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.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
*Respondents*.

THE NORTH AMERICAN COAL CORPORATION,
*Petitioner*,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
*Respondents*.

WESTMORELAND MINING HOLDINGS LLC,
*Petitioner*,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
*Respondents*.

NORTH DAKOTA,
*Petitioner*,

v.

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 *AMICUS CURIAE* AMERICANS FOR PROSPERITY FOUNDATION IN SUPPORT OF PETITIONERS

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December 20, 2021

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## BRIEF OF *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

Under Supreme Court Rule 37.3, Americans for Prosperity Foundation ("AFPF") respectfully submits this *amicus curiae* brief in support of Petitioners.[1]

### INTEREST OF *AMICUS CURIAE*

*Amicus curiae* AFPF is a 501(c)(3) nonprofit organization committed to educating and training Americans to be courageous advocates for the ideas, principles, and policies of a free and open society. One of those ideas is that the separation of powers and our system of federalism protect liberty. As part of its mission, AFPF appears as *amicus curiae* before federal and state courts.

Here, AFPF writes to highlight the critical separation of powers issues that underlie this case, which presents a familiar question: which branch of government is responsible for making public policy and how? Under the Constitution, it is not this Court's role to set public policy. Nor is it the job of unelected federal bureaucrats. Instead, the Constitution tasks the democratically elected, politically accountable branches—Congress and the President—with resolving important policy questions through the deliberately arduous legislative process.

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[1] All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part and no person other than amicus made any monetary contributions intended to fund the preparation or submission of this brief.

## SUMMARY OF ARGUMENT

This case is not about what constitutes sound energy or environmental policy. Whether these important subjects are best addressed by the policy decisions reflected in EPA's 2015 Clean Power Plan ("CPP"), 80 Fed. Reg. 64,662 (October 23, 2015), 2019 Affordable Clean Energy ("ACE") Rule, 84 Fed. Reg. 32,520 (July 8, 2019), or some other approach is beside the point. It is not this Court's role to choose between competing visions for how these subjects should be addressed.

Instead, this case is about which branch of government, under the existing constitutional structure, is entitled to make major policy decisions of vast political and economic importance, like those at issue here, and by what process. At the federal level, the answer is Congress, through duly enacted legislation, subject to constitutional constraints on federal power. It is not for EPA to attempt to impose its will on the nation through regulatory diktat. The fundamental choice in vision between that reflected in the CPP and the ACE Rule is for Congress to make. "[W]hatever multi-billion-dollar regulatory power the federal government might enjoy, it's found on the open floor of an accountable Congress, not in the impenetrable halls of an administrative agency—even if that agency is an overflowing font of good sense." JA.232 (Walker, J., concurring in part, dissenting in part).

In this country, all government power must flow from its proper source: We the People. Our system of government relies on the consent of the governed, memorialized in the Constitution. Our Constitution

exclusively tasks the People's elected representatives with answering major policy questions. And under the Constitution, the political branches may only do so through duly enacted legislation that survives bicameralism and presentment, a deliberately difficult process designed to ensure such laws reflect broad political consensus.

This means Congress cannot duck its responsibility for making hard choices requiring compromise—hard choices that, yes, may well involve some measure of political jeopardy—by passing the buck to unelected, politically unaccountable administrative agents. The Constitution flatly prohibits Congress from delegating *any* of its legislative power to other entities: "*All* legislative Powers herein granted shall be vested in a Congress of the United States[.]" U.S. Const. Art. I, § 1 (emphasis added). Congress, as the People's faithful agent, is expressly barred from divesting itself of power the Constitution— "the supreme Law of the Land," U.S. Const. Art. VI, Cl. 2—exclusively vests in it. Yet, Congress has increasingly sought to insulate itself from accountability by purporting to delegate its legislative power to various administrative bodies. And as Congress has in this way shirked its own constitutional responsibilities, those politically unaccountable administrative bodies have filled the resulting vacuum and taken up the policymaking role Congress has abandoned.

This case implicates a particularly egregious example of an agency seeking to wield legislative powers. Congress did not—and, under our Constitution, *cannot*—grant unelected administrative officials at EPA legislative power to creatively

reimagine energy policy for the entire country, as EPA sought to do with the 2015 CPP. And by all indications EPA is poised to again use Section 111(d) as the vehicle to "enact" transformative "legislative rules" reimagining the electricity sector and many other industries. Making matters worse, this troubling trend of agencies taking upon themselves major policy decisions of vast economic and political importance that must be resolved by People's elected representatives in Congress is by no means limited to EPA, extending to an alphabet soup of administrative bodies. This should not be allowed to stand.

This Court should reaffirm the basic constitutional principle that unelected, unaccountable bureaucrats are not allowed to make important policy decisions before it is too late to protect our constitutional Republic and system of representative self-government. For as the Chief Justice presciently observed in 2013, "[i]t would be a bit much to describe the result as 'the very definition of tyranny,' but the danger posed by the growing power of the administrative state cannot be dismissed." *City of Arlington v. FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). And that danger is far worse today.

