No. ____

IN THE

Supreme Court of the United States

WESTMORELAND MINING HOLDINGS LLC,

Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL REGAN, ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Clean Air Act Section 111(d), 42 U.S.C. § 7411(d), authorizes EPA to impose standards of performance for existing sources' emission of certain pollutants. In *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011), this Court endorsed EPA's longstanding view that it may not apply Section 111(d) to sources that are already regulated under the Act's stringent Section 112 "hazardous air pollutants" program. Nonetheless, EPA promulgated its "Clean Power Plan" to impose carbon dioxide emission limits under Section 111(d) on coal-fired power plants that are already regulated under Section 112. "[O]ne of the most consequential rules ever proposed by an administrative agency," Pet.App.172a, the Clean Power Plan would fundamentally transform the U.S. energy system by "shifting" generation from fossil-fuel-fired plants to other sources of electricity. After EPA repealed the Clean Power Plan as *ultra vires*, the D.C. Circuit vacated that action on the ground that Section 111(d) effectively places "no limits" on EPA.

Accordingly, the questions presented are:

1. Whether EPA may employ 42 U.S.C. § 7411(d) to impose standards of performance on existing stationary sources that are regulated under the "hazardous air pollutants" program of 42 U.S.C. § 7412.

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

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

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

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

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

Intervenor for petitioners was State of Nevada.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

STATEMENT OF RELATED PROCEEDINGS

American Lung Ass'n & American Public Health Ass'n v. EPA, et al., No. 19-1140, consolidated with Nos. 19-1165, 19-1166, 19-1173, 19-1175, 19-1176, 19-1177, 19-1179, 19-1185, 19-1186, 19-1187, 19-1188 (D.C. Cir. 2021).

West Virginia, et. al. v. EPA, et al., No. 20-1530 (petition for a writ of certiorari filed Apr. 29, 2021).

North American Coal Corp. v. EPA, et al., No. 20-1531 (petition for a writ of certiorari filed Apr. 30, 2021).

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

PETITION FOR WRIT OF CERTIORARI

Did Congress authorize EPA in Clean Air Act Section 111(d) to restructure the U.S. electrical system and energy industry by mandating that electric generation be "shifted" away from fossil-fuel-fired power plants and, in particular, coal-fired ones? After nearly a decade of litigation, including over 15 hours of argument across three court-of-appeals cases, the lack of a definitive answer to that question has left Congress, the Executive Branch, and the entire energy industry in a state of regulatory limbo since EPA first asserted that authority in 2014.

This Court signaled that the answer is no when it said as much with respect to coal-fired plants in *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 n.7 (2011) ("*AEP*"), and when it proceeded in 2016 to stay EPA's exercise of that authority in the Clean Power Plan. That latter case was dismissed as moot after the previous administration repealed the Clean Power Plan in 2019, but then the D.C. Circuit in the decision below vacated the repeal on the view that Section 111(d) imposes "no limits on the types of measures" EPA may implement under that provision. Pet.App.56a.

Meanwhile, industry has been whipsawed and frustrated in making the long-term decisions and investments necessary to meet the Nation's energy needs, Congress has been stymied in crafting energy and climate-change policy by the uncertain legal baseline, the past two administrations have seen their regulatory efforts go up in smoke, and the States have been

forced to respond to a series of conflicting regulatory demands merely to ensure that the lights stay on. Both government and industry need certainty on this question of indisputably vast economic and political significance. With the current administration at work on further regulatory measures reliant on the same statutory authority, this Court's intervention is required now to prevent another half-decade or more of turmoil.

Far from authorizing the extraordinary power that EPA claims, the Clean Air Act expressly bars it. EPA relies on a little-used statutory provision, Section 111(d) of the Act. Section 111(d) expressly applies only to a pollutant "which is not...emitted from a source category which is regulated under section [112] of this title." Pet.App.207a. Coal-fueled power plants are a "source category" regulated under Section 112. And "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under...the 'hazardous air pollutants' program, § 7412." *AEP*, 564 U.S. at 424 n.7. As recently as 2014, EPA acknowledged that this is the "literal" application of Section 111(d) and that, "[a]s presented in the U.S. Code," the provision "appears by its terms to preclude" regulation of coal-fired power plants under Section 111(d).[2] But EPA did so anyway.

