015 regulation clean power plan could not possibly have been legal under the Clean Air Act. So they pull it back, then they adopted their own version, which is called the blanking on what it's called the ACE rule, but they put the sort of replaced it with their own regulation that did exactly that. That's sort of, we call it single source, emission regulation, only looking at each individual power plant. That's what they argued, you have a whole bunch of states and our company, then you sue over this, right. And so there was litigation, then over this revocation of the Clean Power Plan, and then the subsequent regulation that replaced it. And so you had different states you could imagine. And I should say on that they went even further in their rationale, they argued that states themselves, couldn't even come up with sort of a trading program or couldn't look at things in the aggregate. So it was not even just that the EPA, his hands were tied. They sort of prevented states from trying to do this, and many states have been doing it. And so you saw, you know, states like the New York, like the New York Attorney General, and a whole coalition of sort of the blue states filing there. So now we're in litigation over the Trump administration's rule in January of 2021, which should signal another like, oh, that's an interesting time for the election. You know, speaking of a new administration coming in January 2021, the DC Circuit, which is the appellate court in DC, and they're very well known for sort of understanding and ruling on these very technical, regulatory questions, they review a lot of federal regulations. They're not the only appellate court that does that. But they're sort of widely respected for the work that they do. And in January of 2021, a divided panel meaning there was a dissent to judges and then one dissenter struck down what the Trump administration had done. And I should have drawn some crazy diagram for you, because I know it's already like really confusing. They said, that rationale that the Trump administration gave that the EPA is hands were tied, that can't possibly be right. There's no way in which the stat you know, maybe it's, you could do what you did in sort of the their new Ace role and just do the individual single source regulation, you could do that. But to come in and assert that EPA could never do what it was going to do is incorrect. They said, and so they use that because that was well, in their view, that was really the only rationale that the EPA used when it revoked the Clean Power Plan. And they said that's not a firm basis upon which to revoke this entire thing to just say, Oh, we didn't think it was legal, we pulled it back. And you have a court that's a comes in and says that's wrong, and so they put it back in place. So they strike down the Trump rule. Normally, or I would say in general, when when a Court strikes down an agency's regulation, normally what happens is the old regulation comes back in its place. And typically, it's not always the case. And it's not what happened here. But a lot of the fight that we're having at the Supreme Court is whether the clean power so in that world, if you set aside the Trump administration's ace rule, there is some world where the Clean Power Plan itself could have sprung back into effect. The No one asked for that. And it would have been wild to do it in part because it was 2015. Right? We’re talking 2015 to 2021. You couldn't just bring this back in and some of the rationales like there were dates built into it. There were deadlines that have already passed. There are emission standards that have already been met. And so that 32% target that I was talking about, industry had already been. I don't know, you all could tell me if it just wasn't aggressive enough of us. Standard or if industry was already on the move. But by 2019, you'd already had a 34% reduction in emissions, which is just to say the standard that the Biden ministration had set in 2015. We already met it, at least on a national level, maybe not every state something like 20 States didn't meet it on their own. But nationally, it's alright. So there's a million reasons. I mean, those are two very good
practical ones, why you wouldn't just want the Clean Power Plan this old 2015 thing to come back, right, we've already met it, it doesn't make sense anymore. At a minimum, the agency would have to do some additional rulemaking. So that still got appealed. One of the so I think the, this is a good place to say there is currently no rule, in effect from the EPA, on greenhouse gas emissions, you don't have the Trump rule that's been invalidated. And the Clean Power Plan has not come back. There is literally no rule in place. Why is there a Supreme Court fight about this? Is the question. And so there, you know, I think it gets at the heart of some of the other issues, I follow this whirlwind, you go through with different administration's pushing back and changing quite significant rules, not just on this, but on a whole host of other things every four years, or maybe every eight years, something like that. West Virginia has really and a whole bunch of other people, I can't even name all the sort of parties in this case, right. But they really the folks who hate the Clean Power Plan, really want a ruling from the Supreme Court. They want the Supreme Court to say what what the EPA can do, basically, can they only do this individual single source? I just look at the power plant, they call it the inside the fences approach, or can I do is like something more like what the Obama administration did permissible. They want a definitive