On the other side of the ledger, the sky will not fall if this Court enforces the Constitution's original public meaning. Congress is perfectly capable of addressing major policy challenges, as necessary—even complicated ones, and on an expedited basis. That is, after all, the job for which each individual member of Congress purportedly signed up. The People deserve the benefit of their bargain, as memorialized in the Constitution.

## ARGUMENT

### I. EPA WRONGLY ARROGATED TO ITSELF CONGRESS'S EXCLUSIVE POWER TO REGULATE IMPORTANT SUBJECTS.

#### A. EPA Uses Section 111(d) to Transform the Nation's Electricity System.

EPA's CPP plainly sought to answer major policy questions of vast economic and political significance on "important subjects." *See Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 43 (1825) (Marshall, C.J.). While the CPP is now stale, the threat to our system of separated powers that this type of agency overreach poses is not. For the legal issues presented by the decision below transcend any particular rule. And, in any event, EPA has given every indication it will attempt to use Section 111(d), 42 U.S.C. § 7411(d), as a vehicle to "enact" similarly broad regulations with "force of law" in the future. The procedural history of this case, which traces its genesis to the CPP, puts the stakes in context.

As EPA would later explain in the 2019 ACE Rule: "At the time the CPP was promulgated, its generation-shifting scheme was projected to have billions of dollars of impact on regulated parties and the economy, would have affected every electricity customer (*i.e.*, all Americans), was subject to litigation involving almost every State . . . [and] would have disturbed the state-federal and intra-federal jurisdictional scheme." JA.1770–1771. "Further evidence" that the CPP purports to answer a major policy question "comes from the notable absence of a valid limiting principle to basing a CAA section 111

rule on generation shifting. . . . [B]y shifting focus to the entire grid . . . , the Agency could empower itself to order the wholesale restructuring of any industrial sector[.]"[2] JA.1771. By the CPP's logic, for example, EPA could use 111(d) to reimagine the agriculture sector.[3] These are all hallmarks of a major policy decision the Constitution requires be made by the People's elected representatives. *See also* JA.228–229 (Walker, J., concurring in part, dissenting in part). *See generally United States Telecomms. Ass'n v. FCC,* 855 F.3d 381, 422–23 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (listing generally relevant factors to major question inquiry).

*First*, the subject of the CPP was a matter of great political interest and failed legislation. *See* JA.220–221 (Walker, J., concurring in part, dissenting in part). Tellingly, it was only after the Senate declined to pass legislation that "President Obama ordered the EPA to do what Congress wouldn't." JA.222 (Walker, J., concurring in part, dissenting in part). The CPP's requirements were so politically divisive that twenty-four states—on the hook for about 80 percent of the

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[2] EPA itself has identified a wide array of existing sources it could target under Section 111(d). EPA, Inventory of U.S. Greenhouse Gas Emissions & Sinks: 1990-2019, at 1-17 to 1-20 (Apr. 2021), available at https://www.epa.gov/sites/default/files/2021-04/documents/us-ghg-inventory-2021-main-text.pdf?VersionId=yu89kg1O2qP754CdR8Qmyn4RRWc5iodZ.

[3] That concern is not abstract. *See also* Abigail E. André, *Biden Should Bet the Farm*, ABA (May 19, 2021), https://www.americanbar.org/groups/environment_energy_resources/publications/aq/20210519-biden-should-bet-the-farm/.

reductions required under the plan—challenged the rule; another sixteen states intervened in support of it.[4] Indeed, the House and Senate adopted a joint resolution *disapproving* of the CPP. *See* Br. of 34 Senators and 171 Representatives as *Amici Curiae* in Support of Petitioners, *West Virginia et al. v. EPA et al.*, No. 15-1363, at 22–23 (D.C. Cir., filed Feb. 23, 2016).

Underscoring the political importance of the CPP, EPA itself said it "confirms the international leadership of the U.S. in the global effort to address climate change," JA.283, adding that it "constitutes a major commitment—and international leadership-by-doing—on the part of the U.S.," JA.345. *Accord* White House Fact Sheet ("[A]s we have seen, the Clean Power Plan is changing the international dynamic and leveraging international action—showing that when the U.S. leads, other nations follow.").[5] Reflecting this reality, EPA claimed in the ensuing litigation that the CPP "addresses the Nation's most important and urgent environmental challenge," describing it as "critically important." *See* EPA Consolidated Response Brief, *West Virginia et al. v. EPA et al.*, No. 15-1363, 1, 25 (D.C. Cir., filed March 28, 2016). The then-President went even farther, "call[ing] it 'the single most important step America

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[4] *See* Robin Bravender, *44 States Take Sides in Expanding Legal Brawl*, Greenwire (November 4, 2015), https://www.eenews.net/articles/44-states-take-sides-in-expanding-legal-brawl/. After EPA reversed course, a different faction of states challenged the ACE rule. *See* JA.95–96.