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[2] Legal Memorandum for Proposed Carbon Pollution Emission Guidelines for Existing Electric Utility Generating Units at 22, EPA-HQ-OAR- 2013-0602-0419 at 22 (June 18, 2014).

Even if one puts aside that express statutory prohibition, EPA lacks authority to implement the sweeping changes attempted under the CPP and approved by the court below, because Section 111(d) does not clearly permit EPA to restructure the Nation's power grid and utility industry. This Court's precedents require clear congressional authorization to support an agency's claim of power to make "decisions of vast economic and political significance." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (quotation marks omitted). If Congress had intended to confer on EPA the authority to restructure the domestic power sector through an obscure statutory provision used approximately once per decade, it would have said as much in the statute. Instead, there is nothing. Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Assn's, Inc.*, 531 U.S. 457, 468 (2001).

The result of EPA's attempt to restructure the U.S. energy system through an obscure Clean Air Act provision and impose a presumptive cap-and-trade system where Congress would not, was predictable: the "Super Bowl" of climate litigation.[3] The D.C. Circuit heard oral argument on a mandamus suit in April 2016, even before EPA finalized the CPP, then heard oral argument again after the CPP was finalized. This Court granted an unprecedented stay of the regulation after receiving briefing raising the same issues

[3] Robin Bravender, *Obama Attorneys Confident as Legal "Super Bowl" Kicks Off*, E&E News, (Oct. 29, 2015), *available at* https://www.eenews.net/stories/1060027150 (last accessed June 15, 2021).

presented in this petition. When the Trump Administration entered office, that litigation was stayed, with the CPP ultimately being repealed and replaced by the Affordable Clean Energy ("ACE") rule. That too led to litigation culminating in the D.C. Circuit's decision vacating both the ACE replacement standards and EPA's repeal of the CPP. The decision below not only clears the way (and effectively mandates) that EPA reenact generation-shifting equivalent to or even more aggressive than the CPP, but goes so far as to hold that there are "no limits" on EPA's power to restructure sectors of the economy. Pet.App.56a.

The time has now come for this Court to finish what it started when it stayed the CPP, by finding that EPA lacks the authority to double-regulate coal-fired power plants after imposing $9.6 billion in costs on them under Section 112 less than a decade ago and lacks the power to remake the utility sector. In the past, overreaching EPA regulations have entrenched themselves merely by virtue of their existence, with a prior Administrator boasting that even Supreme Court review is irrelevant because investments are made.[4] Once the mandate issues on the decision be-

[4] On the eve of this Court's decision in *Michigan v. EPA*, 579 U.S. 743 (2015), then-EPA Administrator Gina McCarthy boasted "we think we're going to win . . . [b]ut even if we don't, it was three years ago. Most of them are already in compliance, investments have been made, and we'll catch up." Timothy Cama & Lydia Wheeler, *Supreme Court Overturns Landmark EPA Air Pollution Rule*, THEHILL, June 29, 2015. EPA repeated that

low, the same situation will occur here, and subsequent review of the fundamental issues raised in this petition will be too late for the States, consumers, communities, businesses, and utilities that depend on coal and coal-fired power. The Petition should be granted.

OPINIONS BELOW

The D.C. Circuit's opinion is reported at 985 F.3d 914 and reproduced at Pet.App.1a.

JURISDICTION

The D.C. Circuit entered judgment on January 19, 2021. Pet.App.1a. On March 19, 2020, this Court extended the deadline to file any petition for a writ of certiorari due on or after that date to 150 days, and this Petition is timely under that order. This Court has jurisdiction under 28 U.S.C. § 1254(1).

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view after this Court's decision. *Id.*; *see also* EPA Connect, Official Blog of the EPA Leadership (June 30, 2015) (stating that *Michigan* came too late to have meaningful effect because "many plants ha[d] already installed controls and technologies" demanded by the regulation and "the majority of power plants [were] already in compliance or well on their way to compliance") (available at https://blog.epa.gov/2015/06/30/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/) (last visited June 17, 2021).

