

NSR Tech Policy: Supreme Court decision may throw up more barriers on the road to tech reform

By [Matt Perault](#) | June 28, 2022

Last week, our New Street Research Policy colleague, Blair forecasted the potential impact of the Supreme Court's upcoming decision in *West Virginia v. EPA* on rulemaking by administrative agencies ([LINK](#)). He wrote that "every current act delegating authority to an expert agency, and every rule that was adopted pursuant to that delegation, is now likely to be subject to new legal challenges." Judges will likely have more power to shape agency rules, and Congress, to achieve their goals, will likely have to craft statutes more specifically to seek to avoid conflicting interpretations by judges.

The focus of that note was principally on the telecom sector, so we highlight additional points below on the impact this decision could have on the tech sector specifically.

- **More headwinds for FTC rulemaking.** In recent years, some scholars and advocates have made the [case](#) that the FTC should issue rules to govern the tech sector in areas like privacy and artificial intelligence. The calls for administrative rules have increased as tech reform efforts in Congress have stalled. FTC Chair Lina Khan has attempted to [initiate](#) rulemaking procedures in [line](#) with this view. But the path to FTC rulemaking for the tech sector is not easy, as some [argue](#) that the FTC does not have broad rulemaking authority, and any FTC rule for the tech sector will likely be challenged in court. Although *West Virginia v. EPA* does not address the question of FTC rulemaking authority, it will make it more difficult for any rulemaking in the tech sector to survive judicial review. To survive a challenge in court, the FTC would not only need to prevail on the question of whether Congress intended to delegate to the FTC the authority to issue the rule in question, but also whether the FTC has properly used authority in the case at hand. After *West Virginia v. EPA*, the FTC would receive no deference on that question, which increases the chances a district court judge could strike down any rule.

- **More headwinds for tech reform in Congress.** It is typical for Congress to avoid difficult, detailed questions about how a statute will apply in practice by deferring these issues to the rulemaking process at an administrative agency. The likely decision in *West Virginia v. EPA* will make it more difficult for Congress to delegate this decision-making authority to agencies. As Blair wrote last week, “unless Congress enacts laws that have one and only one meaning when applied to all situations and never requires rules to change as science or economics may evolve, then the judiciary will now make the laws and regulations” ([LINK](#)). The pressure on Congress to include more detailed language in statutes will make tech reform even more challenging, since many of the [most prominent proposals](#) have been able to build support in part by punting challenging questions to agencies. If every proposal must now either specify how a particular issue must be resolved or risk administrative rules that could be easily overturned by any district court in the country, the prospects for meaningful tech reform diminish even further.
- **States and the EU continue to take the lead in tech reform.** With increasing headwinds for both FTC rulemaking and Congressional action in the tech sector, it is likely that we will continue to see the states and the European Union play the lead role in developing and implementing tech reform, a point we made in both our Q1 ([LINK](#)) and Q2 ([LINK](#)) presentations on regulatory risk in the tech sector.

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