[5] https://ago.wv.gov/publicresources/epa/Documents/StatePetrsAddendum2.pdf#page=4

has ever taken in the fight against global climate change.'" JA.227 (Walker, J., concurring in part, dissenting in part) (citation omitted).

*Second*, the CPP was undeniably of vast economic significance. As Judge Walker explained:

> The potential costs and benefits of the 2015 Rule are almost unfathomable. Industry analysts expected wholesale electricity's cost to rise by $214 billion. The cost to replace shuttered capacity? Another $64 billion. . . . The EPA itself predicted its rule would cost billions of dollars and eliminate thousands of jobs.

JA.226 (Walker, J., concurring in part, dissenting in part) (citations omitted). In short, it was "arguably one of the most consequential rules ever proposed by an administrative agency[.]" JA.225 (Walker, J., concurring in part, dissenting in part). The reality is that the CPP would have fundamentally altered the way of life for many communities; caused substantial financial hardship and stress to many thousands of families impacted by job losses it caused; increased the price of electricity for all Americans, regardless of ability to pay; and potentially impacted grid reliability, to boot.

*Third*, the CPP was, at the least, in serious tension with federalism principles, as in order to implement the CPP's dictates, states would have been required to dedicate state personnel and other resources and even *enact legislation* to comply. *See* State Petitioners' Stay Motion, *West Virginia et al. v. EPA et al.*, No. 15-1363,

at 16 (D.C. Cir., filed Oct. 23, 2015).[6] *But cf. United States Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 ("Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property."). The draconian burdens that compliance with the CPP would have imposed on the states are difficult to overstate.[7]

Underscoring the significance of the CPP's sweeping diktat, this Court stayed its implementation. *See West Virginia v. EPA,* 136 S. Ct. 1000 (2016). *See also* JA.223–224 (Walker, J., concurring in part, dissenting in part) (noting this Court's "unprecedented intervention" to stay the CPP). By any definition, the CPP was a major rule beyond EPA's lawful powers. Put another way, "this wolf comes as a wolf." *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

### B. The Panel Majority Mistakenly Blessed EPA's Section 111(d) Power Grab.

Nonetheless, the panel majority mistakenly found Section 111(d) requires EPA to consider generation shifting, *see* JA.108, 143 n.9, 151–153, which would,

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[6]https://ago.wv.gov/publicresources/epa/Documents/StatePetrsMotionForStay.pdf.

[7] In the stay litigation, numerous state officials executed declarations discussing the real-world impact of the CPP. These declarations are available at https://ago.wv.gov/publicresources/epa/Documents/StatePetrsAddendum2.pdf (Exhibit C).

by implication, grant EPA the power to unilaterally restructure the entire electricity sector (and other industries) as it deems fit.[8] *See also* JA.135–155. That cannot be right.

One of two propositions holds true: The first possibility is, contrary to the panel majority, the statute does not delegate to EPA the power to "enact" transformative "legislative rules" of sweeping importance. *See* JA.230 (Walker, J., concurring in part, dissenting in part) ("Either a statute clearly endorses a major rule, or there can be no major rule."). *See also Util. Air Regulatory Grp. v. EPA,* 573 U.S. 302, 324 (2014) ("We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." (cleaned up)). *Cf. Tiger Lily, LLC v. HUD*, 5 F.4th 666, 672 (6th Cir. 2021) ("[T]o put 'extra icing on a cake already frosted,' the government's interpretation of § 264(a) could raise a nondelegation problem." (citation omitted)). The second possibility is that the statute itself is an unconstitutional delegation of Congress's legislative powers. *See also* JA.230 (Walker, J., concurring in part, dissenting in part) ("[I]f Congress merely allowed generation shifting (it didn't), but did not clearly require it, I doubt doing so was

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[8] The panel majority construed Section 111 to authorize limitless power for EPA to restructure major sectors of the national economy. *See, e.g.,* JA.108 ("Congress imposed no limits on the types of measures the EPA may consider beyond three additional criteria: cost, any nonair quality health and environmental impacts, and energy requirements.").

constitutional.").[9] Either way, the decision below should not stand.

## II. ADMINISTRATIVE AGENCIES INCREASINGLY ATTEMPT TO STAND IN CONGRESS'S SHOES.

More broadly, the CPP is not an isolated instance of unelected bureaucrats purporting to stand in Congress's shoes; it is a symptom of a broader constitutional problem. Consider the CDC's constitutionally dubious foray into reimagining landlord-tenant law by regulatory fiat. *See Ala. Ass'n of Realtors v. HHS,* 141 S. Ct. 2485, 2489 (2021) (rejecting CDC's "unprecedented" "claim of expansive authority"). *See also Tiger Lily,* 5 F.4th at 675 (Thapar, J., concurring) ("While landlords and tenants likely disagree on much, there is one thing both deserve: for their problems to be resolved by their elected representatives."). Or OSHA's recent attempt to impose a national vaccine mandate. *See BST Holdings, L.L.C. v. OSHA*, No. 21-60845, 2021 U.S. App. LEXIS 33698, at *23 (5th Cir. Nov. 12, 2021) ("The Mandate derives its authority from an old statute employed in a novel manner, . . . and purports to definitively resolve one of today's most hotly debated political issues.").