answer on this, which maybe you couldn't blame them. But in court, you have things like standing and moodiness. And all these, you know, requirements. We're not the courts are not supposed to be giving it what we call advisory opinions. Right under the Constitution, the courts derive their power, because they rule on cases or controversies. And so there's a whole lot of argument going on. And I in preparation for this, I was re listening to the oral argument. The justices did seem very troubled by the fact that what are we disputing? What is actually there's nothing in effect, who was harmed. States explained to me how you're harmed by a regulation that no longer exists. And you know, what they would say is it could come back, we want you to tell the EPA in the future what they can and cannot do, which might be fair, but it's not typically how the Supreme Court works or how, you know, federal courts in general work, even if I might understand that, that instinct and that desire. But what's Yeah, what's your harm? What's your standing? How is this not just the court opining about what thinks the statute is? And so what you know, and I'm raising that and really kind of hitting that home because the court could punch this. And I personally think they should I don't think this is a right case to be doing this. And what the, again, now it's the Biden administration, defending action and pushing back. Right. So this has changed hands a few times now. But it's now the Biden administration up in court saying, look, there's no controversy here we have, we're going to do a new rule. And the administration committed to putting out a new regulation, at least a proposed regulation on greenhouse gas emissions, they told the court by by the end of calendar year 2022, I'm not following it closely enough to know if there's something sitting under review, or if that's really true, or what they're going to do, maybe they're probably waiting on this decision. But they've sort of said, Look, once we get that regulation out, we can come back and fight about it. But we shouldn't be fighting about this in the absence of anything binding that is even imposing a standard on these on states or on industry. So I think that's a huge part of it, that the they could sort of kick it. And what else did I want to tell you? I think that's it. I mean, this sort of setting that aside, and maybe going to the bigger kind of administrative questions or administrative law questions, I should say, Well, let me sit back. So that's a big should this be in court at all? Why should this be decided now? Shouldn't we wait till there's a live dispute to take this on? That's a whole set of issues, like least important legal issues in and of itself. If they sort of bless this and allow us to go forward, I think we're going to see a ton more litigation over regulations we already do. But it's going to sort of invite almost want to say like game playing between different administrations to try to sort of tie the next one's hands and I think we're gonna get further and further from sort of the real regulation that
we all need to be doing or that the government needs to be doing. So that that I'm harping on that because I think it's a really, really important issue. Why is this should not be the case, where they decide the big questions that now I'm going to Talk about so the second big thing of course, we care about this because of because it's climate change, right, because of the subject matter itself, and what it means for millions of people and equity and all kinds of right all kinds of things, we have to do better. And I did see some nodding when I suggested maybe even the Obama administration standards weren't high enough. folks seem to agree with that. So there, but if we have a bad decision here, a future administration might actually have its hands tied. Right. So we're in this place now, where the Trump administration asserted that if you and the DC Circuit disagreed, may didn't think the agency's hands were tied. But you might have a Supreme Court that comes in and says, yeah, no, this word, you're very limited. The EPA has a very narrow sort of room or space to navigate when it wants to take on carbon dioxide and greenhouse gas emissions. So we care about that from the substantive side too. And then I is maybe more of a traditional healthcare person care about it for what it means for these broader agency questions. And so there you have to kind of talk about and dig up the arguments, which is, takes us back in time a little bit to some of the recent COVID cases that we've heard even further, this has come up in tobacco regulation. At one point, the FDA tried to assert that nicotine, that cigarettes could be regulated under its drug and device authority. The Supreme Court really pushed back against that given this, given the fact that Congress had rejected that in the past. In King v. Burwell, which is a big an Affordable Care Act case that the Supreme Court issued in 2015. The IRS had said financial help and subsidies are available in all states, regardless of whether a state or the federal government set up a marketplace. They are the Supreme Court, the Chief Justice said, that's not really a question for the IRS. That's something that Congress decided and to sort of pull power back from the agency deciding it was a good outcome, in my opinion. But we have seen that those two cases, the tobacco case, and King paper will get cited over and over and over again, in what we've seen. And then you sort of fast forward to the last term in this term. And it's really showing up in the COVID cases. So I'm thinking of