Nos. 20-1530, 20-1531, 20-1778, 20-1780

IN THE

Supreme Court of the United States

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF PETITIONER WESTMORELAND MINING HOLDINGS LLC, No. 20-1778

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QUESTIONS PRESENTED

Whether 42 U.S.C. § 7411(d) clearly authorizes EPA to decide such matters of vast economic and political significance as whether and how to restructure the nation's energy system.

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The D.C. Circuit consolidated numerous cases under Case No. 19-1140. Respondents in the D.C. Circuit proceeding below were the Environmental Protection Agency and its Administrator.*

Petitioners and intervenors in the D.C. Circuit proceedings below were as follows.

No. 19-1140: Petitioners were American Lung Association and American Public Health Association.

Intervenor for petitioners was State of Nevada.

Intervenors for respondents were AEP Generating Company, AEP Generation Resources Inc., America's Power, Appalachian Power Company, Chamber of Commerce of the United States of America, Indiana Michigan Power Company, Kentucky Power Company, Murray Energy Corporation, National Mining Association, National Rural Electric Cooperative Association, Public Service Company of Oklahoma, Southwestern Electric Power Company, Westmoreland Mining Holdings LLC, Wheeling Power Company, Basin Electric Power Cooperative, Phil Bryant, Governor of the State of Mississippi, Georgia Power Company, Indiana Energy Association, Indiana Utility Group, Mississippi Public Service Com-

* During the pendency of the proceedings below, the EPA Administrator was Andrew Wheeler. The current officeholder is Michael Regan, who is automatically substituted as a party.

mission, Nevada Gold Mines LLC, Nevada Gold Energy LLC, Powersouth Energy Cooperative, the States of Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky, by and through Governor Matthew G. Bevin, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming.

No. 19-1179: Petitioner was The North American Coal Corporation

Intervenors for respondents were American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., City and County of Denver Colorado, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, District of Columbia, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

No. 19-1165: Petitioners were the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New

Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, Wisconsin, District of Columbia, Commonwealths of Massachusetts, Pennsylvania, and Virginia, People of the State of Michigan, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, and City of South Miami.

No. 19-1166: Petitioners were Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club.

Intervenors for respondents were Indiana Energy Association and Indiana Utility Group.

No. 19-1173: Petitioner was Chesapeake Bay Foundation, Inc.

Intervenors for respondents were International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, International Brotherhood of Electrical Workers, AFL-CIO, and United Mine Workers of America, AFLCIO.

No. 19-1175: Petitioners were Robinson Enterprises, Inc., Nuckles Oil Company, Inc., doing business as Merit Oil Company, Construction Industry Air Quality Coalition, Liberty Packing Company, LLC, Dalton Trucking, Inc., Norman R. Brown, Joanne Brown, Competitive Enterprise Institute, and Texas Public Policy Foundation.

Intervenors for respondents were American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., City and County of Denver Colorado, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, District of Columbia, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

No. 19-1176: Petitioner was Westmoreland Mining Holdings LLC (Petitioner here).

Intervenors for respondents were American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., City and County of Denver Colorado, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, District of Columbia, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota

Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

No. 19-1177: Petitioner was City and County of Denver Colorado.

No. 19-1185: Petitioner was Biogenic CO_2 Coalition.

Intervenors for respondents were American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club.

No. 19-1186: Petitioner was Advanced Energy Economy.

No. 19-1187: Petitioners were American Clean Power Association and Solar Energy Industries Association.

No. 19-1188: Petitioners were Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New

York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District.

Pursuant to Supreme Court Rule 29.6, Petitioner provides the following disclosure statement: Westmoreland Mining Holdings LLC ("Westmoreland") has an extensive portfolio of coal mining operations in the United States and Canada. Westmoreland has no parent corporation and no publicly held corporation owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

The centerpiece of the American Clean Energy and Security Act of 2009 was an amendment to the Clean Air Act establishing a cap-and-trade program for greenhouse-gas emissions, primarily carbon-dioxide emitted by power plants. The Act's sponsors and supporters, including President Barack Obama, championed it as a historic measure to decarbonize the electricity sector and transition to renewable generation. To those ends, the Act backstopped its cap-and-trade program with an elaborate structure of mandates, subsidies, timelines, and targets.

But this case is not about that legislation, because it didn't pass Congress. Nor did the scores of other bills before and since proposing similar programs.

Instead, the subject of this case is the Environmental Protection Agency's authority to enact a functionally identical cap-and-trade program for the electricity sector so as to decarbonize generation and force a transition to renewables. After his legislative push failed, President Obama directed EPA to go it alone. And so it did, pointing to an all-but-forgotten backwater of the Clean Air Act, Section 111(d), as authority to restructure a central sector of the economy. To achieve its decarbonization objective, EPA claimed the unprecedented power to set emission requirements that existing facilities could not achieve in operation, but only through what EPA called "generation shifting"—that is, reducing the utilization of or shuttering plants in favor of lower-emitting sources like wind and solar power. The statutory interpretation underlying EPA's rule, the "Clean Power Plan,"

("CPP") empowers EPA to regulate practically any kind of emissions source across the economy out of existence.

This is not the first time the Court has confronted an agency's "claim to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy" or otherwise decide questions of "vast economic and political significance." *Util. Air Regul. Grp. v. EPA* ("*UARG*"), 573 U.S. 302, 324 (2014) (quotation marks omitted). This isn't even the first case involving such a claim asserted in an EPA regulation addressing greenhouse-gas emissions. *Id.* But it is an unusually stark illustration of a recurring problem: agencies sidestepping Congress to decide major questions, the sort that Congress ought to be the one to decide, on their own. Worse, the prospect of agency action relieves pressure on Congress to legislate, which in turn leaves it to agencies to act in Congress's breach. That vicious cycle is an unfortunate consequence of the reality that "diffusion of power carries with it a diffusion of accountability." *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 497 (2010).

But there need not and should not be any confusion over agency power in this case or its ilk. The Court's precedents applying the "major questions" doctrine hold that Congress must "speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *UARG*, 573 U.S. at 324 (quotation marks omitted). That rule draws a straightforward and easily administrable line—clear statutory authorization—governing asserted delegations of power

to decide major questions. And the Clean Power Plan's claim of authority to restructure entire industrial sectors falls far on the wrong side of that line, as the statute says nothing of the sort.

Although many of the lower courts have faithfully followed this Court's major questions precedents, others like the court below have given the doctrine short shrift. And that opening emboldens agencies to press their luck, as EPA did here. The Court should take this timely opportunity to make clear that it meant what it said in *UARG*, *FDA v. Brown & Williamson Tobacco Corp.*, *MCI Telecommunications Corp. v. American Telephone & Telegraph Co.*, and its other major questions cases; clarify that the doctrine is not limited to questions of agency jurisdiction, as the court below believed; and emphasize that the recesses of a statutory scheme are no place to discover vast and unheralded agency power. So doing will break the vicious cycle of agency overreach and place the power and responsibility to decide major policy questions where they properly belong: with Congress.

OPINION BELOW

The D.C. Circuit's opinion is reported at 985 F.3d 914 and reproduced at J.A.53.