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[9] If so, any effort by EPA to save the statute by proposing a limiting construction or promising to behave responsibly should be rejected out of hand. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) ("We have never suggested that an agency can cure an unlawful delegation of legislative power by adopting in its discretion a limiting construction of the statute.").

These are but two examples of a broader trend in recent years of federal agencies wresting from the People's elected representatives the power to make major policy choices among competing societal visions in politically divisive contexts. This is far from constitutionally healthy. As Judge Ho explained: "The modern administrative state illustrates what happens when we ignore the Constitution: Congress passes problems to the executive branch and then engages in finger-pointing for any problems that might result. The bureaucracy triumphs—while democracy suffers." *See Texas v. Rettig*, 993 F.3d 408, 409 (5th Cir. 2021) (Ho, J., dissenting from denial of rehearing *en banc*). And as now-Judge Rao has observed: "Developments in the modern administrative state suggest the time has come to articulate judicially manageable standards for identifying delegations of legislative power. The reasons for judicial restraint in this area have largely collapsed and the costs of judicial toleration of such delegations have grown unacceptably high." Naomi Rao, *Administrative Collusion: How Delegation Diminishes the Collective Congress*, 90 N.Y. U. L. Rev. 1463, 1508 (2015). That resonates here and counsels in favor of enforcing the Constitution's separation of powers.

## III. UNDER THE CONSTITUTION, IMPORTANT SUBJECTS MAY ONLY BE REGULATED BY CONGRESS.

### A. The Separation of Legislative, Executive, and Judicial Power Protects Liberty.

"Our founding document begins by declaring that 'We the People . . . ordain and establish this

Constitution.' At the time, that was a radical claim, an assertion that sovereignty belongs not to a person or institution or class but to the whole of the people." *Gundy v. United States*, 139 S. Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). *Accord* Declaration of Independence ¶ 2 (explaining "[t]hat to secure these [unalienable] rights" such as "Life, Liberty and the pursuit of Happiness" "Governments are instituted among Men, deriving their just powers from the consent of the governed"). In that document, the People agreed to be governed under a system of separated powers and checks and balances.

"Separation-of-powers principles are intended, in part, to protect each branch of government from incursion by the others. . . . The structural principles secured by the separation of powers protect the individual as well." *Bond v. United States*, 564 U.S. 211, 222 (2011). "The purpose of the separation and equilibration of powers in general . . . [is] not merely to assure effective government but to preserve individual freedom." *Morrison*, 487 U.S. at 727 (Scalia, J., dissenting). *See Collins v. Yellen*, 141 S. Ct. 1761, 1780 (2021) ("[T]he separation of powers is designed to preserve the liberty of all the people."). This separation "might seem inconvenient and inefficient to those who wish to maximize government's coercive power." *See Rettig*, 993 F.3d at 409 (Ho, J., dissenting from denial of rehearing en banc). But "[t]o the Framers, the separation of powers and checks and balances were more than just theories. They were practical and real protections for

individual liberty in the new Constitution."[10] *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 118 (2015) (Thomas, J., concurring in the judgment). "The choices . . . made in the Constitutional Convention impose burdens on governmental processes that often seem clumsy, inefficient, even unworkable, but those hard choices were consciously made by men who had lived under a form of government that permitted arbitrary governmental acts to go unchecked." *INS v. Chadha*, 462 U.S. 919, 959 (1983). *See* Declaration of Independence ¶¶ 11–12.

"The primary protection of individual liberty in our constitutional system comes from . . . the separation of the power to legislate from the power to enforce from the power to adjudicate." Brett M. Kavanaugh, *Our Anchor for 225 Years and Counting: The Enduring Significance of the Precise Text of the Constitution*, 89 Notre Dame L. Rev. 1907, 1915 (2014).[11] For as James Madison famously wrote, "[t]he accumulation of all powers, legislative, executive, and judiciary, in the same hands . . . may justly be pronounced the very definition of tyranny." The Federalist No. 47. *See* 1 Montesquieu, The Spirit of

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[10] "The Constitution's particular blend of separated powers and checks and balances was informed by centuries of political thought and experiences." *Perez*, 575 U.S. at 116 (Thomas, J., concurring in judgment).

[11] "In its design and structure, the Constitution is tilted in the direction of liberty." Kavanaugh, 89 Notre Dame L. Rev. at 1911. "[T]he liberty protected by the separation of powers in the Constitution is primarily freedom from government oppression[.]" *Id.* at 1909.

Laws bk. 11, ch. 6, at 163 (Thomas Nugent trans., 1914) ("When the legislative and executive powers are united in the same person, or in the same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.").

