No. 20-1530

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

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Brief of U.S. Senators Sheldon Whitehouse, Richard Blumenthal, Bernie Sanders, and Elizabeth Warren as *Amici Curiae in Support of Respondents*

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STATEMENT OF INTEREST[1]

Amici curiae are U.S. Senators Sheldon Whitehouse of Rhode Island, Richard Blumenthal of Connecticut, Bernie Sanders of Vermont, and Elizabeth Warren of Massachusetts. *Amici* share with the Court a strong interest in preserving the separation of powers and preventing corrupting influences from undermining our democracy.

SUMMARY OF ARGUMENT

American success in the 20th and 21st centuries owes much to the administrative agencies that enabled and facilitated these accomplishments. Metrics that boomed in the 20th century, from average lifespan to economic productivity, were made possible by a slew of new regulations aimed at protecting the public welfare. As the excesses of powerful industries were reined in, however, these same regulations fostered resentment among those seeking to operate without such restraint.

These cases are the direct product of that resentment. Almost everything about these cases—the theories, the arguments, and even many of the parties and *amici curiae*—is an industrial product manufactured in an effort to return to an era free from oversight by the government. The theories and arguments were incubated, grown, propagated, and

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[1] The parties have consented to the filing of this brief. Pursuant to Rule 37.6, no counsel for any party authored this brief in any part, and no person or entity other than *amici* or *amici*'s counsel made a monetary contribution to fund its preparation or submission. The parties have filed blanket consents to the filing of *amicus curiae* briefs.

distributed by a well-funded apparatus that has selfish and destructive goals. These industry interests hope to cripple the federal government's ability to regulate them by fostering hostility toward what they pejoratively call the "administrative state." Their efforts, carried out by their front groups, proliferate through the political process, through faux intellectual ideas and grassroots campaigns, strategic appointments and policy proposals in the executive branch, and massive campaign contributions to those running for Congress.

Most important here, there is no extant regulation to challenge, so there is no case or controversy. The Court should work to restore the public's faith by rejecting this blatant, political policy agenda, and dismiss these cases.

ARGUMENT

I. The Court Should Apply Its Long-Standing, Neutral Justiciability Principles and Dismiss These Cases.

A. The judiciary was intended to settle legal questions in existing cases or controversies.

These cases present a legal oddity: petitioners are challenging a regulation that does not exist. The Court should apply its longstanding justiciability principles and dismiss the cases.

The judiciary was not intended to settle future, potential, or hypothetical disagreements. Rather, the Framers designed Article III courts to adjudicate actual cases and controversies brought by plaintiffs

who suffer a real-world harm.[2] The Constitution circumscribes the federal judiciary's power in this way to prevent courts from issuing advisory opinions and becoming, as anti-Federalists feared, an all-powerful, unanswerable body. Hamilton and the Federalists relied on the requirement for "Cases" and "Controversies" to argue that the federal judiciary could adjudicate only real disputes that arose properly through litigation. As Hamilton explained, this limitation would ensure that the "general liberty of the People can never be endangered" by an ambitious judiciary.[3] In a speech before the House of Representatives, Chief Justice John Marshall similarly recognized these limitations on the federal judiciary:

> If the judicial power extended to every question under the constitution it would involve almost every subject proper for legislative discussion and decision; if to every question under the laws and treaties of the United States it would involve almost every subject on which the executive could act. The division of power [among the branches of government] could exist no longer, and

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[2] *See, e.g.*, *United States v. Muskrat*, 219 U.S. 346, 356 (1911) ("[B]y the express terms of the Constitution, the exercise of the judicial power is limited to 'cases' and 'controversies.' Beyond this it does not extend, and unless it is asserted in a case or controversy within the meaning of the Constitution, the power to exercise it is nowhere conferred.").

[3] THE FEDERALIST NO. 78, at 464 (Alexander Hamilton) (C. Rossiter ed., 2003).

> the other departments would be swallowed up by the judiciary.[4]

These justiciability principles have continued to guide the judiciary into the modern era. Judge Cardozo observed that a judge "is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or of goodness."[5] At the beginning of his tenure, the Chief Justice distilled Cardozo's poetic notion into a simple axiom: "If a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so."[6]

This is no small matter. It is at the heart of our separation of powers.

Justiciability doctrines are especially important now because of the rise of industry-manufactured litigation—cases fabricated to bring issues before the Court to achieve policy victories unattainable through the legislative process because they are unpopular and unwanted. Industry groups, particularly the fossil fuel industry, rely on such litigation to advance their aims. Instead of promoting their arguments directly—which would expose them to accusations of callous self-interest—industry actors fund innocuously-named front groups to do their work for them. Swarms of "freedom-based public interest law" organizations now exist only to

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[4] 4 Papers of John Marshall 95 (C. Cullen ed., 1984); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

[5] BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 141 (1921).

[6] *DaimlerChrysler Corp.*, 547 U.S. at 341.

change public policy through the courts.[7] There has also emerged "a 'secretive alliance' between red-state attorneys general and fossil fuel corporations to litigate in federal courts with 'unprecedented' coordination to obstruct environmental and other regulatory efforts."[8]

Secrecy is their watchword. These organizations seldom, if ever, disclose their funders, making it difficult for courts and other parties to know the real interests behind the litigation. They are then accompanied by flotillas of professional *amici curiae*, whose common funding sources and ties to the party-in-interest are obscured by ineffective disclosure rules.[9]

Industry-manufactured litigation frequently involves strange legal posturing. Plaintiffs even rush to lose cases in the lower courts "as quickly as practicable and without argument, so that [they] can expeditiously take their claims to the Supreme Court."[10]

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[7] *See* Timothy L. Foden, *The Battle for Public Interest Law: Exploring the Orwellian Nature of the Freedom Based Public Interest Movement*, 4 CONN. PUB. INT. L.J. 184 (2005).