JURISDICTION

The D.C. Circuit entered judgment on January 19, 2021. J.A.53. The petition for certiorari was timely filed on June 18, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Clean Air Act § 111(d)(1), 42 U.S.C. § 7411(d)(1), provides, in relevant part:

> The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance.

Section 111(a)(1) provides:

> The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements)

the Administrator determines has been adequately demonstrated.

Section 111 is reproduced at Pet.App.204a.

STATEMENT OF THE CASE

The Clean Power Plan's limitations on carbon-dioxide emissions from coal- and gas-fired power plants are premised on "shifting" electricity generation away from those plants in favor of lower-emitting sources like combined-cycle gas, wind, and solar. EPA located the authority to restructure the Nation's electricity sector in Section 111(d), an obscure provision employed a handful of times over the past five decades to improve the operating performance of existing facilities.

1. EPA has never been responsible for determining the mix of generation necessary to satisfy the Nation's electricity needs. Instead, regulation of the need for, types of, and utilization of generating capacity has always been the purview of the States and, as to limited aspects affecting wholesale rates, the Federal Energy Regulatory Commission (or its predecessor).

Since the dawn of the Age of Electricity, the regulation of electric generation has been the province of the States. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 206 (1983). The States have long exercised "their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Id.* at

205. This includes specifically "authority over the need for additional generating capacity [and] the type of generating facilities to be licensed." *Id.* at 212. Indeed, "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). And States exercise that power diligently, particularly with respect to the mix of generation.[2]

Congress, in turn, has long resisted intruding on State authority in this area, legislating with "meticulous regard for the continued exercise of state power, not to handicap or dilute it in any way." *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 388 (2015) (quoting *Panhandle E. Pipe Line Co. v. Pub. Serv. Comm'n of Ind.*, 332 U.S. 507, 517–18 (1947)). In the Federal Power Act, it filled a "regulatory gap" by providing for federal regulation of interstate wholesale electricity transactions held to be beyond States' reach, *id.* at 384, but it generally denied federal regulatory authority "over facilities used for the generation of electric energy," 16 U.S.C. § 824(b)(1). Thus, FERC "has no authority to direct or encourage generation." Congressional Research Service, The Federal Power Act and Electricity

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[2] *See, e.g.*, *Petition for A Ltd. Proceeding to Approve Second Solar Base Rate Adjustment, by Duke Energy Fla., LLC*, No. 20190072-EI, 2019 WL 3323489, at *2 (Fla. P.S.C., July 22, 2019) (approving project because it would "diversify and strengthen [the] supply side generation portfolio"); *Application of Alle-Catt Wind Energy LLC for a Certificate of Env't Compatibility & Pub. Need*, No. 17-F-0282, 2020 WL 3036287, at *48 (N.Y.S.B.E.G.S.E., June 3, 2020) (similar).

Markets 9 (2017). As FERC has acknowledged, that power remains reserved to the States. *New York v. FERC*, 535 U.S. 1, 24 (2002); *see also Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016) (identifying this as an area of "[t]he States' reserved authority"). Likewise, when Congress has authorized federal regulation of things like nuclear-plant safety, it has not disturbed the States' "traditional authority" to make decisions regarding the need for and types of power generation. *Pacific Gas*, 461 U.S. at 212; *Vt. Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 550 (1978).

2. Prior to the CPP, EPA had never asserted authority to prescribe or otherwise regulate the mix of generation sources. The CPP purported to find this authority in Section 111(d) of the Clean Air Act.

"The Clean Air Act establishes a series of regulatory programs to control air pollution from stationary sources[.]" *Michigan v. EPA*, 576 U.S. 743, 747 (2015). Among them is Section 111, entitled "Standards of performance for new stationary sources." 42 U.S.C. § 7411. The statute directs EPA to list "categories of stationary sources" that it determines to "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." *Id.* § 7411(b)(1)(A).[3] EPA then must "establish[] Federal standards of performance for new sources within [each] category." *Id.*

[3] A "stationary source" is "any building, facility, or installation which emits or may emit any air pollutant." *Id.* § 7411(a)(3).

§ 7411(b)(1)(B). A "new source" is one built after the proposal of standards. *Id.* § 7411(a)(2). To date, EPA has listed and established standards of performance for more than 70 categories of new sources. *See* 40 C.F.R. Part 60.

Notwithstanding its title's reference to "new…sources," Section 111 also addresses existing sources. Weighing in at all of a paragraph, Section 111(d)(1) authorizes EPA to "prescribe regulations" directing each State to submit a plan establishing and implementing "standards of performance" for emissions of certain[4] existing sources in categories that are subject to new-source standards. *Id.* § 7411(d)(1).

The Clean Air Act defines "standard of performance" in two places. Although Section 111 is the only provision establishing any "standard of performance," the term is defined in the Act's general "Definitions" provision as "a requirement of continuous emission reduction, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction." *Id.* § 7602(*l*). And it is defined in Section 111 itself as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and

[4] Specifically, those where neither the relevant pollutant nor the source is already covered by the National Ambient Air Quality Standards program or National Emissions Standards for Hazardous Air Pollutants Program, respectively.

energy requirements) the [EPA] determines has been adequately demonstrated." *Id.* § 7411(a)(1).

Thus, Section 111(d) establishes a two-step process for imposing standards of performance on existing sources. First, EPA publishes an "emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities." 40 C.F.R. § 60.22(b)(5). Second, States then establish "standards of performance for any existing source[s]" based on EPA's guideline and consideration of the factors like "the remaining useful life of [a given] existing source." 42 U.S.C. § 7411(d)(1). Only when a State fails to submit a satisfactory plan may EPA directly impose a standard of performance on existing sources. *Id.* § 7411(d)(2).

From its enactment in 1970 to adoption of the CPP in 2015, Section 111(d) was applied to a sum total of "four pollutants from five source categories," 80 Fed. Reg. 64,703 & n.275 (Oct. 23, 2015), with only one added since the provision's last amendment in 1990, 61 Fed. Reg. 9905 (Mar. 12, 1996). "Every one of those rulemakings applied technologies, techniques, processes, practices, or design modifications directly to individual sources." 84 Fed. Reg. 32,520, 32,526 (July 8, 2019) (listing and discussing rules). None relied on measures wholly outside individual sources, decreased utilization of individual sources, or "shifting" production away from individual sources. *Id.*

3.a. Upon taking office, President Barack Obama pledged to cut U.S. greenhouse-gas emissions by transitioning electric generation from fossil-fuel sources to renewables.[5] To that end, the Obama Administration, and the President himself, championed legislation to cap electricity-sector carbon emissions and thereby force a transition to renewable generation.[6] After Congress declined to enact that policy into law, the President announced in his 2013 State of the Union address that his administration would instead proceed through executive action: "[I]f Congress won't act soon to protect future generations, I will. I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution…, and speed the transition to more sustainable sources of energy."[7] A few months later, he ordered EPA to propose and finalize carbon-emission standards for

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[5] *See* Executive Office of the President, The President's Climate Action Plan 6 (June 2013) available at https://obamawhitehouse.archives.gov/sites/default/files/image/president27sclimateactionplan.pdf (last visited Dec. 3, 2021).