To guard against tyranny and protect liberty, "the Constitution . . . vest[s] the authority to exercise different aspects of the people's sovereign power in distinct entities."[12] *Gundy,* 139 S. Ct. at 2133 (Gorsuch, J., dissenting). Subject to bicameralism and presentment, U.S. Const. Art. I, § 7, Cl. 2, Article I of the Constitution vests "[a]ll legislative Powers herein granted" in Congress, U.S. Const. Art. I, § 1—not the Executive branch. *See Gundy*, 139 S. Ct. at 2123 (confirming "assignment of power to Congress is a bar on its further delegation"); *Loving v. United States*, 517 U.S. 748, 758 (1996) ("[T]he lawmaking function belongs to Congress . . . and may not be conveyed to another branch or entity."). Article II tasks the Executive Branch with faithfully executing the law. U.S. Const. Art. II, § 3. Article III "vests the judicial power exclusively in Article III courts[.]" *Michigan v. EPA*, 576 U.S. 743, 762 (2015) (Thomas, J., concurring). "That is the equilibrium the Constitution demands. And when one branch impermissibly

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[12] "That this system of division and separation of powers produces conflicts, confusion, and discordance at times is inherent, but it was deliberately so structured to assure full, vigorous, and open debate on the great issues affecting the people[.]" *Bowsher v. Synar*, 478 U.S. 714, 722 (1986).

delegates its powers to another, that balance is broken." *Tiger Lily*, 5 F.4th at 673 (Thapar, J., concurring). "The allocation of powers . . . is absolute[.]" *DOT v. Ass'n of Am. R.R.*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring).

### B. Laws Restricting Liberty Must Be Enacted by the People's Representatives.

"Our Constitution was adopted to enable the people to govern themselves, through their elected leaders." *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 499 (2010). *See also King v. Burwell,* 576 U.S. 473, 498 (2015) ("In a democracy, the power to make the law rests with those chosen by the people."). "[B]y careful design, [it] prescribes a process for making law, and within that process there are many accountability checkpoints." *Ass'n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring). For good reason: "[B]y directing that legislating be done only by elected representatives in a public process, the Constitution sought to ensure that the lines of accountability would be clear: The sovereign people would know, without ambiguity, whom to hold accountable for the laws they would have to follow." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting).

"Admittedly, the legislative process can be an arduous one. But that's no bug in the constitutional design: it is the very point of the design." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1151 (10th Cir. 2016) (Gorsuch, J., concurring). "In order to protect individual liberty and guard against the whim of majority rule, the Framers . . . made it very difficult

to enact laws."[13] Kavanaugh, 89 Notre Dame L. Rev. at 1909. By design, "the Framers required the concurrence of three separate entities to enact legislation: the House, the Senate, and the President." *Id*. at 1910. *See* U.S. Const. Art. I, § 7, Cl. 2. "These structural impediments to lawmaking were . . . a deliberate and jealous effort to preserve room for individual liberty." *United States v. Nichols*, 784 F.3d 666, 670 (10th Cir. 2015) (Gorsuch, J., dissenting from denial of rehearing en banc). As Judge Walker explained below: "This legislative gauntlet sometimes produces unfortunate, even tragic, consequences. . . . That, however, is the price we pay for bicameralism and presentment. Major regulations and reforms either reflect a broad political consensus, or they do not become law." JA.219 (Walker, J., concurring in part, dissenting in part).

### C. The Constitution Bars Congress from Transferring Its Legislative Power.

Nor may Congress duck the Constitution's accountability checkpoints by divesting itself of its legislative responsibilities.[14] As Chief Justice

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[13] "At the heart of th[e] liberty" the Framers sought to protect "were the Lockean private rights: life, liberty, and property. If a person could be deprived of these private rights on the basis of a rule (or a will) not enacted by the legislature, then he was not truly free." *Ass'n of Am. R.R.*, 575 U.S. at 75–76 (Thomas, J., concurring in judgment).

[14] "The principle that Congress cannot delegate away its vested powers exists to protect liberty." *Ass'n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring).

Marshall observed: "It will not be contended that Congress can delegate . . . powers which are strictly and exclusively legislative." *Wayman*, 23 U.S. (10 Wheat.) at 42. Instead, the Constitution requires "important subjects . . . must be entirely regulated by the legislature itself[.]" *Id.* at 43. *See also Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., statement respecting denial of certiorari). In other words, "important choices of social policy" must be "made by Congress, the branch of our Government most responsive to the popular will." *Indus. Union Dep't, AFL-CIO v. API*, 448 U.S. 607, 685 (1980) (Rehnquist, J., concurring in judgment). "It is the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people." *Id.* at 687 (Rehnquist, J., concurring in judgment).