[8] NANCY MACLEAN, DEMOCRACY IN CHAINS (2017) (citing Eric Lipton, *Working So Closely Their Roles Blur*, N.Y. TIMES (Dec. 7, 2014)).

[9] *See generally* Sheldon Whitehouse, *A Flood of Judicial Lobbying: Amicus Influence and Funding Transparency*, 131 YALE L.J.F. 141 (2021).

[10] Br. of Appellants at 4, *Friedrichs v. California Teachers Ass'n*, No. 13-57095, 2014 U.S. App. LEXIS 24935 (9th Cir. Nov. 18, 2014) ("It is . . . Appellants' intention to pursue their claims before the Supreme Court. Because *this* Court's authority to grant that relief is foreclosed by binding

The coordinated campaign of industry-manufactured litigation is engineered to get around standing, case or controversy, and other separation-of-powers guardrails provided by Article III justiciability doctrines. When courts stray from these doctrines, they make it easy for large, powerful, anonymous forces to accomplish their goal. Through careful review of cases to ensure that there are actual justiciable disputes present, the judiciary can rebuff attempts by political actors seeking to accomplish a public policy agenda they cannot achieve through democratic means.

B. There is no real case or controversy here, only a hypothetical disagreement.

Petitioners ask the Court to decide whether the approach the Environmental Protection Agency (EPA) adopted two administrations ago in the Clean Power Plan (CPP) was impermissible under Section 111(d) of the Clean Air Act. This regulation was rescinded over two years ago, and EPA does not intend to revive it. As respondents note, even though the court of appeals vacated the rescission of the

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precedent, Appellants respectfully request that the Court affirm the district court's entry of judgment on the pleadings in favor of Appellees (public-teachers unions and public-school superintendents) as quickly as practicable and without argument, so that Appellants can expeditiously take their claims to the Supreme Court."); Br. of Sens. Sheldon Whitehouse, Jeff Merkley, Richard Blumenthal, Cory Booker, and Alex Padilla, in Supp. of Resp'ts at 3-12, *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063 (2021) (No. 20-107) (describing similar tactics by the plaintiffs in *Cedar Point Nursery v. Hassid*).

CPP, it granted EPA's unopposed motion to stay that vacatur. This means that there is no risk that the CPP will take effect while EPA develops a new regulation.[11]

In the current posture, the Obama Administration's CPP is not law, the Trump Administration's Affordable Clean Energy (ACE) rule that replaced it is not law, and the Biden Administration has not promulgated any rule on the subject. While EPA has indicated that it intends to develop a new regulation for carbon emissions from existing coal-fired power plants, there is no basis for judicial surmise that any such rule will mirror the CPP or the ACE rules, or that it will even rely on Section 111(d). At this time, EPA is not regulating CO_2 from existing coal-fired power plants at all. The Court does not have the authority to review future, potential, or hypothetical administrative regulations. The Constitution, through well-established justiciability doctrines, protects against courts engaging in precisely this type of free-range policymaking knight-errantry.[12] Without an extant regulation to review, any decision here would be a judicial usurpation of power contrary to the Constitution.

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[11] Br. for Federal Resp'ts in Opp'n 15.

[12] *See generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993).

II. The Court Should Reject Petitioners' Efforts to Enlist It in Their Industry-Driven Deregulatory Agenda.

A. Polluting interests seek to gut EPA using previously rejected legal theories.

These cases are the product of an industry-led agenda. We Senators see this constantly. Regulated industries, the heavily-polluting fossil fuel industry first among them, have spent decades developing, funding, and executing a campaign to restrict or even eliminate the federal government's regulatory authority. They have an obvious motive.[13]

As Senators, we not only witness this industry behavior, but we also engage constantly with real constituents, from whom we hear little if no complaint about the so-called "administrative state." The complaint we most often hear is that an agency has failed to regulate forcefully enough, with

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[13] The International Monetary Fund estimates that total fossil fuel subsidies in the United States, including both direct and indirect (i.e., the unpriced negative externalities associated with fossil fuel production and combustion), total $660 billion. Ian Parry, et al., *Still Not Getting Energy Prices Right: A Global and Country Update of Fossil Fuel Subsidies*, IMF working papers (Sept. 24, 2021), https://www.imf.org/en/Publications/WP/Issues/2021/09/23/Still-Not-Getting-Energy-Prices-Right-A-Global-and-Country-Update-of-Fossil-Fuel-Subsidies-466004. Opposing government action to reduce or eliminate such subsidies is therefore worth up to $660 billion annually to the fossil fuel industry. That is quite a motive.

resulting harm to the constituent. Often, that failure is the result of industry influence at the agency.