[6] *See* President Barack Obama, Speech on Climate Change at the United Nations, 2009 Daily Comp. Pres. Doc. 736 (Sept. 22, 2009) available at https://obamawhitehouse.archives.gov/the-press-office/remarks-president-united-nations-general-assembly (last visited Dec. 9, 2021).

[7] President Barack Obama, State of the Union Address 2013 Daily Comp. Pres. Doc. 90 (Feb. 12, 2013); *see also* President Barack Obama, Remarks by the President Before Cabinet Meeting, 2014 Daily Comp. Pres. Doc. 19 (Jan. 14. 2014) ("[W]e are not just going to be waiting for a legislation….I've got a pen…and I can use that pen to sign executive orders and take executive actions and administrative actions that move the ball for-

power plants that would "speed[] the transition to more sustainable sources of energy."[8]

b. EPA did as it was told. In 2014, it proposed a rule, marketed as the "Clean Power Plan," to regulate existing power plants by capping emissions. 79 Fed. Reg. 34,830 (June 18, 2014). In congressional testimony, the EPA Administrator identified the rule's objective as transforming the Nation's electricity sector: "The great thing about this proposal is it really is an investment opportunity. This is not about pollution control. It is about increased efficiency at our plants, no matter where you want to invest. It is about investments in renewables and clean energy."[9] The Secretary of State put it more bluntly: "We're going to take a bunch of them [coal-fired power plants] out of commission."[10]

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ward…") available at https://obamawhitehouse.archives.gov/the-press-office/ 2014/01/14/remarks-president-cabinet-meeting (last visited Dec. 3, 2021).

[8] President Barack Obama, Presidential Memorandum: Power Sector Carbon Pollution Standards (June 25, 2013) available at https://obamawhitehouse.archives.gov/the-press-office/2013/06/25/Presidential-memorandum-power-sector-carbon-pollution-standards (last visited Dec. 3, 2021).

[9] *Oversight Hearing: EPA's Proposed Carbon Pollution Standards for Existing Power Plants Before the Senate Env't. & Pub. Works Comm.*, 113th Cong. 782 at 33 (2014) (testimony of Gina McCarthy, Administrator, United States Environmental Protection Agency).

[10] Coral Davenport, Strange Climate Event: Warmth Toward U.S., N.Y. Times (Dec. 11, 2014) at A14.

c. EPA published the final rule on October 23, 2015. 80 Fed. Reg. 64,662. Relying on Section 111(d) as authority, the rule sets "final emission guidelines" that States must use in imposing standards of performance on existing plants. *Id.* at 64,663. The guidelines set "performance rates" for existing plants calculated by adding up the rate improvements associated with each of three "Building Blocks" that EPA determined comprise the "best system of emission reduction" for those plants. *Id.* at 64,667.

The first was to improve the efficiency of coal-fired plants through equipment upgrades and operational improvements—albeit ones that EPA recognized could not be applied to all plants, such that the agency had to rely on emissions trading to justify the rate-improvements associated with this building block. *Id.* at 64,734.

Departing further from precedent, the second and third building blocks did not involve any system applicable to a particular facility, or even "improving the emission rates of individual sources," but "shifting generation" of electricity to other sources altogether. *Id.* at 64,726. The second building block was shifting generation from "the most carbon-intensive affected [plants]" (i.e., coal-fired plants) to "less carbon-intensive affected [plants]" (i.e., natural gas combined cycle plants). *Id.* at 64,745. And the third was shifting generation from existing plants, including gas- and coal-fired plants, to new renewable generating capacity, specifically "wind turbines and solar voltaic installations." *Id.* at 64,747–48.

EPA rationalized this departure from its historic use of Section 111(d) on the theory that the statutory term "system of emission reduction" could encompass any "set of measures that work together to reduce emissions," *id.* at 64,720, including "actions that may occur off-site and actions that a third party takes pursuant to a commercial relationship with the owner/operator." *Id.* at 64,761. And so it was enough that "reduced generation" is a "measure[] that fossil fuel-fired [plants] may implement to reduce their emissions of air pollutants and thereby achieve emission limits." *Id.* at 64,780.

EPA recognized that no existing facility could actually meet the CPP's rates through pollution controls or operational improvements. *Id.* at 64,754. In fact, the rates were even stricter than those EPA determined to be attainable with the "best" available technology for *brand new* fossil-fuel-fired plants. *Compare* 80 Fed. Reg. 64,509, 64,510, 64,513 (Oct. 23, 2015) (new-source standards), *with* 80 Fed. Reg. at 64,707 (existing-source standards). For their existing plants to achieve compliance, States would have to implement measures to shift generation like emissions trading, which EPA acknowledged to be "an integral part of [its] BSER analysis." *Id.* at 64,734.

The stated objective of all this was to transform the electricity sector. That was, in fact, the White House's message to the public about the rule: it would force an "aggressive transformation" of the electricity sector through "transition to zero-carbon renewable energy sources." White House Fact Sheet, CADC.App.2076–

77. EPA was hardly more circumspect. It acknowledged in the final rule that it adopted generation-shifting because measures that improve efficiency at existing sources alone would not transform the electricity sector: "the quantity of emission reductions achieved…would be of insufficient magnitude in the context of this pollutant and this industry." 80 Fed. Reg. at 64,787. So it decided that "most of the CO_2 controls need to come in the form of…replacement of higher emitting generation with lower- or zero-emitting generation." *Id*. at 64,728.

d. Commensurate with that objective, the CPP's projected impacts were staggering. EPA's own modeling concluded that the CPP would force the immediate retirement of dozens of coal-fired power plants, cause coal production to plummet, reduce new natural gas generation by up to 69 percent, and sacrifice thousands of jobs in the electricity, mining, and resource sectors by 2025. EPA, *Regulatory Impact Analysis for The Clean Power Plan Final Rule*, 3-30, 3-33, 3-27, 6-25 (Oct. 23, 2015).[11] Industry modeling projected that the CPP would lead wholesale electricity costs to rise by $214 billion, displace 40 percent of coal generation, and impose $64 billion in costs to replace the plants that were forced to close. *See* Nat'l Mining Ass'n,

[11] Available at https://19january2017snapshot.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf (last visited Dec. 3, 2021).

EPA's Clean Power Plan: An Economic Impact Analysis, at 2 (Nov. 13, 2015) ("NMA EIA").[12]

e. The CPP never took effect. Dozens of parties, including 27 States, petitioned for review of the rule, and this Court stayed it after the D.C. Circuit declined to do so. *West Virginia v. EPA*, 577 U.S. 1126 (2016). The *en banc* D.C. Circuit heard argument on the merits, but "that litigation was held in abeyance and ultimately dismissed as the EPA reassessed its position." J.A.88.