As Professor Gary Lawson has observed, "[t]he Constitution's grants of power to Congress in Article I (and in Articles IV and V as well) are, in form, the written record of a delegation of authority from a principal, 'We the People,' to an agent, 'a Congress of the United States.'" Gary Lawson, *Mr. Gorsuch, Meet Mr. Marshall: A Private-Law Framework for the Public-Law Puzzle of Subdelegation*, 13 (May 2020) [hereinafter "Mr. Gorsuch, Meet Mr. Marshall"].[15] *Cf.* David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Courts Should Substantially Enforce,* 43 Harv. J.L. & Pub. Pol'y 213,

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[15] Available at https://ssrn.com/abstract=3607159 or http://dx.doi.org/10.2139/ssrn.3607159.

219–224 (2020) (detailing consent-of-governed norm). Accordingly, Congress cannot delegate its legislative power to other entities: *Delegatus non potest delegare. See also Shankland v. Washington*, 30 U.S. 390, 395 (1831) (Story, J.) ("[T]he general rule of law is, that a delegated authority cannot be delegated.").

To the contrary, the Constitution specifically bars Congress from doing so, vesting *all* legislative power in Congress alone. U.S. Const. Art. I, § 1. *See also* Philip Hamburger, *Is Administrative Law Unlawful?* 388 (2014) ("Americans clearly understood how to write constitutions that expressly permitted the subdelegation of legislative power to the executive, and they did not do this in the federal constitution."). Indeed, "[i]f Congress could pass off its legislative power to the executive branch, the '[v]esting [c]lauses, and indeed the entire structure of the Constitution,' would 'make no sense.'"[16] *Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting) (quoting Gary Lawson, *Delegation and Original Meaning*, 88 Va. L. Rev. 327, 340 (2002)).

"[I]t would frustrate 'the system of government ordained by the Constitution' if Congress could merely announce vague aspirations and then assign others the responsibility of adopting legislation to realize its

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[16] "From the standpoint of constitutional design, the critical point is that redistribution of authority from one entity to another . . . is at odds with the inclusion of specific procedures for each branch's and officer's functions." Ronald Cass, *Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State*, 40 Harv. J. L. & Pub. Pol'y 147, 155 (2016).

goals." *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting) (quoting *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892) (Harlan, J.)). *See also* Schoenbrod, 43 Harv. J.L. & Pub. Pol'y at 222 ("Stating goals [in legislation] is insufficient because Congress can state goals yet avoid responsibility to the governed for how the agency resolves major political controversies[.]"). For "[b]y shifting responsibility to a less accountable branch, Congress protects itself from political censure—and deprives the people of the say the framers intended them to have." *Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring).

Indeed, if Congress could delegate its legislative duties to other entities it would breach the social compact on which our Constitution rests. "The nondelegation principle can be traced to John Locke's Second Treatise, which was deeply influential on the Founding generation." Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1518 (2021). *See Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). As John Locke explained: "[W]hen the people have said, We will submit to rules, and be governed by laws made by such men, and in such forms, no body else can say other men shall make laws for them[.]" John Locke, Second Treatise of Government, §141. This means that "the legislative can have no power to transfer their authority of making laws, and place it in other hands." *Id.* Thus, "when the legislature attempts to delegate lawmaking authority to a third party, the third party's rules are nullities because the third party was not chosen by the people to exercise the legislative power, and the people (according to Locke) never authorized a further delegation of

legislative power to others."[17] Larry Alexander & Saikrishna Prakash, *Reports of the Nondelegation Doctrine's Death Are Greatly Exaggerated*, 70 U. Chi. L. Rev. 1297, 1322 (2003).

### D. Line-Drawing Questions Should Not Deter Enforcement of the Separation of Powers.

As discussed above, "[s]trictly speaking, there is *no* acceptable delegation of legislative power." *Mistretta v. United States*, 488 U.S. 361, 419–20 (1989) (Scalia, J., dissenting) (emphasis in original).[18] This raises the question what is "legislative power" that Congress may not delegate. To be sure, as Chief Justice Marshall observed: "The line has not been exactly drawn which separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to

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[17] Indeed, some have argued that the nonsubdelegation doctrine is grounded in the social compact and republicanism. *See* Joseph Postell, "*The People Surrender Nothing": Social Compact Theory, Republicanism, and the Modern Administrative State*, 81 Mo. L. Rev. 1003, 1012 (2016).

[18] "When it came to the legislative power, the framers understood it to mean the power to adopt generally applicable rules of conduct governing future actions by private persons[.]" *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting). *See* Federalist No. 75 ("The essence of the legislative authority is to enact laws, or, in other words, to prescribe rules for the regulation of the society[.]"). "[T]he core of the legislative power that the Framers sought to protect from consolidation with the executive is the power to make 'law' in the Blackstonian sense of generally applicable rules of private conduct." *Ass'n of Am. R.R.*, 575 U.S. at 76 (Thomas, J., concurring in the judgment).

those who are to act under such general provisions to fill up the details." *Wayman*, 23 U.S. (10 Wheat.) at 43. "But the inherent difficulty of line-drawing is no excuse for not enforcing the Constitution." *Ass'n of Am. R.R.*, 575 U.S. at 61 (Alito, J., concurring). *See id.* at 86 (Thomas, J., concurring) ("It may never be possible perfectly to distinguish between legislative and executive power, but that does not mean we may look the other way when the Government asks us to apply a legally binding rule that is not enacted by Congress pursuant to Article I.").