the eviction moratorium case, where the CDC had this policy on housing. And that's been struck down by the Supreme Court, OSHA's vaccine or test mandate, OSHA that has been struck down with the even the the sort of mask mandate, which was a lower court, not the Supreme Court, but all these decisions that you're sort of seeing, pulling back. And in those cases, they've all been somewhat similar to the regulatory authority that we're talking about here with the EPA, a broad statute, designed to give flexibility to the agency to sort of bring standards in line, whether it's new technological advances, whether it's an emergency public health or otherwise, you know, and this happens a lot in the environmental space and in the healthcare space, because circumstances change quite quickly. Congress doesn't have the expertise. So they often are deferring to these federal agencies. They say here, we're going to put some put some guardrails on what you can do and what we want you to consider. But agency go forth CDC, go regulate sanitation, we're going to keep that broad those kinds of things. And this EPA statute is similar. And what we're running into with the Supreme Court, and in the lower courts as well, is the skepticism of that deference from Congress to the agencies. And so far, it's come up again, like if you think about the eviction moratorium case. I don't know should CDC be making housing policy? That was one of the questions that the court really grappled with. And one of the things that they're kind of working into their framework about how they think about these issues, which is when the agency is doing something you wouldn't normally think of them doing. You know, should you be telling 10 Like landlords what they can do as the public health agency? I think it was fine. But that those are that's the way that for OSHA, should you be I think the
argument there was, can you really be dictating the behavior that workers have off site outside of employment, and we've never done a vaccine mandate before from OSHA? Is this really workplace safety? This seems like something beyond the pale and it's new. So you've sort of seen this skepticism going, we're not gonna allow these agencies to do that. We're not going to read that authority broadly anymore. Historically, we have all in the courts have long defer to the agencies, and we could talk more about that if folks are interested. We are seeing this extreme skepticism. What I'm most sort of interested in and worried about with this case. West Virginia was the EPA is definitely authorized to do this. This is different from the CDC regulating housing. This is the EPA regulating greenhouse gas. And so I think if you see a pullback here and skepticism from the Supreme Court here, that's going to have sort of repercussions like there's a world in which you could argue, the OSHA man Now to vaccine or does mandate and the the marjoram are sort of special cases. I were here, this would not be a special case. This is like part and parcel and like the heart of what the EPA does. And if you tell them they can't do this, under this interpretation of the statute, I think it's going to have big broad implications. And so some of the, you know, I'm kind of talking about this generally, some of the skepticism on the deference to agencies, we call it like, major questions, doctrine and non delegation doctrine, I would just feel silly if I left this room without saying those phrases to you, because I think we're gonna start reading them, and they're gonna be much more on people. Maybe that is, I don't know why that would be true. That's just my mind. No, your average person is not going to be talking about major questions doctrine, but you might see it somewhere soon. You know, and the major question is doctrine. And I should say doctrine, because these are really sort of judicially created principles, is the idea that Congress is not deferring to agencies on major questions, without being very, very clear about it. And major, major questions is sort of open to interpretation right now. In some cases, they call it any issue of vast political and economic significance. Which could be pretty much anything, if you ask me, you know, there's a way to construe pretty much anything an agency wants to do as pretty significant, whether it's dollars or lives affected, or industry impacts, that could be really broad. Sometimes they call it the extraordinary cases doctrine. So again, maybe CDC, maybe some of these emergency COVID cases, arguably could fall closer in those categories. Again, I'm watching to see what they do here on something that is much more aligned with what the agency is supposed to be doing in the first place. And there's a lot of I don't, I don't know what the right word is not confusion, even during the oral argument, like well, the court itself has not decided what the major questions doctrine is. And it's a little bit it's sort of loose. Even during oral argument, in this case, in West Virginia, you had the different justices pulling the lawyers, they weren't really giving what they thought or their view of major questions. They asked the government, what do you think major questions doctrine means? They asked West Virginia, where you think you mean, give us your take? How about this, and it felt like they're sort of trying to collect all these ideas. But the the core of it, I think, is unless Congress clearly tells an agency to do something. Agents, EPA go set up a cap and trade program, this court might not bless it. Unless Congress says go do a vaccine mandate for workers, go do a mask mandate on public transportation. And so we're really and what I guess what I want to emphasize, and then I might stop and take questions or make it a little bit more chatty, is we are changing the rules on Congress while we're doing eight? Well, there's two things. One is that we're changing the rules on Congress. So we have for, you know, we haven't used the non delegation doctrine to strike down as the court hasn't historically, under statute in 90 years, like we have law in since 1984, we've had this something called Chevron deference, which is where the courts defer to the agencies, when they make a reasonable interpretation of a statute. They're asked to interpret. We have law and and the reason for that is because we don't want courts stepping in and