STATUTES INVOLVED

The core provisions at issue, 42 U.S.C. §§ 7411(a)–(d), 7412(a)–(c), are reproduced at Pet.App.203a, Pet.App.215a.

STATEMENT OF THE CASE

I. Statutory Background

A. Clean Air Act Section 111

Clean Air Act Section 111 was originally enacted in the Clean Air Act Amendments of 1970 and assumed its current form in 1990. Consistent with other provisions of the Act, Section 111 distinguishes between new, modified, and existing sources. New or modified stationary sources were subject to regulation under Section 111(b) if the source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1). Since its enactment in 1970, the focus of Section 111 has always been regulation of new sources. EPA has promulgated emission standards for more than 70 such categories, *see* 40 C.F.R. Part 60, from large industrial facilities like power plants and oil refineries, to much smaller facilities like installers of residential central heating, 40 C.F.R. § 60.5472, and hospitals' incineration of infectious waste, 40 C.F.R. § 60.30.

Existing sources may be subjected to regulation under Section 111(d) if the sources belong to a source category not already regulated under Section 112 and the regulations concern pollutants from that source for which air quality criteria have not already been issued or published in a list under Section 108. Due to the breadth of these statutory exclusions, Section 111(d) was long a regulatory backwater. For the provision's first forty years, EPA applied it to a sum total of "four pollutants from five source categories," 80 Fed. Reg. 64,703 & n.275 (Oct. 23, 2015). Since Section 111(d) took on its current form in 1990, it has been used only once. *See* 61 Fed. Reg. 9905 (Mar. 12, 1996).

B. Congress Excludes Section 112-Regulated Sources from Section 111(d) Regulation

Congress substantially amended the Clean Air Act in 1990. One of Congress's focuses was expanding the "hazardous air pollutants" ("HAPs") program of Section 112, the Act's most stringent and burdensome regulatory provision. Before the 1990 Amendments (discussed below), Section 112 reached only pollutants that were extremely hazardous to human health because they "result in an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness." 42 U.S.C. § 7412(a) (1988). Pollutants outside that category were generally regulated as criteria pollutants through the national ambient air quality standards program, which set national standards for air pollutants that "may reasonably be

anticipated to endanger public health or welfare" and that are present in the ambient air "from numerous or diverse mobile or stationary sources." 42 U.S.C. § 7408. Section 111(d) was reserved for the rare situation where a pollutant did not fit either of those programs.

The 1990 Amendments greatly expanded the Section 112 program to include pollutants that posed less serious risks. 42 U.S.C. §§ 7412(a)(7), 7412(b)(1). The Amendments required EPA to publish a list of source categories emitting HAPs—as consistent as practicable with the source categories regulated under Section 111—and then promulgate emission standards for each listed source category. *Id.* § 7412(d). These sources would then be subject to the most stringent and expensive control technology requirements under the Act—"maximum achievable control technology" ("MACT"). For new and modified sources, MACT requires the adoption of controls no "less stringent than the emission control that is achieved in practice by the best controlled similar source." *Id.* § 7412(d)(3). Existing, unmodified sources, in turn, must meet the degree of control achieved by the best performing 12 percent of existing sources (for source categories with 30 or more sources) or the 5 best performing existing sources (for source categories with 30 or more sources). *Id.* § 7412(d)(3)(A)–(B).

In contrast to its expansion of Section 112, Congress paid little attention to the little-used Section 111(d). It was, in the words of a lead architect of the 1990 Act,

"some obscure, never-used section of the law."[5] In fact, the only substantial change Congress made to the provision was an accommodation of its wholesale revision of Section 112: it barred EPA from applying Section 111(d) to source categories already subject to the stringent and comprehensive emission standards of Section 112.

This so-called "Section 112 Exclusion" was hardwired into the 1990 Amendments as originally proposed by the Administration and was enacted as part of the House bill.[6] Throughout the legislative process—including during conference—various stylistic adjustments were made to this amendment, without altering its substance.[7] In conference, Senate conferees agreed to the Administration's proposed amendment as contained in the House bill:

> Section 108—Miscellaneous Provisions...
>
> *Senate amendment*....