Whatever the precise line between the exercise of executive and legislative power might be, what is clear is that EPA's CPP crossed the Rubicon.[19] Under the Constitution, "important subjects . . . must be entirely regulated by the legislature itself[.]" *Wayman*, 23 U.S. (10 Wheat.) at 43. And whatever else one might say about EPA's efforts to restructure the entire electricity sector (and potentially other industries) under the banner of addressing a *global* environmental issue, these are plainly important subjects that Congress alone may address.

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[19] As Judge Walker observed, "[t]his case touches on some of administrative law's most consequential, unresolved issues," including "[w]hat are the limits of congressional delegation?" JA.253–254 (Walker, J., concurring in part, dissenting in part). That is a hard question, put mildly, on which much ink has been spilled. AFPF does not presume to know the precise line or offer an answer. AFPF respectfully submits, however, that this Court should carefully study and address this important question.

## IV. THIS COURT SHOULD JETTISON THE "INTELLIGIBLE PRINCIPLE" TEST.

"If" this Court is "ever to reshoulder the burden of ensuring that Congress itself make the critical policy decisions," *Indus. Union Dep't, AFL-CIO*, 448 U.S. at 687 (Rehnquist, C.J., concurring in judgment), this case provides an ideal opportunity to do so. Then-Chief Justice Rehnquist explained forty years ago, fittingly in the context of the OSH Act: "It is difficult to imagine a more obvious example of Congress simply avoiding a choice which was both fundamental for purposes of the statute and yet politically so divisive that the necessary decision or compromise was difficult, if not impossible, to hammer out in the legislative forge." *Id.* (Rehnquist, J., concurring in judgment). That resonates here. *See* JA.220–221 (Walker, J., concurring in part, dissenting in part). *Cf. Massachusetts v. EPA*, 549 U.S. 497, 535 (2007) (Roberts, C.J., dissenting) ("Global warming . . . is not a problem . . . that has escaped the attention of policymakers in the Executive and Legislative Branches[.]").

This Court should make clear that "th[e] mutated version of the 'intelligible principle' remark" in *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928), that forms the basis of the toothless "intelligible principle" test "has no basis in the original meaning of the Constitution, in history, or

even in the decision from which it was plucked."[20] *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting). After all, "[a]lthough this Court since 1928 has treated the 'intelligible principle' requirement as the only constitutional limit on congressional grants of power to administrative agencies, the Constitution does not speak of 'intelligible principles.' Rather, it speaks in much simpler terms: 'All legislative Powers herein granted shall be vested in a Congress.'"[21] *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 487 (2001) (Thomas, J., concurring) (citations omitted).

Under the judicially created "intelligible principle" regime, this Court "ha[s] overseen and sanctioned the growth of an administrative system that concentrates the power to make laws and the power to enforce them in the hands of a vast and unaccountable administrative apparatus that finds no comfortable home in our constitutional structure." *Ass'n of Am. R.R.*, 575 U.S. at 91 (Thomas, J., concurring in judgment). "[G]iv[ing] the 'force of law' to agency pronouncements on matters of private conduct as to

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[20] "[T]he 'intelligible principle' remark eventually began to take on a life of its own. . . . [The Court] sometimes chide[s] people for treating judicial opinions as if they were statutes, divorcing a passing comment from its context, ignoring all that came before and after, and treating an isolated phrase as if it were controlling. But that seems to be exactly what happened here." *Gundy*, 139 S. Ct. at 2139 (Gorsuch, J., dissenting).

[21] "Much of the upheaval in . . . [the Court's] delegation jurisprudence occurred during the Progressive Era, a time marked by an increased faith in the technical expertise of agencies and a commensurate cynicism about principles of popular sovereignty." *Ass'n of Am. R.R.*, 575 U.S. at 84 n.8 (Thomas, J., concurring in judgment).

which Congress did not actually have an intent, . . . permit[s] a body other than Congress to perform a function that requires an exercise of the legislative power." *Michigan v. EPA*, 576 U.S. at 762 (Thomas, J., concurring in judgment) (cleaned up)).

This troubling trend is not constitutionally harmless. As Justice Thomas has observed: "The end result may be trains that run on time (although I doubt it), but the cost is to our Constitution and the individual liberty it protects." *Ass'n of Am. R.R.*, 575 U.S. at 91 (Thomas, J., concurring in judgment). "Delegations have weakened accountable government in both political branches, allowing agencies to initiate policy and congressmen to serve as shadow administrators. This brings things too far out of alignment with the vesting of legislative and executive powers in separate branches." Rao, 90 N.Y. U. L. Rev. at 1526. "Delegation . . . drives a wedge between the personal interests of legislators and the institutional interests of Congress, undermining the collective legislative process established to promote the public good." *Id.* at 1477. "Along with its role in neutering Congress, delegation also contributes to . . . political polarization[.]" Thomas J. Philbrick, *A Purple Garment for Their Nakedness: Wilson, Hegel, and the Non-Delegation Doctrine*, 14 Alb. Gov't L. Rev. 30, 63 (2020).