substituting their own judgment for the next, you know, expert judgment of the agency. Sometimes that breaks down sometimes it doesn't. And I think there may be there was a lot of people who, you know, didn't want deference to the Trump administration on a whole host of things, right. But the idea is that we there has long been this deference. And so Congress has also operated under that assumption, Congress has written these broad statutes delegating authority to the agencies. And so one of the things I really worry about, and it just, it's important, because of all the dysfunction in Congress, right, so many of the what this is going to what it's going to do is we'll have these old laws that you can't use to, for the agency to do what it needs to do to maybe bring things into the 21st century. And then you're going to have a Congress that can't fix it. But you're going to have the courts, all of a sudden, in many cases, telling Congress, you weren't clear enough, you need to go back and do this, again, you need to tell the agency what to do, which is a huge shift, and something that I think is going to make it very, very hard and ultimately will tie the hands of federal regulators on a whole host of issues. Everything has to be crystal clear and directed from Congress. I mean, it's gonna be really hard on health care on the Affordable Care Act, where that that statutes not going to be touched for a long time, for example, and I think you think about the age of the Clean Air Act and a lot of our environmental statutes, the idea that Congress is going to be revisiting any of those anytime soon, I think is is far fetched. Maybe Maybe I'm wrong about that. I'd be happy to be wrong. The second piece of this is yeah, it's just it's really going to I mean, I covered it, it's really going to tie the government's hands in terms of what they're able to do and how they're able to navigate. And one thing I'm sort of watching and I am concerned that If you've really smart lawyers at the Department of Justice and at the agencies were, even if the court in this case doesn't go all the way there, and doesn't strike down even some suggestion that agencies don't have as much room to navigate or flexibility could really tie the Biden administration and future administrations, but right now, the Biden ministration, up in north, and I think you saw the gun case today. So some of the things they might want to do I know, folks are thinking about a response to the dogs decision on abortion, what you know, what can government do, these things are going to matter for how we're able to respond to what's going on in the real world. And if you can't sort of count on Congress, even in a bipartisan way, right to do new things, or authorized new things, it sort of starts to dismantle the administrative state, and really undercuts federal regulation. So I hope that was not too wonky about I think this is why it's a big, big case. And if you don't sort of from the way the Chief Justice, saying, you know, this is going to come back and we'll be ready and all that. But there are so many questions here on mootness, and standing and all that, but it's not the right vehicle. And so there is a world that in which they do that. But inevitably think this, this issue is going to be back before them depending on what the Biden ministration does. Or they could go all the way and like flip the table, sort of more of what I'm talking about and say, Oh, my gosh, major questions. Congress has to speak clearly, before we let agencies do anything, but the most kind of minor sort of gap filling. So I probably made that as confusing as possible. I'm not I'm happy to take any questions or, or comments from folks, and I don't even know what how we're doing on time. But Oh, perfect. Okay, great. Yeah, we're just discussion whatever's of interest to folks. Yeah, please.
Feel like karaoke. Thanks so much for this. It's fascinating as somebody who has worked, supporting federal agencies, through foundations, it's a unique kind of flexibility. I'm just interested in where you would see, you know, unique mechanisms like that may be coming in to help support the work of federal agencies. Also, if you have any, maybe predictions for based on the legal landscape of what other sort of, you know, because I'm thinking, you talked about COVID. I've heard about, you know, future, some states are like preventing mass mandates. I'm, you know, I'm worried about requiring basic vaccines, not just COVID vaccines, but basic vaccines, you're starting to see states like Georgia, you know, like Texas, come up with, you know, laws at the state level that would maybe affect that. So I'm just interested to hear your perspective, from a public health side of this, around that. And then also, kind of the second part of the question is like, what sort of unique mechanisms may be able to help the support the federal agency do their aims?