4. That process culminated in EPA's 2019 Affordable Clean Energy ("ACE") rule. The ACE rule repealed the CPP and finalized replacement emission guidelines premised solely on source-level efficiency improvements. 84 Fed. Reg. 32,520 (July 8, 2019). EPA conceded that the CPP was "in excess of its statutory authority" under Section 111. *Id.* at 32,523. That provision, it explained, "unambiguously limits the BSER [best system of emission reduction] to those systems that can be put into operation at a building, structure, facility, or installation," such as "add-on controls" and "inherently lower-emitting processes/practices/designs." *Id.* at 32,524. It "does not authorize EPA" to select a "system that is premised on application to the source category as a whole or to entities entirely outside the regulated source category." *Id.* "Thus, the EPA is precluded from basing

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[12] Available at http://nma.org/attachments/article/2368/11.13.15%20NMA_EPAs%20Clean%20Power%20Plan%20%20An%20Economic%20Impact%20Analysis.pdf. (last visited Dec. 3, 2021).

BSER on strategies like generation shifting and corresponding emissions offsets because these types of systems cannot be put into use at the regulated building, structure, facility, or installation." *Id.*

EPA also found support for its historical interpretation of Section 111 and repeal of the CPP in this Court's decisions applying the major questions doctrine. The CPP, it reasoned, was indisputably a "major" rule based on its cost, "impact on regulated parties and the economy," encroachment on State and FERC authorities, congressional and public attention to its subject matter, and the "absence of a valid limiting principle to basing a CAA section 111 rule on generation shifting." *Id.* Through shifting-based approaches, EPA "could empower itself to order the wholesale restructuring of any industrial sector"—even where it lacks "authority to even regulate all the actors within that sector," such as renewable sources. *Id.* But the statute contains no hint of "Congressional intent to endow the Agency with discretion of this breadth to regulate a fundamental sector of the economy." *Id.* Accordingly, EPA concluded, that power may not be inferred. *Id.*

5. Reflecting its significance, the ACE rule drew numerous challengers and defenders from the ranks of State and local government, the electricity sector, the natural resources sector, and the environmental movement, as well as more than 175 amicus parties. As in the litigation over the CPP, the central issue was EPA's authority under Section 111(d) to restruc-

ture the electricity sector through generation-shifting. Petitioner Westmoreland Mining Holdings LLC intervened below to defend repeal of the CPP.

The D.C. Circuit rejected the ACE rule's interpretation of Section 111 and so vacated its repeal of the CPP. The panel majority held that "Congress imposed no limits on the types of measures that the EPA may" adopt as the "best system of emission reduction" so long as it considers "cost, any nonair quality health and environmental impacts, and energy requirements." J.A.108. Under the statute, it may even adopt measures like demand-side regulation and "capturing emissions after they are released into the air by planting trees." J.A.143 n.9. The panel majority also concluded that the major questions doctrine had no application at all because "the regulation of greenhouse gas emissions by power plants…falls squarely within the EPA's wheelhouse." J.A.137.

Judge Walker dissented. The CPP, he concluded, was indisputably a major rule, based on its "almost unfathomable" costs and touted benefits, heavy impact on entire industries, and political salience. J.A.217–26 (Walker, J., dissenting). And yet "[h]ardly any party in this case makes a serious and sustained argument that § 111 includes a clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting." J.A.217 (Walker, J., dissenting). Judge Walker therefore would have upheld the repeal: "because the rule implicates 'deci-

sions of vast economic and political significance,' Congress's failure to clearly authorize the rule means the EPA lacked the authority to promulgate it." *Id*.

After judgment, EPA sought and obtained a partial stay of the mandate to consider a new plan, given that the CPP's underlying figures and its deadlines had become outdated in the five years since this Court's stay.

SUMMARY OF THE ARGUMENT

I. EPA was constrained to repeal the Clean Power Plan because Congress did not clearly authorize the agency to decide the major question of whether and how to restructure entire sectors of the economy so as to achieve emissions reductions.

A. The major questions doctrine requires "clear congressional authorization" for agencies to make decisions of "vast economic and political significance." *UARG*, 573 U.S. at 324 (quotation marks omitted). It reflects the overriding presumption that Congress intends to reserve the most important decisions to itself, and it thereby serves the constitutional principle that Congress may not divest itself of the legislative power by passing the buck on hard decisions through delegation.

B. The Clean Power Plan implicated major questions by every possible measure. Its impacts—in terms of costs, lost jobs, and forgone economic growth—were nothing short of massive. It asserted authority to resolve a heated and long-running debate over climate and energy policy, one that has occupied

Congress for decades, by agency fiat. It intruded on States' traditional authority, long observed by Congress, to choose the mix of electricity sources necessary to ensure public safety and welfare. And, most significant of all, it claimed the unheralded power under Section 111(d) to upend entire industries by forcing the reduced utilization or closure of practically any emitting facility—a far cry from EPA's historical usage of the provision to implement achievable improvements to sources' emissions performance in operation.

C. None of this was clearly authorized by Congress. Consistent with EPA's historical practice, the statute authorizes only standards respecting the "performance" of individual sources, as opposed to reduced performance or non-performance. Not a word of the statutory text suggests that EPA has the power to reorganize industries by setting standards based on reduced utilization of sources, closure of sources, or too-clever-by-half contrivances like "generation shifting." When Congress has authorized mere components of the Clean Power Plan like emissions trading, it did so expressly with the type of clear language absent here. Section 111(d) is an ancillary provision of the Act that serves as a fall back to its primary stationary-source programs, not an untapped source of unbounded authority over the economy. Even if the statute is ambiguous in some respect, that could not support the Clean Power Plan's claim that Congress intended to assign EPA this awesome power.

II. Accepting the Clean Power Plan's interpretation of EPA's authority would result in a forbidden delegation of legislative power. Treating reduced utilization and shifting as permissible components of Section 111 standards allows EPA to shrug off the statutory criteria that would otherwise limit its regulatory discretion. What's left is unbridled power for the agency to decide what industries to target, how fast to proceed, and how far to go in achieving its objectives, whether decarbonization or otherwise. To avoid constitutional doubt, Section 111 must be interpreted according to its plain language as not delegating that power to the agency.

ARGUMENT

I. Section 111 Does Not Authorize EPA To Restructure the Nation's Electricity Sector

"For an agency to issue a major rule, Congress must *clearly* authorize the agency to do so." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 420 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). That rule is dispositive here. Whether and how to restructure the electricity sector is indisputably a question of vast economic and political significance—for the Congresses that rejected cap-and-trade schemes akin to the CPP, for the communities whose livelihoods depend on fossil-fuel production, and for electricity consumers on whom the CPP would impose billions in price increases. Accordingly, the Clean Power Plan—which asserted EPA's authority to answer that question and force a transition to renewable

generation—was indisputably a major rule. Because Congress in Section 111 did not clearly authorize EPA to make that decision, the Clean Power Plan was unlawful, and EPA's repeal of it properly reflected the agency's limited authority.

A. The Court's Precedents Require Clear Congressional Authorization for Agencies To Make Decisions of Vast Economic and Political Significance

The major questions doctrine holds that Congress must "speak clearly if it wishes to assign an agency decisions of vast 'economic and political significance.'" *UARG*, 573 U.S. at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). In case after case, the Court has applied that rule to reject agencies' claims "to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'" or otherwise "bring about an enormous and transformative expansion in [the agency's] regulatory authority." *Id.*

This doctrine is grounded in the Constitution's separation of powers. Because the Constitution vests the "legislative power" in Congress alone, U.S. Const., Art. I, § 1, "important subjects…must be entirely regulated by the legislature itself," and it may delegate to another branch only "power…to fill up the details." *Wayman v. Southard*, 23 U.S. (10 Wheat) 1, 43 (1825). Accordingly, absent independent constitutional authority, the Executive Branch may "issue binding legal rules…only pursuant to and consistent with a grant of authority from Congress." *U.S. Telecom*

Ass'n, 855 F.3d at 419 (Kavanaugh, J., dissenting). Thus, the major questions doctrine serves "the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting); *see also Indus. Union Dep't, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion).