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[5] Clean Air Act Amendments of 1987 (Part 2): Hearings on S. 300, S. 321, S. 1351, and S. 1384 Before the Subcomm. on Env'tl Prot. of the S. Comm. on Env't & Pub. Works, 100th Cong. at 13 (June 19, 1987) (Durenberger).

[6] Clean Air Act Amendments of 1990, H.R. 3030, 101st Cong. §108(d) (1989); Clean Air Act Amendments of 1990, S. 1630, 101st Cong. §108(f) (as passed by the House on May 23, 1990).

[7] Clean Air Act Amendments of 1990, H.R. 3030, 101st Cong. §108(d) (1989); Clean Air Act Amendments of 1990, S. 1630, 101st Cong. §108(f) (as passed by the House on May 23, 1990).

> *House amendment*.... [T]he House amendment contains provisions...for amending section 111 of the Clean Air Act relating to new and existing stationary sources....
>
> *Conference agreement*. The Senate recedes to the House except...with respect to the requirement regarding judicial review of reports...and with respect to transportation planning....

136 Cong. Rec. 36007, 36067 (1990) (emphasis added). The House provision was then enacted by Congress as Section 108(g) of the 1990 Amendments, with the subtitle "Regulation of Existing Sources." Pub. L. 101–549, §108(g), 104 Stat. 2,399, 2,467 (1990).

The amendment was codified in 42 U.S.C. § 7411(d)(1). In relevant part, it prohibits EPA from imposing "standards for performance for any existing source for any air pollutant…which is…emitted from a source category which is regulated under section 7412."

In the wake of the 1990 Amendments, EPA determined five separate times—across three different administrations—that the literal meaning of this provision bars EPA from applying Section 111(d) to any existing "source category…regulated under section [1]12." 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005); *see also* 69 Fed. Reg. 4652, 4685 (Jan. 30, 2004); EPA, Air Emissions from Municipal Solid Waste Landfills—Background Information for Final Standards and

Guidelines at 1-6 (Dec. 1995);[8] Final Brief of Respondent, *New Jersey v. EPA*, No. 05-1097 (D.C. Cir. July 23, 2007), 2007 WL 2155494; Legal Memorandum for Proposed Carbon Pollution Emission Guidelines at 26, EPA-HQ-OAR-2013-0602-0419 (June 18, 2014).

II. Regulatory Background

A. EPA Subjects Power Plants to Section 112 Regulation

Also as part of the 1990 Amendments, Congress required EPA to determine whether it was "appropriate and necessary" to subject power plants to Section 112's stringent regulatory regime and, upon making such a finding, to do so. 42 U.S.C. § 7412(n)(1)(A). EPA issued an affirmative finding in 2000 and then proceeded to promulgate Section 112 emission standards for coal- and oil-fired power plants in 2012. *See* 77 Fed. Reg. 9304 (Feb. 16, 2012). Reflecting the stringency of Section 112, EPA projected that these standards would impose annual compliance costs of $9.6 billion.[9]

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[8] *Available at* http://www3.epa.gov/ttn/atw/landfill/bidfl.pdf (last accessed June 15, 2021).

[9] EPA, Regulatory Impact Analysis for the Final Mercury and Air Toxics Standards, EPA-452/R-11-011, at Table ES-1 (December 2011).

B. EPA's Clean Power Plan Subjects Power Plants to Section 111 Regulation

Two years after regulating coal-fired power plants under Section 112, EPA proposed the CPP. 79 Fed. Reg. 34,830 (June 18, 2014). Secretary of State John Kerry announced that it was intended "to take a bunch of [coal-fired power plants] out of commission." *See* Coral Davenport, *Strange Climate Event: Warmth Toward U.S.*, N.Y. Times (Dec. 11, 2014) at A14. The EPA Administrator testified that the proposal's objective was to transform the utility sector by forcing a shift away from coal: "The great thing about this proposal is that it really is an investment opportunity. This is not about pollution control. It's about increased efficiency at our plants, no matter where you want to invest. It's about investments in renewables and clean energy." Gina McCarthy, Senate Environment and Public Works Committee (July 23, 2014).[10]