Petitioners and their industry-allied front group *amici* invite the Court to curtail EPA's authority by arguing that Congress cannot delegate meaningful regulatory power to administrative agencies.[14] They revive, and seek to weaponize, the long-dormant non-delegation doctrine and other anti-regulatory theories to further their crusade against government regulation.[15] They would take a doctrine

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[14] *See* Br. for Pet'rs West Virginia et al. 14-30; Br. of Pet'r Westmoreland Mining Holdings LLC; Br. of Resp't North Am. Coal Corp. in Supp. Of Pet'rs 16-32; Amicus Curiae Br. of New Civil Liberties Alliance in Supp. of Pet'rs 10-32; Br. of *Amici Curiae* Doctors for Disaster Preparedness and Eagle Forum Educ. & Legal Defense Fund in Supp. of Pet'rs 17-19; Br. of *Amicus Curiae* Buckeye Inst. in Supp. of Pet'rs 4-7; Br. of America First Policy Inst. as *Amicus Curiae* in Supp. of Pet'rs 8-25; Br. of *Amicus Curiae* Claremont Inst.'s Ctr. for Const. Juris. in Supp. of Pet'rs 2-12; Br. of *Amicus Curiae* Americans for Prosperity Found. in Supp. of Pet'rs 12-29; Br. of Cato Inst. and Mountain States Legal Found. as *Amici Curiae* in Supp. of Pet'rs 4-7.

[15] These arguments peaked in 1935 with the Court's decisions in *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935), and *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). In the decades since then, however, the Court has declined to endorse such staunch anti-delegation arguments. *See* Cass Sunstein, *Nondelegation Canons*, 67 U. CHI. L. REV. 315, 322 (2000); *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 474 (2001) ("In the history of the Court, we have found the requisite 'intelligible principle' lacking in only two statutes, one of which provided literally no guidance for the exercise of discretion, and the other of which conferred authority to regulate the entire economy on the basis of no more precise a standard than stimulating the economy by assuring 'fair competition.'").

designed to address the rare circumstances in which Congress has provided no "intelligible principle" for the agency to follow,[16] "literally no guidance in the exercise of discretion,"[17] and deploy it to bring down what they pejoratively refer to as "the administrative state."

This would be a needless, activist, unprecedented gambit for the Court, particularly insofar as it targets the Clean Air Act. Congress has given abundant attention to this Act in major reauthorizations in 1970, 1977, and 1990; and the Court upheld the Act's application to greenhouse gas emissions from the combustion of fossil fuel in 2007.[18]

The constitutionality of this delegation is actually settled. In *Whitman v. American Trucking Associations*, a bevy of fossil fuel companies, chemical manufacturers, industry-funded front groups, and other organizations with fossil fuel ties challenged Congress's authority to delegate the power to set air quality standards.[19] The Court unanimously rejected

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[16] *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394 (1928).

[17] *Whitman* , 531 U.S. at 474 .

[18] *Massachusetts v. EPA*, 549 U.S. 497, 528-532 (2007).

[19] For arguments made by these groups, see Br. of Resp'ts Am. Trucking Ass'ns., Inc., Chamber of Com. of the United States, et al., *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457 (2001) (No. 99-1257); Br. for Resp'ts Appalachian Power Co., et al., in Supp. of Pet'rs, *Whitman*, 531 U.S. 457 (No. 99-1257); *Amicus Curiae* Br. of Am. Crop Protection et al. in Supp. of Resp'ts, *Whitman*, 531 U.S. 457 (No. 99-1257); Br. of *Amicus Curiae* General Electric Co. in Supp. of Resp'ts, *Whitman*, 531 U.S. 457 (No. 99-1257); Br. of *Amici Curiae* Inst. for Justice and Cato Inst. in Supp. of Resp'ts, *Whitman*, 531 U.S. 457 (No. 99-1257); Br. of

the industries' invitation to participate in their political agenda. Justice Scalia reiterated that the Court has "almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law."[20]

B. These efforts are the product of a decades-long, industry-funded project to dismantle the so-called "administrative state."

As the challenges of the twentieth century unfolded—from a persistent, worldwide economic depression to unprecedented global warfare to rapidly developing and complex environmental and public health dangers born of ever greater industrialization—the responsibilities of lawmaking required modernization. Congress responded by creating administrative agencies with both the time and expertise to meet these demands.[21] The Court,

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Amicus Curiae Mercatus Ctr. in Supp. of Resp't, *Whitman*, 531 U.S. 457 (No. 99-1257); Mot. for Leave to File Br. *Amicus Curiae* and Br. of *Amicus Curiae* Pacific Legal Found. and Cal. Chamber of Com. in Supp. of Resp'ts Am. Trucking Ass'ns., Inc., et al., *Whitman*, 531 U.S. 457 (No. 99-1257); Br. *Amicus Curiae* of Lincoln Inst. for Rsch. and Educ. et al. in Supp. of Resp'ts, *Whitman*, 531 U.S. 457 (No. 99-1257).

[20] *Whitman*, 531 U.S. at 474-75 (citing *Mistretta v. United States*, 488 U.S. 361, 416 (1989) (Scalia, J., dissenting)).

[21] *See generally* IRA KATZNELSON, FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME (2013); Robert L. Rabin, *Federal Regulation in Historical Perspective*, 38 STAN. L. REV. 1189 (1986); Mark Fenster, *The Birth of a "Logical System": Thurman Arnold and the Making of Modern Administrative Law*, 84 OR. L. REV. 69 (2005); Mariano-Florentino Cuéllar,

in turn, acknowledged that "in our increasingly complex society, replete with ever changing and more technical problems, Congress simply cannot do its job absent an ability to delegate power under broad general directives."[22]

The result has been an astonishing success. Over the past fifty years, Congress charged regulatory agencies—operating under congressional supervision and executive-appointed leadership—with protecting the public interest in countless ways, such as ensuring the safety of the water we drink, the air we breathe, the cars we drive, the medications we take, and the markets we invest in for our retirement and our children's future. Medicines are not snake-oil mysteries any longer. People are rarely burned or killed in boiler explosions. Automobiles have airbags. Smokestacks mostly have pollution controls. Stock jobbers have a harder time suckering innocent investors. Most insurance policies actually pay when the insured risk occurs. We take for granted the safety and reliability that a regulated world has built. Thus protected, we may overlook the simple reality that industries motivated by maximizing their profits often cause social harm. That is why regulation is often imperative.