The doctrine also reflects the sound interpretative presumptions that Congress intends to reserve important decisions to itself and "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). While legislation regularly calls on agencies to resolve "interstitial matters," "Congress is more likely to have focused upon, and answered, major questions." Stephen Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986). The Court has long understood that, when Congress intends to delegate to an agency a power of "delicacy and importance," it does so unambiguously through "language open to no misconstruction, but clear and direct"—to the exclusion of asserted delegations founded upon "doubtful and uncertain language." *Interstate Com. Comm'n v. Cincinnati, N.O. & T.P. Ry. Co.*, 167 U.S. 479, 505 (1897); *see also Brown & Williamson*, 529 U.S. at 161 (expressing "confiden[ce] that Congress could not have intended to delegate a decision of such economic and political significance to

an agency in so cryptic a fashion"); *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) ("highly unlikely"); *Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) ("anomalous").

As developed in the Court's precedents, the major questions doctrine implements those ends through a straightforward two-step inquiry. The first step considers whether the agency claims regulatory authority over a matter of great significance. If so, the inquiry proceeds to the second step, assessing whether Congress has clearly authorized the agency to exercise that authority. The Court's decisions in *Brown & Williamson*, *UARG*, and *Alabama Association of Realtors v. Department of Health & Human Services* illustrate the doctrine's operation in this fashion.

Brown & Williamson rejected an FDA rule asserting authority to regulate tobacco products as "drugs" and "devices" under the Food, Drug, and Cosmetic Act. The Court had no difficulty concluding that the agency's assertion of authority "to regulate an industry constituting a significant portion of the American economy" implicated "a decision of…economic and political significance." 529 U.S. at 159–60. Reinforcing that conclusion was Congress's repeated rejection of proposals to confer precisely that power on FDA. *Id.* There being no clear statutory authorization for the rule, the Court invalidated it, reasoning that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

UARG similarly applied the major questions doctrine to invalidate a portion of an EPA rule extending a permitting program to small facilities by interpreting the term "air pollutant" in the program's statutory trigger to include greenhouse-gas emissions. 573 U.S. at 320–22. The question of the agency's asserted authority was plainly a major one: "The power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text." *Id.* at 324. And the Court rejected EPA's interpretation "because it would bring about an enormous and transformative expansion in EPA's regulatory authority *without clear congressional authorization*." *Id.* (emphasis added).

And, just this term, *Alabama Association of Realtors v. Department of Health & Human Services* applied the major questions doctrine in considering a nationwide moratorium on evictions imposed by the Centers for Disease Control and Prevention under a statute authorizing disease-prevention measures like fumigation and pest extermination. 141 S. Ct. 2485, 2486 (2021). The "sheer scope of the CDC's claimed authority" implicated the doctrine, given the moratorium's economic and social impact, its intrusion on "an area that is the particular domain of state law," the novelty of CDC's assertion of authority, and the lack of any limiting principle for that authority. *Id.* at 2489. As Congress did not "clearly" authorize anything like the moratorium—merely "ambiguous" text

being insufficient to support so major a rule—it was "difficult to imagine [the moratorium's challengers] losing" on the merits. *Id*. at 2485.

The other precedents in this area apply the same analysis to agencies' assertions of significant powers. *See, e.g.*, *King v. Burwell*, 576 U.S. 473, 485–86 (2015) (declining to defer to agency's interpretation where Congress did not "expressly" assign question to agency and it had "no expertise" in the area); *Gonzales*, 546 U.S. at 274 (rejecting assertion of major power premised on "obscure" statutory provision); *MCI Telecomm. Corp.*, 512 U.S. at 231 (adjudging it "highly unlikely" Congress would delegate decision on regulating an industry without saying so clearly).

In an influential[13] opinion addressing the FCC's decision (since rescinded) to subject Internet providers to common-carrier regulation, then-Judge Kavanaugh summed up the "lesson" of this line of authority: "If an agency wants to exercise expansive regulatory authority over some major social or economic activity…an *ambiguous* grant of statutory authority is not enough. Congress must *clearly* authorize an agency to take such a major regulatory action." *U.S. Telecom Ass'n*, 855 F.3d at 422 (Kavanaugh, J., dissenting).

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[13] *See, e.g.,* Justin Walker, The Kavanaugh Court and the *Schechter*-To-*Chevron* Spectrum, 95 Ind. L.J. 923, 941, 946 (2020); Jennifer Mascott, *Gundy v. United States*: Reflections on the Court and the State of the Nondelegation Doctrine, 26 Geo. Mason L. Rev. 1, 20–21 (2018).

B. Whether and How To Restructure Entire Industries Is Indisputably a Question of Vast Economic and Political Significance

EPA's claim of authority in the CPP to restructure the electricity sector by "shifting" generation away from regulated facilities like coal-fired plants is precisely the kind of "transformative expansion" in regulatory power that the Court has held to implicate the major questions doctrine. Indeed, the Court has never confronted an agency decision of greater "economic and political significance" across so many dimensions, including: its vast impacts on the economy and regulated sources, attempted resolution of a policy dispute of intense political and public interest, invasion of an area of traditional State authority, and assertion of an expansive and unprecedented authority to upend entire industries. The conclusion of the court below that there is nothing "major" about any of this flies in the face of both precedent and common sense.

1. In the CPP, EPA asserted the previously unheralded—indeed, previously unimagined—power to force the closure of practically any emitting facility in the Nation. EPA's view, endorsed by the court below, was that Section 111 authorizes the agency to set emission limitations based on any conceivable "set of measures" that might be "taken by the owners or operators" of emissions sources "to reduce emissions." 80 Fed. Reg. at 64,720; *see also* J.A.108. That includes "contractual arrangements, investment, or purchase," 80 Fed. Reg. at 64,769, or simply throwing the off-

switch, which the CPP refers to as "reduced generation," *id*. at 64,780. Reduced generation is, in fact, the cornerstone of the CPP: EPA designed the rule so that "most of the CO_2 controls need to come in the form of…replacement of higher emitting generation with lower- or zero-emitting generation." *Id*. at 64,728. The upshot is that, as to any source of any air pollutant, EPA claims discretion to set required "emission limitation[s]" at practically any level—even zero—given that reducing the usage of or shuttering a facility is always an "adequately demonstrated" means of reducing emissions. *See* 80 Fed. Reg. at 64,780 ("Reduced generation is a well-established method for individual fossil fuel-fired power plants to comply with their emission limits.").