Katie Keith 33:37
Those are great questions. I mean, I think it's pretty i This is not a, it's pretty devastating on the public health set. Right. I don't know what else to say. And just again, this, what I skimmed with this guns decision, for example, is just going to really open things up on the state level, in particular. And so I think the same thing about some of the sort of public health or not just COVID vaccines, but vaccines in general, doesn't necessarily raise the same sort of like major questions, doctrine issues. But I do think when you have that that trickle down effect is incredibly important. So if the federal government can't do this, the states are sort of free to do, right. Normally, federal regulations can come in and preempt some of that. And if that is not what's able to happen. I think vaccines at the state level might be a bit of a special case because of state authority to do vaccinations and all that but on under their police powers, but the trickle down of a federal government that is potentially broken, right, like a federal agency that can't do what it wants to do or do what it needs to do. Leaves a void that then states fill positively or negatively, right. So California is going to continue with what it's doing. But Texas or maybe Georgia, might not have there might just not be that counterbalance of the federal government to come in and do sort of what what folks in this room might be was like positive regular patient's in its place. So I think it could just I think it's more of the absence of the regulation could really sort of open things up even more on the state level than what we've already seen. I would like to think a bit more about that question. But that's sort of off the top of my head. And then I think some of the mechanisms I, you know, I will probably say this again tomorrow, like, I don't, I'm quite concerned about this, as you can tell, I don't want to be too sort of down about it, I do think we have to get smarter about litigation, like thinking about the litigation risk of all these policies that we do, from Congress all the way down. So including the agencies. And so something I'm already trying to think through is, depending on the scope of this decision, what we don't want necessarily is for a whole bunch of law professors, myself included to go, the agencies fully have their hands tied, they could never do anything. I think it's going to take like a whole team and a whole mechanism of going, even if you are limited here. What is the room that the agency still has to navigate, we're still going to have to do things and try things. And it's going to be up to the Biden administration to sort of figure out which issues it wants to push the envelope with. Right, I think on the OSHA vaccine or test mandate? I don't Well, I don't know, they thought that that you know, they would win in court. i My sense is they thought regardless, they thought it was important enough to do, and it gave employers cover to do their own mandates, right, to get more people vaccinated. I think for some for the post office decision, there might be some things like that, where they go for it, even if
it's completely legally uncertain. But I don't think we're gonna be able to do that for everything. And so it
is, I think there's gonna have to be some expectation setting, and like some broader understanding,
probably from the more progressive side of like, what is even going to be possible after this. Because if
we keep going that way, we could end up creating really bad law, we could even further tie the hands of
the agencies in a way that would be bad. So I think the mechanisms are probably very sophisticated,
like sort of legal analysis and advocacy that needs to come out of this. It will fully depend on the
decision, and sort of the scope there. But that's what comes to mind off the top of my head.

37:19
Hi, so it's a bleak scenario. At 9am. I tea and tea leaves are hard to read. But I'm just wondering, since
you know, there are nine people now who are going to decide this case, and I think we at least know
that a couple of them pretty much do want to tie the federal government's hands. They don't like the
federal government, they don't like agencies. And we probably know that a few of them who don't want
to type it. So the ones in the middle, potentially, that's what we want to call them right now. Was there
anything that was said at oral argument or anything in their records previously, that could offer a
glimmer of hope? That maybe they're looking for a way out? Kick the can down the road? Or that I don't
know, is Kavanaugh, particular Gorsuch, any of them? Any hints any glimmer of hope that they might
be disposed not to do something devastating here?

Katie Keith 38:09
I have no good news for you. Sorry, no, it's a good it's a great question. I think the most likely best, like
the best outcome from from my personal perspective is that they just they dismissed this case, and they
shouldn't have granted it. I don't know, if they're going to again, I'm anxious that they've kept it. If they
were going to do it, maybe they would have kicked it already. The fact that it's sort of maybe one of
going to be issued on one of the last one, if not the last day of the term makes me a little bit nervous.