Regulation helps channel America's competitive enterprise into good and helpful innovations instead of into new tricks and traps for consumers, or new ways of cutting safety corners, or

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Foreword, *Administrative War*, 82 GEO. WASH. L. REV. 1343 (2014); Stephen M. Johnson, *Indeconstructible: The Triumph of the Environmental "Administrative State"*, 86 U. CIN. L. REV. 653 (2018).

[22] *Mistretta*, 488 U.S. at 372.

new ways of conning gullible buyers. Confidence in our industries grows when consumers know they can count on the safety and reliability of the product. Would the American pharmaceutical industry be a world powerhouse if patent medicine hucksters were still allowed to operate? Regulation sets a positive frame for our economic progress.

Despite all this success, certain regulated industries resent the constraint of regulation. Deep-pocketed industries with massive lobbying and public relations teams and well-funded political leverage would undo government's capacity for highly technical regulation. These industries have set about fabricating legal theories into deregulatory weapons. Industry-funded think tanks and scholars produce "intellectual capital" to "frame, filter, or shape the outcome of . . . decision-making process[es] according to their own shared beliefs, principles, or values."[23] Front groups proliferate these arguments, promoting them through pseudo-grassroots organizing, legislative lobbying, industry-financed conferences, and industry-driven litigation, including the filing of orchestrated flotillas of *amicus* briefs.[24]

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[23] AMANDA HOLLIS-BRUSKY, IDEAS WITH CONSEQUENCES: THE FEDERALIST SOCIETY AND THE CONSERVATIVE COUNTERREVOLUTION 7, 12 (2014).

[24] *See, e.g.*, Mark Joseph Stern, *What the Koch Brothers' Money Buys*, SLATE (May 2, 2018) (discussing the Koch Brothers' funding of deregulatory academic institutions); Andy Kroll, *Exposed: The Dark-Money ATM of the Conservative Movement*, MOTHER JONES (Feb. 5, 2013); Alexander Hertel-Fernandez, Caroline Tervo, & Theda Skocpol, *How the Koch brothers built the most powerful rightwing group you've never heard of*, THE GUARDIAN (Sept. 26, 2018); SHELDON

For example, opponents of regulation began promoting the idea that delegation jeopardizes "individual liberty." Throughout the 1990s and 2000s, industry front groups inundated Congress and the public with handbooks and articles calling delegation "The Corrosive Agency of Democracy" and warning that it "subjects the lives, liberty, and property of Americans to arbitrary rule."[25]

These industry front groups and their funders are part of a well-organized and tightly connected web of organizations, which we often see dedicated to promoting climate denial and opposing climate action in Congress, at executive agencies, and in the courts. *Amici* Competitive Enterprise Institute, Americans for Prosperity Foundation, Cato Institute, Mountain States Legal Foundation, Landmark Legal

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WHITEHOUSE, CAPTURED 147-58 (2017) (discussing dark-money industry funding of plaintiffs, counsels, and *amici curiae* in pro-industry litigation).

[25] Jerry Taylor, *The Role of Congress in Monitoring Administrative Rulemaking*, CATO INST. (Sept. 12, 1996) (stating that delegation "undermin[es] democracy"); CATO INST., "The Delegation of Legislative Powers" *in Cato Handbook for Congress* 99-101 (2003) (describing delegation as "The Corrosive Agency of Democracy"); *see also* Robert A. Anthony, *Unlegislated Compulsion: How Federal Agency Guidelines Threaten Your Liberty*, CATO INST. (Aug. 11, 1998). In 2014, Taylor realized he, Cato, and the rest of the right-wing anti-climate groups were misleading the public about climate change. In a noisy exit, he left Cato and began supporting policies to reduce greenhouse gas emissions. *See* David Roberts, *The arguments that convinced a libertarian to support aggressive action on climate*, VOX (May 12, 2015), https://www.vox.com/2015/5/12/8588273/the-arguments-that-convinced-this-libertarian-to-support-a-carbon-tax.

Foundation, and Southeastern Legal Foundation are all part of this network of groups.[26]

In his book, *The War on Science*, Shawn Otto makes a crucial point about the "freedom" narrative that big, regulated industries want to sell about regulation: "[W]e accept limitations on our individual freedoms to gain greater freedom," through "regulations that reduce smog, acid rain, ozone destruction, the use of DDT, backyard burning of garbage, driving while intoxicated, noise pollution, lead in paint and gasoline, certain carcinogens, water pollution—and more recently, exposure to secondhand smoke, injuries caused by not wearing seat belts, and texting while driving."[27] The freedom we gain from these regulations is "the freedom they provide from the tyranny of others' stupid decisions," freedom from "a tyranny of trash—of ignorance."[28] Regulation is indeed a constraint on corporate actions; but it's one that delivers freedoms the rest of us enjoy.