That is an awesome power, made all the more so by two aspects of the statute. The first is that Section 111 has no minimum emissions threshold for regulated sources, applying to "any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. § 7411(a)(3); *compare id*. § 7479(a)(4) (prescribing minimum thresholds for NAAQS-related preconstruction-review program). Second, with the CPP having shrugged off EPA's historic view that Section 111 addresses only achievable improvements to sources' operating performance, the statute opens the door for EPA to set emission limitations based on any conceivable measure that could be taken by a source's owner or operator. That includes erecting entirely new facilities, reducing demand for its product, or reducing production. The court below put this plainly:

in its view, "Congress imposed *no limits* on the types of measures the EPA may consider." J.A.108 (emphasis added); *see also* J.A.110.

The result is to transform EPA from an environmental regulator to the master of "a significant portion of the American economy," *Brown & Williamson*, 529 U.S. at 159, empowered to decide the fate of entire industries. Will it choose to accelerate the transition to zero-emission vehicles by determining that the best system of emission reduction for petroleum refineries is investing in electric cars and otherwise reducing demand for motor fuels—i.e., "fuel shifting"? Curtail the production of wood-pulp used to make books and magazines in favor of Kindles and iPads? Issue emission limitations for woodstoves (which are already subject to Section 111 standards) premised on replacing them with electric heat-pumps? And why not press homeowners—with their woodstoves, water heaters, gas ranges, and other sources of carbon-dioxide emissions—to install rooftop solar panels? All of these and more would be plausible "system[s] of emission reduction" under the CPP's interpretation of EPA's authority. After all, EPA need only consider "cost" and "energy requirements" in determining what measures have been "adequately demonstrated," the statute provides no standard governing that consideration, and nothing prevents EPA from treating the "climate crisis" as a brick on the scale. *Cf.* Tackling the Climate Crisis at Home and Abroad, Exec. Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021).

The asserted agency authorities addressed in the Court's previous major questions cases pale in comparison to EPA's power to impose an indefinite series of transformative measures on practically every industrial facility, office building, community center, and home across the Nation. Rarely if ever has an agency laid claim to a more "extravagant statutory power," *UARG*, 573 U.S. at 324, or such a "breathtaking amount of authority," *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. If EPA's power to extend existing permitting programs to large numbers of smaller sources "falls comfortably within the class of authorizations" subject to the major questions doctrine, *UARG*, 573 U.S. at 324, then this awesome power surely qualifies.

The fact that this assertion of power has no precedent under the statute also warrants "a measure of skepticism," to say the least. *Id.* Section 111(d) is a statutory backwater. Since the provision's enactment in 1970, "no regulation premised on it has even begun to approach the size or scope" of the CPP. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. It has been applied only a handful of times to improve the operating efficiency of facilities like fertilizer plants and pulp mills. *See* 84 Fed. Reg. at 32,526 & n.83. "Every one of those rulemakings applied technologies, techniques, processes, practices, or design modifications directly to individual sources." *Id*. None premised emission rates on reduced utilization of existing sources, through "shifting" or otherwise. *Id*. EPA's belated discovery in this "long-extant statute" of the previously unrecognized power to restructure entire industries according

to its policy objectives presents a major question requiring "clear congressional authorization." *UARG*, 573 U.S. at 324.

2. Focusing on the CPP itself, whether and how to restructure the Nation's electricity sector is on its face a question of "vast economic and political significance." *Id.* (quotation marks omitted). The numbers speak for themselves. EPA's own models projected billions in compliance costs, a near-collapse in coal production, displacement of thousands of jobs across multiple industries, and hundreds of billions in forgone economic growth. CADC.App.632–46. Industry, in turn, projected nearly a quarter-trillion in cost increases for electricity and massive required outlays to replace the generating capacity that the CPP would "shift" out of operation. NMA EIA at 2; *compare King*, 135 S. Ct. at 2489 (applying doctrine where question involved "billions of dollars" and "affected the price of health insurance for millions of people"). By any measure, the CPP was "transformative." *UARG*, 573 U.S. at 324.

That was the point. On the same day that President Obama declared the CPP "the single most important step America has ever taken in the fight against global climate change,"[14] the White House briefed reporters that the rule would "drive" an "aggressive transition to zero-carbon renewable energy sources"

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[14] President Barack Obama, Remarks by the President in Announcing the Clean Power Plan, 2015 Daily Comp. Pres. Doc. 546 (Aug. 3, 2015).

and an "aggressive transformation in the domestic energy industry."[15] EPA, in turn, hailed the CPP as "laying the foundation for the long-term strategy needed to tackle the threat of climate change."[16] It was, according to both the White House and EPA, a "historic" action.[17]

Indeed, the CPP's political significance could hardly be overstated. Climate change has been on Congress's agenda for decades. Paralleling the legislative backdrop in *Brown & Williamson*, 529 U.S. at 159, Congress considered and "squarely rejected" proposals to institute a cap-and-trade program imposing functionally identical emissions reductions on the electricity sector as the CPP. *E.g.*, American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong. (2009); *see also* Amanda Reilly & Kevin Bogardus, 7 years later, failed Waxman-Markey bill still makes waves, E&E Daily (June 27, 2016) (quoting bill's sponsor that the CPP was "based largely on what

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[15] White House Fact Sheet, CADC.App.2076–77.

[16] EPA, Factsheet: Overview of the Clean Power Plan (2015) available at https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan_.html (last visited Dec. 3, 2021).

[17] President Barack Obama, Fact Sheet, President Obama to Announce Historic Carbon Pollution Standards for Power Plants, The White House (Aug. 3, 2015) available at https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards (last visited Dec. 3, 2021); EPA, Factsheet: Overview of the Clean Power Plan.

was inside of [our] bill").[18] Congress also considered and rejected less prescriptive measures like a carbon tax, S. Con. Res. 8, S. Amdt. 646, 113th Cong. (2013), and "carbon emissions fees," Climate Protection Act of 2013, S. 332, 113th Cong. (2013). To this day, Congress continues to consider and debate legislation addressing electricity-sector carbon emissions.[19] Congress's decades-long deliberation over this issue reflects that it remains the subject of "earnest and profound debate across the country," making EPA's "claimed delegation" to decide it "all the more suspect." *Gonzales*, 546 U.S. at 267 (quotation marks omitted).

Finally, it is no minor thing that the CPP "intrudes into an area that is the particular domain of state law." *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. For as long as there has been a power grid, States have taken responsibility for regulating the mix of electricity sources necessary to ensure public safety and welfare. *See Pacific Gas*, 461 U.S. at 206. Congress, in turn, has taken care to preserve that exclusive domain of State authority. *See, e.g.*, *Oneok*, 575 U.S. at 384, 388; *Pacific Gas*, 461 U.S. at 205–06. The CPP's assertion

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[18] Available at https://www.eenews.net/articles/7-years-later-failed-waxman-markey-bill-still-makes-waves/ (last visited Dec. 3, 2021).

[19] Resources for the Future, Carbon Pricing Bill Tracker (updated June 21, 2021), available at https://www.rff.org/publications/data-tools/carbon-pricing-bill-tracker/ (last visited Dec. 3, 2021).

of authority "to significantly alter the balance between federal and state power" itself presents a major question that can be answered only by "exceedingly clear language" enacted by Congress. 141 S. Ct. at 2489 (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1850 (2020)).