EPA finalized the CPP in 2015. 80 Fed. Reg. at 64,662. An Administration "fact sheet" stated that the CPP was intended to effect an "aggressive transformation" of the electric sector by forcing "transition to zero-carbon renewable energy sources." State Petitioners' Motion for Stay at Ex. B, *West Virginia, et al.*

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[10] *Available at* https://www.epw.senate.gov/public/index.cfm/2014/7/full-committee-hearing-entitled-oversight-hearing-epas-proposed-carbon-pollution-standards-for-existing-power-plants (archived webcast, advance to 1:22:45) (last accessed June 15, 2021).

v. EPA, et al., No. 15-1363 (D.C. Cir. Oct. 23, 2015), ECF 1579999 (hereinafter "White House Fact Sheet").

Before the CPP, EPA had always established emission standards under Section 111(d) that were achievable by individual existing sources, *see* 80 Fed. Reg. at 64,703 & n.275 (citing prior Section 111(d) rules), but because emission controls at individual existing coal plants could not yield sufficient emission reductions to meet its policy goals, EPA abandoned that approach in favor of restructuring the entire power sector by requiring States to reduce the use of existing coal-fired power plants in favor of lower-emitting natural gas-fired power plants and renewable resources. *See id.*; *see also generally id.* at 64,717–811.

To achieve this policy objective, EPA devised national "emission performance rates" for coal and gas power plants based on three so-called "Building Blocks." *Id.* at 64,719–20, 64,752. The first, consistent with EPA's historic practice of achieving reductions through facility-based controls and technology, was based on improved combustion efficiency at individual coal-fired generating facilities. *Id.* at 64,745. But, as EPA explained, that alone would not satisfy EPA's emissions-reduction goals. *Id.* at 64,769. Thus, the other two Building Blocks were directed not at achieving operational emissions reductions at individual sources, but at "ensur[ing] that owner/operators of affected steam EGUs as a group would have appropriate incentives not only to improve the steam EGUs' efficiency but also to reduce generation from those EGUs consistent with replacement of generation by

low- or zero-emitting EGUs." *Id.* at 64,748. To that end, Building Block 2 was based on displacing existing coal-fired generation with additional generation from existing natural gas generating facilities. *Id.* at 64,745–46. And Building Block 3 was based on displacing both existing coal- and gas-fired generation with large increases in generation from new renewable energy resources like wind and solar. *Id.* at 64,747–48. The fundamental restructuring of utility sector reflected in Building Blocks 2 and 3 is what EPA refers to as "generation shifting."

Based on these "Building Blocks," EPA set uniform "emission performance rates" for existing fossil fuel-fired generating facilities based on theoretical carbon dioxide emission rates at which existing coal- and gas-fired plants would have to operate to obtain the emission reductions assumed to be achievable through implementation of the three sector-wide Building Blocks. *See generally* EPA, *CO_2 Emission Performance Rate and Goal Computation Technical Support Document for CPP Final Rule* (Aug. 2015).

EPA recognized that no existing facility could actually meet the CPP's rates through pollution controls or operational improvements. 80 Fed. Reg. at 64,754. In fact, the rates were even stricter than those EPA considers to be attainable for the "best" available technology for brand new sources. *Compare* 80 Fed. Reg. at 64,510, 64,513 *with* 80 Fed. Reg. at 64,707. Instead, EPA attempted to strong-arm states into implementing Section 111(d) through either statewide,

40 C.F.R. § 60.5855(a), or multistate, *id.* § 60.5855(b), emission-trading schemes.

EPA's modeling predicted that the CPP would force the immediate closure of several dozen coal-fired electric generating units, reduce coal production for power sector use by 25 percent, and sacrifice thousands of jobs in the electricity, coal, and natural gas sectors by 2025. EPA, *Regulatory Impact Analysis for The Clean Power Plan Final Rule*, 6-25 (Oct. 23, 2015).[11] And there is reason to believe that EPA's projection is a substantial underestimate. Industry modeling demonstrated that the generation shifting mandated by the CPP would lead wholesale electricity's costs to rise by $214 billion, displace 40 percent of total coal generation, and cost another $64 billion just to replace the capacity of the plants shuttered by the CPP. *See EPA's Clean Power Plan: An Economic Impact Analysis*, Nat'l Mining Ass'n, at 2 (Nov. 13, 2015) (hereinafter "*Economic Impact Analysis*").[12]

Dozens of parties, including 27 States, petitioned for review of the CPP. After the D.C. Circuit denied challengers' request to stay the rule, numerous parties moved this Court for a stay. Their applications

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[11] *Available at* https://19january2017snapshot.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf (last accessed June 15, 2021).