Concocting and exploiting deregulatory ideology is no small effort, and it has a parallel effort in the political process. The fossil fuel industry floods members of Congress with campaign contributions to impede Congress's attempts to combat climate

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[26] Robert Brulle, *Institutionalizing delay: foundation funding and the creation of U.S. climate change counter-movement organizations*, CLIMATIC CHANGE (Dec. 2013), https://www.cssn.org/wp-content/uploads/2020/12/InstitutionalizingDelay-ClimaticChange.pdf.

[27] SHAWN OTTO, THE WAR ON SCIENCE (2016).

[28] *Id.*

change; it funds supposedly "independent" political spending groups and super PACs and supposedly non-political "issue ads" to exert further political force; and it secures the placement of proven industry allies atop key agencies like EPA to implement its agenda.[29]

Regrettably, there was another parallel effort, one targeting the judiciary. To achieve the political goal of "deconstruction" of the so-called "administrative state," judicial appointments were made part of the "larger plan" to eradicate regulatory agencies.[30] In the last administration, former White House Counsel Don McGahn "exercised an

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[29] *See e.g.*, Matthew H. Goldberg et al., *Oil and Gas Companies Invest in Legislators that Vote Against the Environment*, 117 PROCEEDINGS OF THE NAT'L ACAD. OF SCIENCES 5111 (2020) ("The more a given member of Congress votes against environmental policies, the more contributions they receive from oil and gas companies supporting their reelection."); Alan Zibel, *Big Oil's Capitol Hill Allies*, PUB. CITIZEN (Feb. 10, 2021) (documenting $13.4 million in donations from oil and gas interests to twenty-nine lawmakers who signed a letter denouncing the Biden administration's pause on new oil and gas leases); Suzanne Goldenberg & Helena Bengtsson, *Oil and gas industry has pumped millions into Republican* campaigns, THE GUARDIAN (Mar. 3, 2016) (documenting approximately $107 million donated through fossil fuel superPACs to Republican presidential candidates in 2015); Danielle Ivory & Robert Faturechi, *The Deep Industry Ties of Trump's Deregulation Teams*, N.Y. TIMES (July 11, 2017).

[30] Jeremy W. Peters, *Stephen Bannon Reassures Conservatives Uneasy About Trump*, N.Y. TIMES (Feb. 23, 2017); Eli Watkins, *Top WH lawyer details Trump admin's 'larger plan' to shrink regulatory state*, POLITICO (Feb. 22, 2018); *see also* Luke Hartig, *Trump's Four-Pronged War on the Administrative State*, JUST SECURITY (Feb. 7, 2018).

unprecedented degree of control over judicial appointments,"[31] and stated plainly that "the judicial selection and the deregulation effort are really the flip side of the same coin."[32] More than $400 million was spent on this deregulatory effort targeting the judiciary, with much of it coming in large donations from anonymous sources, while fossil fuel interests donated added millions to the then-president's reelection campaign.[33]

This is the environment that these special interests have created through their influence operation. For this Court to ignore it would be a grave error.

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[31] Jason Zengerle, *How the Trump Administration is Remaking the Courts*, N.Y. TIMES (Aug. 22, 2018).

[32] Robert Barnes & Steven Mufson, *White House Counts on Kavanaugh in Battle Against 'Administrative State'*, WASH. POST (Aug. 12, 2018); *see also* Zengerle, *supra* note 31 (quoting McGahn's November 2017 speech to the Federalist Society observing that "regulatory reform and judicial selection are so deeply connected").

[33] *What's Wrong with the Supreme Court: The Big-Money Assault on Our Judiciary: Hearing Before the S. Comm. on the Judiciary*, 117th Cong. 6 (2021) (statement of Lisa Graves); Peter Stone, *Big oil remembers 'friend' Trump with millions in campaign funds*, THE GUARDIAN (Aug. 9, 2020); Matt Egan, *Exxon denies Trump called CEO for money. But Big Oil is donating way more to Trump than Biden*, CNN (Oct. 21, 2020).

C. Regulated industries brought these cases because they believe the Court will fulfill their decades-long deregulatory goals.

Now this industry machine turns to the judiciary to push its policy agenda, asking the Court yet again to do what Congress has consistently refused to do: gut EPA's regulatory authority under one of our preeminent environmental protection laws. The anti-regulatory arguments advanced here would shield deep-pocketed and politically-powerful coal, oil, and gas interests from regulation under the statutory EPA authority challenged by the petitioners, and give polluters new opportunities to tangle and delay regulation of their emissions.[34] It is no surprise that most, if not all, of the *amici* supporting the petitioners in these cases receive substantial funding from this industry.[35]

For example, *amicus* Competitive Enterprise Institute has received funding from Exxon Mobil, Murray Energy, the American Fuel and

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[34] This extremist anti-regulatory agenda has even been rejected by several of the nation's leading electric utilities. *See* Br. for Power Company Resp'ts.

[35] *Amici* with known-funding ties to the fossil fuel industry include the New Civil Liberties Alliance, New England Legal Foundation, Buckeye Institute, Southeastern Legal Foundation, National Federation of Independent Small Business Legal Center, Claremont Institute, Americans for Prosperity Foundation, Competitive Enterprise Institute, Cato Institute, Mountain States Legal Foundation, and Landmark Legal Foundation. Because so many industry front groups do not disclose their donors, and because the Court does not meaningfully enforce its *amicus* disclosure under Rule 37.6, we are denied a more complete understanding of the linkages.