3. The court below was able to conclude otherwise only by ducking the significance of the CPP's novel claim of authority to restructure an entire sector of the economy through reduced utilization and shifting. Rather than consider *that* "enormous and transformative expansion in EPA's regulatory authority," *UARG*, 573 U.S. at 324, the panel majority simply declared that "EPA's scientific and technological identification of the best system of emission reduction cannot bear the major-question label," J.A.143. In its view, the fact that traditional emissions limitations based on "at-the-source controls" could affect costs and thereby cause "some generation-shifting effect" meant there was nothing new or unusual about EPA doing an end-run by directly basing emissions limitations on shifting. J.A.143.

That is, of course, a complete *non sequitur*. A sales tax might reduce newspaper sales, but that doesn't mean the government can restrict the sale of newspapers through taxation. *See Grosjean v. Am. Press Co.*, 297 U.S. 233 (1936); *Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue*, 460 U.S. 575 (1983). Likewise, although FERC may regulate wholesale electricity markets in ways that affect retail markets, it cannot regulate retail markets directly so as to

achieve its wholesale-market objectives. *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 280 (2016). Yet the court below sanctioned the same kind of bait-and-switch, conflating incidental impacts on generation with by-design shifting of generation away from regulated sources.

The court similarly reasoned that, because power plants were already subject to regulation under Section 111, "EPA made no new discovery of regulatory power with the Clean Power Plan." J.A.147. But the major questions doctrine's reach is not limited to questions of an agency's regulatory jurisdiction. *See, e.g.*, *Gonzales*, 546 U.S. at 267–68 (applying doctrine to question of authority over physicians undisputedly subject to Attorney General's jurisdiction); *MCI Telecomm. Corp.*, 512 U.S. at 234 (authority over long-distance carriers undisputedly subject to FCC jurisdiction). *How* an agency may regulate is no less susceptible to posing a major question than *whom* it may regulate.

To suppose otherwise is to lose sight of the fact that "no legislation pursues its purposes at all costs." *Rodriguez v. United States*, 480 U.S. 522, 525–26 (1987); *cf. Michigan v. EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001) ("[W]e have before had occasion to remind EPA that its mission is not a roving commission to achieve pure air or any other laudable goal."). There is, after all, a significant difference between setting emissions limitations based on improvements in a source's emissions performance in operation and setting them based on shutting down the source. The view of the

court below that the CPP's unprecedented claim of authority to compel the latter "does nothing to enlarge the Agency's regulatory domain," J.A.154, blinks reality and ignores why the agency adopted that aberrant approach in the first place: to transform a major sector of the Nation's economy in the teeth of Congress's considered refusal to do so.

C. Congress Did Not Clearly Authorize EPA To Restructure Industries, Let Alone the Nation's Electricity Sector

The relevant question, then, is whether Congress *clearly* authorized EPA to restructure a major industry like the electricity sector by forcing the reduced utilization of disfavored facilities. Merely to ask the question is to answer it, as the statute contains not a hint that Congress intended to delegate that awesome power to EPA.

1. Begin with the statutory language. Section 111(d) merely authorizes EPA to direct States to "establish standards of *performance for* any existing source," while expressly providing that States may "take into consideration" a source's "remaining useful life" so as to moderate the impact of regulation. 42 U.S.C. § 7411(d)(1) (emphasis added). Nothing in that authorization suggests that EPA has been endowed with a transformational power; to the contrary,

it contemplates no more than standards for the "performance" of individual sources, as opposed to reduced performance or non-performance.[20]

Confirming as much are the provisions defining "standard of performance." The Act generally defines the term as "a requirement of *continuous* emission reduction," including "any requirement relating to the operation or maintenance of a source to assure *continuous* emission reduction," thereby ruling out reduced utilization and shifting. 42 U.S.C. § 7602(*l*) (emphases added). The Section 111 definition, consistent with the general one, refers to "the degree of emission limitation *achievable* through the application of the best system of emission reduction…[EPA] determines has been adequately demonstrated." *Id.* § 7411(a)(1) (emphasis added). An "achievable" emission limitation can only be understood as one that is achievable in performance because otherwise the word would be surplusage: any limitation could be achieved through reduced performance or closure of a facility. *See Astoria Fed. Savings & Loan Ass'n v. Solimino*, 501 U.S. 104, 112 (1991) (explaining that statutes should be construed "so as to avoid rendering superfluous any parts thereof"). Whether or not the general definition strictly controls, the two provisions, along with the operative language of Section 111(d), are best read *in*

[20] That "standard of performance" is a defined term does not undermine its "import of showing us what Congress had in mind." *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001).

pari materia to refer to traditional means of improving sources' emissions performance in operation, not curtailing their operation. *See generally United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988) ("Statutory construction…is a holistic endeavor.").

Even if these statutory provisions were ambiguous in some respect, that would not authorize EPA to seize any power the statute does not expressly foreclose to it, as the court below held it could. J.A.145 (finding delegation because the Act does not "categorically foreclose[] the EPA's consideration of…generation-shifting"). Congress must "speak clearly" to assign EPA such decisions as whether and how to restructure a major industry. *UARG*, 573 U.S. at 324. If the best support an agency can find for a major rule is statutory ambiguity, "that is the end of the game." *U.S. Telecom Ass'n*, 855 F.3d at 425 (Kavanaugh, J., dissenting).

2. EPA insisted in the CPP that Section 111(d) authorizes it to restructure the entire electricity sector through the contrivance of "generation shifting," reasoning that the term "system of emission reduction" "is capacious enough" to include any "actions taken by the owner/operator of a stationary source designed to reduce emissions." 80 Fed. Reg. at 64,761. That term, of course, says nothing about EPA's authority to reorder entire sectors of the economy to achieve emission reductions. And it's not as if the Congress that enacted Section 111 in 1970, or the ones that amended it in 1977 and 1990, were unaware

that source categories like fossil-fuel-fired power plants emit air pollutants or that temporarily or permanently shutting them down would reduce emissions.

Section 111(d) is also an unlikely place to find such an awesome power. It is a rarely used ancillary provision that serves as a fallback for situations not governed by the Act's primary stationary-source programs—"a catch-all," as the court below put it. J.A.119. The Act subjects the most common air pollutants to national ambient air quality standards, 42 U.S.C. § 7409(a), which are implemented through programs addressing the construction and operation of stationary sources, *see generally UARG*, 573 U.S. at 308–10. And the Act's Hazardous Air Pollutants program addresses stationary source emissions of other pollutants posing threats to human health (like carcinogenicity or neurotoxicity) or significant and widespread environmental effect. 42 U.S.C. § 7412. These programs reach the universe of major sources and the vast majority of stationary-source emissions, and Congress's focus on these programs through amendments over the years confirms their primary status. *See generally* Congressional Research Service, Clean Air Act: A Summary of the Act and Its Major Requirements (2020). Section 111(d), by contrast, addresses the leftovers, things like fluoride emissions from fertilizer and aluminum plants and kraft pulp mills' sulfuric-acid mist emissions.[21] *Id.* at 13; 84 Fed. Reg. at

[21] Which, if promulgated today, would most likely fall instead under the Hazardous Air Pollutant program.