[12] *Available at* http://nma.org/attachments/article/2368/11.13.15%20NMA_EPAs%20Clean%20Power%20Plan%20%20An%20Economic%20Impact%20Analysis.pdf. (last accessed June 16, 2021).

disputed EPA's authority under Section 111(d), raising the same two arguments presented by this Petition. *E.g.*, Coal Industry Application for Stay, *Murray Energy Corp. v. EPA*, No. 15A778 (U.S., filed Jan. 27, 2016); State Petitioners' Application for Stay, *West Virginia v. EPA*, No. 15A773 (U.S., filed Jan 26, 2016). The Court granted the applications and stayed the CPP pending disposition of the petitions for review in the D.C. Circuit and any petitions for a writ of certiorari or merits determination. *Murray Energy Corp. v. EPA*, 577 U.S. 1127 (2016); *West Virginia v. EPA*, 577 U.S. 1126 (2016).

C. The Affordable Clean Energy Rule

But the D.C. Circuit never decided the case. It *sua sponte* ordered the case heard *en banc*, and the *en banc* court heard a full day of argument in 2016. A few months later, the incoming Administration asked that the case be stayed pending its reconsideration of the CPP, and the case was ultimately dismissed as moot based on EPA's subsequent actions.

In particular, EPA published the Affordable Clean Energy, or "ACE," Rule in July 2019. 84 Fed. Reg. 32,520 (July 8, 2019). The ACE Rule repealed the CPP, reasoning that it exceeded EPA's authority under the Clean Air Act because it established emission standards based on activities that occurred outside the fence-line of regulated power plants—*i.e.*, Building Blocks 2 and 3. Accordingly, it adopted new performance standards based on emission reductions attainable at existing sources. *Id.* EPA, however, maintained the position that it has authority to impose

Section 111(d) regulation on facilities that are already subject to Section 112 regulation. *See id.* at 32,533.

III. Proceedings Below

Numerous parties petitioned for review of the ACE Rule. Petitioner here (among the "Coal Petitioners" identified in the opinion below), petitioned on grounds that the ACE Rule violated the Section 112 Exclusion. Petitioner also intervened as a Respondent to support the repeal of the CPP as unauthorized by the Act. The vast political and economic consequences of the ACE Rule drew challenge from all quarters, including 12 different consolidated lawsuits with over 45 parties including the power generation industry, utilities, federal, state, and local governmental entities, and a variety of industry and environmental advocacy groups and over 175 amici. Briefing exceeded a quarter of a million words, and the oral argument lasted roughly nine hours.

On January 19, 2021, the panel below issued a split 2-1 decision that vacated the ACE Rule's standards and repeal of the CPP, effectively reinstating the CPP. Pet.App.1a. The majority held that the Clean Air Act was ambiguous regarding whether Section 111(d) emission standards must be based on the best system of emission reductions attainable by individual sources, for whole source categories, or even just "emissions" in general. Pet.App.62a–63a.

Relying on that purported ambiguity, the majority interpreted EPA's Section 111(d) authority to extend beyond that claimed in the CPP. Congress, it held,

"imposed no limits" on EPA's authority to set methods for emission reductions for existing sources, as long as EPA considers "cost, nonair quality health and environmental impact, and energy requirements." Pet.App.68a. Further, it indicated that EPA was *required* to implement generation shifting, because the administrative record demonstrated that generation shifting is capable of achieving far greater emission reductions than controls physically confined at or to the source. Pet.App.51a. The majority even went so far as to state that EPA has the authority and perhaps the obligation to impose regulation of demand-side activities or offsetting the effects of emissions rather than limiting emissions in the first place. *See* Pet.App.90a (stating that the "EPA has *tied its own hands*" by considering only measures that "reduce emissions (rather than, for example, capturing emissions after they are released into the air by planting trees)") (emphasis added).