Petrochemical Manufacturers, the American Petroleum Institute, and groups tied to the fossil fuel billionaire Koch family.[36] *Amicus* Cato Institute was founded by the Koch family and has been richly funded by groups tied to the Kochs, as well as Exxon Mobil and other fossil fuel companies.[37] *Amicus* Americans for Prosperity Foundation, an arm of the group Americans for Prosperity, was also founded by the Koch family, and has received funding from numerous groups tied to the family.[38] Other *amici* do not reveal their funding sources, but their output of climate denialism is a hallmark of industry-funded propaganda.[39] Moreover, some *amici*, like the Cato Institute, have been instrumental in developing and promoting the industry "intellectual capital" that undergirds these challenges to EPA's authority.[40]

The industry-funded and industry-promoted arguments made here have been repeatedly rejected by the Court, and would empower and enrich polluting corporations at the expense of public health, welfare, and the environment. The Court should refuse to participate in this industry-driven project. Reversals of precedent that reek of politics,

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[36] *Competitive Enterprise Institute*, DESMOG, https://www.desmog.com/competitive-enterprise-institute/.

[37] *Cato Institute*, DESMOG, https://www.desmog.com/cato-institute.

[38] *Americans for Prosperity*, DESMOG, https://www.desmog.com/americans-for-prosperity/.

[39] *See, e.g.*, Doctors for Disaster Preparedness, *Ozone hole, Global warming, and other Environmental Scares*, http://ddponline.org/envir.htm.

[40] *See supra* note 25.

and are advanced by thinly-disguised but highly-motivated industry front groups, create a "stench" that is likely to undermine the public's remaining faith in the Court.[41]

III. Limiting Congress's Ability to Delegate Would Undermine the Federal Government's Ability to Function.

A. There is no legitimate basis for eviscerating Congress's authority to delegate.

The industry arguments presented here were reverse-engineered to produce desired outcomes, so it should be no surprise if they trespass into falsehood and fancy. And they do.

For instance, anti-delegation legal theories do not hand power back to "the people's representatives."[42] A democratically-elected Congress created these agencies and maintains oversight of (and even has expedited procedures for rebuking) agency actions.[43] Every appropriations bill gives Congress an opportunity to expand or contract agency authorities via funding. We Senators sit on legislative committees dedicated to agency oversight, with the power to call agencies to account. The

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[41] *See* Transcript of Oral Argument at 15, *Dobbs v. Jackson Women's Health*, No. 19-1392 (Dec. 1, 2021).

[42] *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

[43] Congressional Review Act, 5 U.S.C. § 801.

"people's representatives" speak through these laws, and act through these powers.

These agency duties are then carried out by officials appointed by the president, "the most democratic and politically accountable official in Government."[44] Recent decisions have vouchsafed that executive branch agencies "remain accountable to" and "dependent on the President, who is in turn accountable to the people."[45] The industry's anti-delegation theories would de-democratize this process by transferring power to an unelected judiciary, to strike down laws whenever a delegation of power makes them uncomfortable. This removes political decisions further from democratic accountability. The industry theorists have this exactly backward.

The industry's anti-delegation theories have no constitutional basis. An extensive review of Founding-era understandings of the separation of powers reveals that the Constitution, as understood by the Founders, "contained no discernable, legalized prohibition on delegations of legislative power, at least so long as the exercise of that power remained subject to congressional oversight and control."[46] Early Congresses regularly enacted laws that "broadly empowered executive and judicial actors to

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[44] *Seila Law LLC v. Consumer Financial Protection Bureau*, 140 S. Ct. 2183, 2203 (2020).

[45] *Id.* at 2197, 2211.

[46] Julian Davis Mortenson & Nicholas Bagley, *Delegation at the Founding*, 121 COLUM. L. REV. 277, 280 (2021). *But see* Ilan Wurman, *Nondelegation at the Founding*, 111 YALE L.J. 1490 (2021).

adopt binding rules of conduct for private parties on some of the most consequential policy questions of the era."[47] These delegations often came "without even a whiff of constitutional protest."[48]

There is abundant incentive, but little historical or legal basis, for the anti-regulatory industry theories.

B. Delegation is essential for Congress to accomplish its lawmaking responsibility, particularly with respect to environmental protection statutes.

Our increasingly advanced twentieth-century economy relied on the widespread combustion of fossil fuels and the manufacture and use of thousands of chemicals and other synthetic substances. Unfortunately, this resulted in widespread environmental destruction and public health damage. Substances emitted during combustion and manufacturing polluted our air, water, ground, and food; and are now disturbing even the basic oceanic and climatic operating systems of our planet.

Facing these environmental and public health perils, Congress passed and amended environmental protection statutes over the last six decades, including the Clean Air Act, passed in 1963 and

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[47] Mortenson & Bagley, *supra* note 47, at 277; *see also* Nicholas Parrillo, *A Critical Assessment of the Originalist Case Against Administrative Regulatory Power: New Evidence from the Federal Tax on Private Real Estate in the 1790s*, 130 YALE L.J. 1288 (2021).

[48] Mortenson & Bagley, *supra* note 47, at 332.

amended in 1970, 1977, and 1990; the Clean Water Act, passed in 1972 and amended in 1977 and 1987; and the Toxic Substances Control Act (TSCA), passed in 1976 and amended in 2016.