32,526 n.63 (citing regulations). It is hardly where one would expect to locate the power for EPA to restructure entire industries by fiat so as to reduce emissions. Congress, after all, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Whitman*, 531 U.S. at 468.

By contrast, Congress did speak with the "requisite clarity to place [its] intent beyond dispute," *Cowpasture*, 140 S. Ct. at 1849, when it authorized EPA to exercise lesser powers along the lines asserted by the CPP. For example, the acid rain program of Title IV authorized EPA to administer a cap-and-trade program applicable to many of the same sources as the CPP. 42 U.S.C. §§ 7651–7651o. Congress specified the initial distribution of emission allowances itself, rather than leave that vital decision to EPA, and it carefully circumscribed EPA's authority with respect to sources and States going forward. *Id.* §§ 7651c–7651e. Likewise, the Stratospheric Ozone Protection program of Title VI expressly directed EPA to administer a phase-out of ozone-depleting substances, while limiting EPA's authority to accelerate the timeline. *Id.* §§ 7671–7671q. Given that "Congress has used express language in other statutes" to authorize mere components of the CPP like cap-and-trade and phaseout-style transitions, the CPP's reliance on the spare language of Section 111(d) is "especially questionable." *Cowpasture*, 140 S. Ct. at 1849–50.

And it is "especially unlikely" that Congress would have delegated to EPA authority to restructure the

electricity sector because the agency has "no expertise" in generation, transmission, and reliability. *King*, 135 S. Ct. at 2489. As EPA has elsewhere acknowledged, "management of energy markets and competition between various forms of electric generation are far afield from EPA's responsibilities" under the Act.[22] Those technical fields are the province of the States and FERC, and Congress has taken great care to preserve State authority specifically with respect to generation. *See, e.g.*, *Pacific Gas*, 461 U.S. at 212; *Hughes*, 136 S. Ct. at 1299. Given that Congress denied FERC authority to "directly shape the generation mix of" a State, "the only reasonable inference is that Congress did not intend to give the EPA that authority via CAA section 111." 84 Fed. Reg. at 32,530.

Finally, the Court's decision in *Massachusetts v. EPA* provides no support for the CPP's unprecedented claim of authority. *Massachusetts* did not license EPA to regulate greenhouse-gas emissions by any possible means. *UARG*, 573 U.S. at 318–19. Nor did it upend the major questions doctrine. Instead, it held that the Act clearly ("[o]n its face") "authorizes EPA to regulate greenhouse gas emissions from new motor vehicles" if it finds that such emissions "'cause, or contribute to, air pollution which may reasonably be anticipated to endanger." 549 U.S. 497, 528–29 (2007) (quoting 42 U.S.C. § 7521(a)(1)). So while such a rule may qualify as "major," it would be, as required, clearly authorized by Congress. The difference here is

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[22] Response to Comments on Amendments to Standards for Stationary Internal Combustion Engines, CADC.App.1996.

that the CPP was not, and that is dispositive: "In the absence of a clear mandate in the Act, it is unreasonable to assume that Congress intended to give [EPA] the unprecedented power over American industry" that the CPP asserted. *Indus. Union Dep't*, 448 U.S. at 646 (plurality opinion).

II. Interpreting Section 111 To Authorize EPA To Restructure Entire Industries Would Result in a Forbidden Delegation of Legislative Power

The conclusion of the court below that Congress placed essentially "no limits" on EPA's authority to compel emission reductions across the economy, J.A.108, is a red flag that the assertion of statutory authority underlying the CPP raises serious constitutional concern. An open-ended grant of authority to restructure entire industries at will by "shifting" production away from disfavored facilities, or forcing them closed, does not satisfy Congress's obligation to "lay down by legislative act an intelligible principle by which the person or body authorized to [act] is directed to conform." *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). As interpreted by EPA in the CPP, and by the court below, EPA's Section 111 authority fails to satisfy that standard and therefore amounts to a forbidden delegation of legislative power.

The Constitution vests "[a]ll legislative Powers…in a Congress of the United States." U.S. Const., Art. I, § 1. "Accompanying that assignment of power to Congress is a bar on its further delegation." *Gundy*, 139 S.

Ct. at 2123 (plurality opinion). Specifically, "Congress…may not transfer to another branch 'powers which are strictly and exclusively legislative.'" *Id*. (quoting *Wayman*, 23 U.S. (10 Wheat.) at 42–43); *see also Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). And "fundamental policy decisions" are the *sine qua non* of exclusively legislative power: "the hard choices, and not the filling in of the blanks,…must be made by the elected representatives of the people." *Indus. Union Dep't*, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment). Congress must therefore lay down an "intelligible principle" that prescribes "the general policy" to be pursued and sets the "boundaries of [agency] authority." *Gundy*, 139 S. Ct. at 2129 (plurality opinion) (citation omitted). And the degree of constraint required on agency discretion "varies according to the scope of the power" at stake. *Whitman*, 531 U.S. at 475. Ultimately, the question is, "did Congress, and not Executive Branch, make the policy judgments?" *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

The answer here is no if Section 111 is not limited to measures that improve a source's emissions performance in operation. Without that limitation, reduced utilization all the way down to zero will always be an "achievable" means of reducing emissions, 42 U.S.C. § 7411(a)(1), leaving it to EPA to determine whether entire source categories making up entire industrial sectors may remain in operation. Although the statutory requirement to consider "cost" limits EPA's discretion when determining whether things like control

technologies are "adequately demonstrated," *id.*, it has no application to reduced utilization. *See* 80 Fed. Reg. at 64,780 (determining that "reduced generation" is "well-established"). Nor do the requirements to consider, as part of the "adequately demonstrated" inquiry, "energy requirements" and "any nonair quality health and environmental impact." 42 U.S.C. § 7411(a)(1). In short, these statutory criteria—achievability and consideration of cost, energy requirements, and health and environmental impacts—circumscribe EPA's discretion only when applied to traditional measures to improve sources' operational emissions performance like control technologies and work practices. They have no bite applied to reduced utilization and measures that depend on reduced utilization, such as "shifting."

The result is to leave EPA unfettered discretion to "determine[]" what it thinks "best" in setting required emission reductions and decarbonizing the economy. *Id.* Nothing precludes it from deciding to adopt reduced utilization as a component of the "best system of emission reduction" for a source category, driving down emissions by any amount, and thereby restructuring (or condemning) entire sectors of the economy according to its own policy objectives. The agency gets to decide whether to proceed, how fast, and how far. While that may be a convenient way of settling thorny debates over environmental and industrial policy, it is one that the Constitution forbids: the separation of

powers requires that Congress "must provide substantial guidance on setting air standards that affect the national economy." *Whitman*, 531 U.S. at 475.

At the very least, "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Indus. Union*, 448 U.S. at 646 (plurality opinion); *cf. Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988) (reciting the "rule" that statutes must be construed to avoid "serious constitutional problems") (citation omitted). The favored construction here is that Congress did not delegate to EPA the authority to decide whether and how to restructure entire industries through contrivances like reduced utilization and "generation shifting." Not only does that construction avoid constitutional doubt, but it is also the one that fits the statutory text, any reasonable view of Congress's intentions, and EPA's historical practice.

CONCLUSION

The decision of the court of appeals should be reversed.

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