This should not be allowed to stand. The time has come for this Court "to enforce the separation of powers required by our Constitution." *Ass'n of Am. R.R.*, 575 U.S. at 91 (Thomas, J., concurring in judgment). That means "respecting the people's sovereign choice to vest the legislative power in Congress alone" and "safeguarding a [constitutional

structure designed to protect their liberties, minority rights, fair notice, and the rule of law." *Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting). *See also Morrison*, 487 U.S. at 710 (Scalia, J., dissenting) ("While the separation of powers may prevent us from righting every wrong, it does so in order to ensure that we do not lose liberty."). After all, as Chief Justice Marshall wrote: "To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained?" *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803) (Marshall, C.J.). And "[t]o leave this aspect of the constitutional structure alone undefended would serve only to accelerate the flight of power from the legislative to the executive branch, turning the latter into a vortex of authority that was constitutionally reserved for the people's representatives in order to protect their liberties." *Gundy*, 139 S. Ct. at 2142 (Gorsuch, J., dissenting). *See also* Rao, 90 N.Y. U. L. Rev. at 1516.

## V. COMMON OBJECTIONS TO ENFORCEMENT OF THE SEPARATION OF POWERS LACK MERIT.

The sky will not fall if this Court enforces the Constitution's bar against delegation of Congress's legislative power. As Judge Thapar has suggested, the strawman arguments commonly advanced by proponents of the administrative state lack merit:

> [O]ne common critique stands in the way: Congress simply isn't up to the job. According to some, Congress is incapable of acting quickly in response to emergencies. Others say modern society is too complex to be run by legislators—

> better to leave it to the agency bureaucrats. In light of the original meaning, history, and structure of our Constitution, these arguments should not carry any weight. But even on their own terms, neither argument washes.

*Tiger Lily*, 5 F.4th at 674 (Thapar, J., concurring).

As to the first objection, Judge Thapar counters: "The government's response to the coronavirus pandemic proves otherwise. Congress acted swiftly to pass broad relief for the general public. But it also switched out the hammer for the scalpel when necessary." *Id.* (Thapar, J., concurring). As to the second: "The contention that Congress lacks the expertise to legislate on complicated topics appears similarly attractive at first glance. But the executive branch need not have a monopoly on experts. . . . [Congress] has experts of its own." *Id.* at 675 (Thapar, J., concurring). *See* Jesse M. Cross & Abbe R. Gluck, *The Congressional Bureaucracy*, 168 U. Pa. L. Rev. 1541, 1544 (2020). *Cf. Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting) ("Congress can also commission agencies or other experts to study and recommend legislative language."). Neither objection should stand in the way of enforcing the separation of powers required by the Constitution.

One might ask what difference does it make? The answer: "Executive-branch experts make regulations; congressional experts make recommendations. Congressional bureaucracy leaves the law-making power with the people's representatives—right where

the Founders put it."[22] *Id.* (Thapar, J., concurring). After all, "[o]ne can have a government that functions without being ruled by functionaries, and a government that benefits from expertise without being ruled by experts." *Free Enter. Fund.*, 561 U.S. at 499. "Nor would enforcing the Constitution's demands spell doom for what some call the 'administrative state.' The separation of powers does not prohibit any particular policy outcome[.]"[23] *Gundy*, 139 S. Ct. at 2145 (Gorsuch, J., dissenting).

The separation of powers demands that major policy problems must be addressed by the People's elected representatives in Congress through the deliberately difficult legislative process, so that any federal law restricting the People's liberty, or imposing obligations upon them, necessarily reflects broad political consensus, subject to limits on Congress's enumerated powers and other constitutional constraints on federal power. That is not a bad thing. Indeed, this process is a core feature of our constitutional Republic, designed to "secure the

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[22] "The members of the First Congress shared a significantly different expectation of their role than contemporary legislators. They turned to the executive branch for information and to receive recommendations. But members of Congress viewed themselves as the actors responsible for reaching finely grained policy determinations that would impact and bind the public." Jennifer Mascott, *Early Customs Laws and Delegation*, 87 Geo. Wash. L. Rev. 1388, 1449 (2019).

[23] In any event, to the extent there are practical concerns with enforcing the Constitution's bar against subdelegation of legislative power, prudential limiting principles may exist. *See, e.g., Mr. Gorsuch, Meet Mr. Marshall*, *supra*, at 28–29, 40–45.

Blessings of Liberty to ourselves and our posterity[.]" U.S. Const., Preamble.

## CONCLUSION

For the foregoing reasons, this Court should protect our constitutional Republic by enforcing the separation of powers and reversing the judgment of the court of appeals.

Respectfully submitted,

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