These statutes are intentionally designed to allow EPA to respond to the rapid pace of industrial, scientific, and technological innovation. They are, by congressional design, forward-looking, directing EPA to periodically recalibrate its regulatory approach in response to changes in industry, technology, and science. For example, the 1970 amendments to the Clean Air Act direct EPA to periodically determine the types of stationary sources that significantly contribute to "air pollution which may reasonably be anticipated to endanger public health or welfare," and then to develop standards of performance in order to reduce the pollution.[49]

The legislative history of the 1970 amendments to the Clean Air Act is replete with expressions of Congress's intent that EPA respond to changing conditions and advances in scientific understanding.[50] Congress reaffirmed this EPA regulatory flexibility in the 1977 and 1990 amendments to the Clean Air Act.

An *amicus* brief filed by Republican members of Congress is wrong in suggesting that EPA is

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[49] 42 U.S.C. § 7411.

[50] *See, e.g.*, STATEMENT OF REP. SPRINGER, *reprinted in* 2 A LEG. HIST. OF THE CLEAN AIR AMENDMENTS OF 1970, 809 (1970); TESTIMONY OF DR. JOHN MIDDLETON, BEFORE THE SENATE PUBLIC WORKS COMMITTEE'S SUBCOMMITTEE ON AIR AND WATER POLLUTION, *reprinted in* 2 A LEG. HIST. OF THE CLEAN AIR AMENDMENTS OF 1970, 1185 (1970).

limited in its ability to deal with the emissions responsible for climate change. The brief argues that because Congress has on occasion passed laws more specific to greenhouse gas emissions, the Clean Air Act's forward-looking grant of authority to EPA to regulate air pollutants and sources that endanger health and human welfare is limited.[51]

This argument fails on numerous grounds. First, Congress is well-within its power to pass a specific law about a single category of air pollutants while also maintaining a broad, forward-looking regulatory authority to address air pollutants generally, in a way consistent with evolving science and technology. For example, like the Clean Air Act, TSCA provides a forward-looking grant of regulatory authority given the number of new, potentially toxic chemicals developed and commercialized by industry—as many as 1,100 new chemicals since mid-2016 alone.[52] To require Congress to write a law for each class of pollutants is absurd and terribly dangerous for the environment and public health.

Even were Congress capable of developing and passing legislation for each and every pollutant, as scientific understanding of the harmfulness of pollutants evolves, such laws would quickly become outdated. Scientific understanding of the

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[51] Br. of 91 Members of Congress as *Amici Curiae* in Supp. of Pet'rs 13-19.

[52] *See Statistics for the New Chemicals Review Program under TSCA*, U.S. ENVIRONMENTAL PROTECTION AGENCY, https://www.epa.gov/reviewing-new-chemicals-under-toxic-substances-control-act-tsca/statistics-new-chemicals-review#noc.

harmfulness of fine particulate matter, of lead paint and pipes, and of the dangers of planetary warming has changed significantly with time.[53]

Third, technology to reduce and erase pollutants is constantly evolving. A decade ago, carbon capture technology would not have been a viable option to limit greenhouse gas emissions. Now, it is increasingly deployed.[54]

Congress may choose to delegate substantial authority to agencies because Congress does not have the resources or expertise required.[55] EPA, for instance—an agency solely dedicated to environmental work—employs roughly as many individuals as every congressional committee and member office combined.[56] It is simply not possible

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[53] *See, e.g.*, *The Need for a Tighter Particulate Air-Quality Standard*, 383 N. ENG. J. MED. 680, 680-83 (2020); Michele Augusto Riva et al., *Lead Poisoning: Historical Aspects of a Paradigmatic "Occupational and Environmental Disease"*, 3 SAFE HEALTH WORK 11, 11-14 (2012); U.N. Intergovernmental Panel on Climate Change, *Global Warming of 1.5°C* (2019).

[54] *See* GLOBAL STATUS OF CCS 2021, GLOBAL CCS INST., https://www.globalccsinstitute.com/wp-content/uploads/2021/11/Global-Status-of-CCS-2021-Global-CCS-Institute-1121.pdf.

[55] *See, e.g.*, J. Harvie Wilkinson III, *Assessing the Administrative State*, 32 J.L. & POL. 239, 241 (2017) ("[I]t is difficult to legislate in minute detail upon intricate and technical subjects where the body of knowledge is changing and growing by the day. As a practical matter, the legislative process just cannot keep up.").

[56] *Compare* U.S. Environmental Protection Agency, *EPA's Budget and Spending*, https://www.epa.gov/planandbudget/budget (last accessed Jan. 7, 2022) (showing an EPA workforce of 14,297 in fiscal year

to drive all the work of all the administrative agencies through Congress itself. Even if agencies completed 99% of the work required to develop and draft a new rule, requiring Congress to enact those thousands of rules that are published by agencies each year would still vastly exceed the hours on the legislative calendar.[57]

Congress may also choose to delegate substantial authority to agencies in order to create an orderly, expert, and transparent environment for complex technical decisions. Congress is witness to its own susceptibility to the outsize influence of industries that have vast resources—a vulnerability made much worse by the political dark money deluge that followed the Court's decision in *Citizens United v. FEC*.[58] Even when legislative action has overwhelming public support, political interests can

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2021) *with* R. ERIC PETERSEN, CONG. RESEARCH. SERV., R43947, HOUSE OF REPRESENTATIVES STAFF LEVELS IN MEMBER, COMMITTEE, LEADERSHIP, AND OTHER OFFICES, 1977-2021 10 tbl. 1 (2021) (showing approximately 7,649 House employees in personal offices and committees) *and* R. ERIC PETERSEN, CONG. RESEARCH. SERV., R43946, SENATE STAFF LEVELS IN MEMBER, COMMITTEE, LEADERSHIP, AND OTHER OFFICES, 1977-2020 6 tbl. 1 (2020) (showing approximately 5,193 Senate employees in personal offices and committees).