But that's, you know, I'm just speculating like everyone else. I think one thing that's coming to mind, and
the way to think about the court for folks who maybe aren't watching all the time, I always say this to
people in there, like what you sort of have the, you know, sort of the most conservative block, which is
like Justice Thomas, Justice Gorsuch and Justice Alito, over here, I would put justice Amy Coney
Barrett there as well, sort of on the more liberal side, you have, Justice Breyer, Justice Kagan, Justice
Sotomayor, and you then have the Chief Justice and justice Cavanaugh, and so you need five votes to
win, which is a very obvious thing to say. But when you still had Justice Ginsburg on the court, you had
at least four sort of more liberal justices, you only had to pull one of the more conservative justices,
right, you could pull the Chief Justice you could try to get typically it was the Chief Justice. Back in the
day, it was like Justice Kennedy, right? With only three sort of more liberal justices, you have to pull two
of those more conservative justices. And so you have to have the Chief Justice generally, which is not a
given in a lot of cases. And then you have to pull one more. And so I think the way to think about the
court is justice Cavanaugh is the swing vote on the Supreme Court right now. He's sort of the center.
And so just to put I mean, to put that in perspective, that's the way to think about it. And I will say that
you I mean you Haven't looked at this lately. There's some statistics that show that Justice Kavanaugh
votes with the Chief Justice almost one to one, maybe that's going to shift over time. But there's, I'm not
going to psychoanalyze with this camera. But there's like a, you know, there's maybe a mentorship that
or I don't know what you call it, but they vote together often, at least they have historically. So there's
something there, just as Kevin was on the DC Circuit, during one of these reviews, and I think descent
would I should have looked at this before I got up here. My son, I can't remember that code is my sense is that it was not helpful. He dissented from a request to for rehearing on bonk for one of these decisions and said, like, no, no, this is really important, we should hear this case, and would have maybe come out the other and I don't know if that holds. I can't think of anything necessarily from the argument. I think, you know, if anything, it's probably how the decision gets written rather than like an up or down. You know, how devastating of a major questions doctrine are we writing or not delegation or something like that? Where do they sidestep it altogether? And just kind of kick the case or decide narrowly, there's there could be some hope I shouldn't be so dour. But I don't. I didn't get a sense of something to hold on to go, this is going to be okay. And I do think this sort of maybe liberal continued, did a really good job asking questions and trying to get things out and going. This doesn't make any the way you're trying to tie that up his hands makes no sense, based on the statute and the sort of practical nature of regulating emissions. I just don't know if it landed. Sir.

41:43
Thank you, you know, in lieu of the decision, do you think that you know, already this kind of cycle of litigation and court battles has been having a chilling effect on federal rulemaking? I know, you mentioned some of the maybe cases during you know, earlier in the pandemic, when agencies were maybe going for it a little more than normal. But are there other areas where you would maybe expect to see some rulemaking or some action? And you haven't?

Katie Keith  42:11
It's a terrific question. I mean, I do think, as a non government person, it's a little bit hard for me to say like this could have happened, but didn't, I do think I do get the sense from the folks who I know who work on those buildings. That lit the shadow of litigation, the mere possibility of litigation hangs over everything. And so and it's not even necessarily these most controversial issues. So something I follow is like implementation of the no surprises Act, which is like a huge, historic bipartisan ban on surprise medical bills. And the Biden administration did a regulation that made some of the health care provider community mad, but wasn't isn't sort of ideological in the same way as maybe some of what we're talking about here is, and there's eight lawsuits over that. And so it was just an incredible I mean, as someone who follows us, of course, it's an incredible amount of litigation. And so it just, it's sort of penetrating everything that they're doing, and being exacerbated by sort of a much more conservative federal judiciary because of who President Trump appointed. So I can't I don't have a strong example of like, they could have done this but haven't I will say, I'm waiting on Mike get them today, because it's the anniversary of Title Nine, but Title Nine regulations, and some things called Section 1550 stuff. So you know, the regulations on sexual harassment and they often have maybe protections for LGBTQ students, those so I think some of like the Biden assertion, at least on the issues I follow has not sort of gone gone big on healthcare. And this is sort of the year we're watching and waiting to see if they're going to do that and push. There's a role in the family glitch, short term plan some of these things that are maybe they haven't been done before. So this I think this is the year but this decision could throw even more of a wrench in what they perhaps wanted to do. So not a perfect answer, but Well, thank you. I'm sorry to be very depressing at 9am I will also be depressing at 140 Tomorrow afternoon with a partner so if it was gonna come but thank you for coming. This is lovely