[57] *See* MAEVE P. CAREY, CONG. RESEARCH. SERV., R43056, COUNTING REGULATIONS: AN OVERVIEW OF RULEMAKING, TYPES OF FEDERAL REGULATIONS, AND PAGES IN THE *FEDERAL REGISTER* 1 (2019) (showing between 3,000-4,000 final rule documents published in the *Federal Register* each year between 2005-2018).

[58] 558 U.S. 310 (2010). Anna Massoglia, *'Dark money' in politics skyrocketed in the wake of Citizens United*, OPENSECRETS (Jan. 27, 2020).

use dark-money power to block it. We in Congress have seen fossil fuel interests, including those behind this litigation, wield that power to block legislation combatting climate change for over a decade.[59] Some of us were in the Senate when climate change was a bipartisan issue, before *Citizens United* unleashed the torrents of political (and now usually anonymous) spending that put an end to that. While administrative agencies are susceptible to regulatory "capture," they are better protected than Congress

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[59] *See, e.g.*, Frank Newport, *Americans Want Government to Do More on Environment*, GALLUP NEWS (Mar. 29, 2018) ("Proposals to reduce emissions, enforce environmental regulations, reduce fracking, spend government money on alternative energy sources and pass a carbon tax all receive majority approval – in some instances over 70%."). A single front group for fossil fuel interests declared it would spent $750 million dollars to influence the 2016 election, and warned Republican candidates that they would be "severely disadvantaged" and would face "political peril" if they crossed it on climate change. *See* WHITEHOUSE, CAPTURED, *supra* note 24, at 175-77 (2017); Matea Gold, *Charles Koch Downgrades His Political Network's Projected 2016 Spending from $889 million to $750 million*, WASH. POST (Oct. 21, 2015); Coral Davenport, *Why Republicans Keep Telling Everyone They're Not Scientists*, N.Y. TIMES (Oct. 30, 2014); Eric Holthaus, *Researchers: Exxon, Koch Family Have Powered the Climate Denial Machine for Decades*, SLATE (Dec. 1, 2015); Puneet Kollipara & David Malakoff: *For the First Time in Years, the U.S. Senate Voted on Climate Change. Did Anybody Win?*, SCI. MAG. (Jan. 29, 2015); Jane Mayer, *Koch Pledge Tied to Congressional Climate Inaction*, NEW YORKER (June 30, 2013); Jeffrey Toobin, *Republicans United on Climate Change*, NEW YORKER (June 9, 2014).

from the malign influence that well-resourced industries can now apply.[60]

In sum, delegation to regulatory agencies like EPA allows Congress to meet the challenges our country faces via well-overseen expert agencies that are given statutory direction to develop and implement technical policy solutions, to the benefit of the American people and the American economy.

Finally, the industry-proposed dismantling of this system invites mischief. It would not be easy to articulate a principle for determining which delegations would remain constitutional and which would not. The absence of a clear workable principle opens the door to judicial caprice. The ultimate decision would often come down to one thing: a judge's decision about whether a delegation is, in his or her own mind, too much.[61] That is nothing more than judicial policymaking at its worst. Without a clear, bright line, moreover, it will be impossible to stem the flood of new, time-consuming tasks unprecedentedly thrust upon Congress.[62]

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[60] *See, e.g.*, PREVENTING REGULATORY CAPTURE: SPECIAL INTEREST INFLUENCE AND HOW TO LIMIT IT 1-11 (Daniel Carpenter & David A. Moss eds., 2013).

[61] *See U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 423 (D.C. Cir. 2017) (en banc) (Kavanaugh, J., dissenting from the denial of reheaing en banc) ("To be sure, determining whether a rule constitutes a major rule sometimes has a bit of a 'know it when you see it' quality.").

[62] *See Gundy*, 139 S. Ct. at 2130. ("Indeed, if SORNA's delegation is unconstitutional, then most of Government is unconstitutional . . . .").

The Court has neither the expertise nor the record to evaluate the "options" suggested by Justice Gorsuch in *Gundy*.[63] None of these "options" provide any clear principle for determining which delegations are permissible and which are unconstitutional.

Of course, industry groups understand this all too well. It is precisely because delegation of authority to administrative agencies is so critical that these groups seek to hobble it. They know that if they can enlist the Court to push these responsibilities over onto Congress, they will be better able to defeat effective regulation of their industries.

The American administrative law model is implicitly or explicitly reaffirmed virtually daily by Congress; it has been immensely successful and enjoys broad popular support and reliance; and it has been upheld repeatedly and for decades by the Court. It would be folly to disrupt that successful model now based on judicial surmise and special-interest pleading. The Court should deny these industries' invitation to disable, for their own benefit, the American government's ability to function in the modern world.

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[63] *Id.* at 2145 (Gorsuch, J., dissenting) ("What is more, Congress is hardly bereft of options to accomplish all it might wish to achieve. It may always authorize executive branch officials to fill in even a large number of details, to find facts that trigger the general applicable rule of conduct specified in a statute, or to exercise non-legislative powers. Congress can also commission agencies or other experts to study and recommend legislative language.").

CONCLUSION

For the foregoing reasons, the opinion of the D.C. Circuit should be affirmed.

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