Dissenting, Judge Walker agreed with Petitioner that "EPA has no authority to regulate coal-fired power plants under § 111" because they are "already regulated under § 112, and § 111 excludes from its scope any power plants regulated under § 112." Pet.App.164a. Judge Walker also reasoned that EPA lacks authority altogether to restructure the utility sector, let alone to regulate demand and require planting trees. Pet.App.164a–181a. "Hardly any party in this case makes a serious and sustained argument that § 111 includes a clear statement unam-

biguously authorizing EPA to consider off-site solutions like generation shifting. And because the rule implicates 'decisions of vast economic and political significance,' Congress's failure to clearly authorize the rule means EPA lacked the authority to promulgate it." Pet.App.164a. (quoting *Util. Air Regul. Grp.*, 573 U.S. at 324).

The court below partially stayed the mandate as to the vacatur of the CPP repeal "until the EPA responds to the court's remand in a new rulemaking action." Order Granting Partial Stay of Mandate, *Am. Lung Assoc. v. EPA*, No. 19-1140 (D.C. Cir. Feb. 22, 2021). In light of the lower court's directive to "consider the question [of section 111(d) regulation] afresh," Pet.App.161a, EPA presumably is now considering whether and how to update the now-obsolete figures in the CPP and the more stringent measures that the decision below suggests it is required to implement.

REASONS FOR GRANTING THE PETITION

I. The Petition Presents Recurring Issues of Vast Importance that Require Prompt Resolution by This Court

A. The importance of the questions presented here cannot be seriously disputed and, in fact, has been undisputed to date. EPA's authority to regulate carbon dioxide from existing fossil-fuel fired power plants obviously "implicates decisions of vast economic and political significance." Pet.App.164a (Walker, J. dissenting) (quotation marks omitted). How could it not? The CPP embodied EPA's claim that it possesses the power to fundamentally reconfigure the energy sector by "shifting" generation from coal-fired power plants to those sources preferred by EPA. Indeed, then-president Obama hailed the CPP as "the single most important step America has ever taken in the fight against global climate change." Andrew Rafferty, *Obama Unveils Ambitious Plan to Combat Climate Change*, NBC News (Aug. 3, 2015, 3:05 PM).[13] In EPA's own words, the CPP was intended to effect through the States an "aggressive transformation" of the electric sector by systematically forcing "transition to zero-carbon renewable energy sources." White House Fact Sheet. Whether Congress actually empowered EPA to take this "single most important step" and transform an entire sector of the economy is no minor question.

The consequences of EPA's claimed authority speak for themselves. EPA projected that the CPP would force the imminent closure of dozens of coal-fired

plants, decrease coal production for power-sector use by a full 25 percent by 2030, and cause a net decrease of thousands of jobs in the electricity, coal, and natural gas sectors by 2025. EPA, *Regulatory Impact Analysis for The Clean Power Plan Final Rule*, 6-25 (Oct. 23, 2015).[14] Other analyses found that EPA significantly underestimated costs, and that the CPP would lead to wholesale electricity's cost to rise by $214 billion, and cost another $64 billion just to replace the capacity of the plants shuttered by the CPP. *Economic Impact Analysis*, *supra*, at 2.

And all of these figures refer to the CPP that was promulgated before the court below ruled that EPA has the discretion or even obligation to regulate electricity demand across the nation and to impose mitigating measures like planting forests. According to the policy of the current administration, that authority will be deployed to "reduce[] climate pollution in every sector of the economy." Executive Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021). The CPP, then, is just the tip of the iceberg.

The consequences of setting a national energy policy designed to destroy a particular industry (coal-fired energy) are no less momentous than the eco-

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[13] *Available at* https://www.nbcnews.com/politics/barack-obama/obama-unveilsambitious-plan-combat-climate-change-n403296 (last accessed June 16, 2021).

[14] *Available at* https://19january2017snapshot.epa.gov/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf (last accessed June 16, 2021).

nomic ramifications. Under the view of EPA's authority adopted by the court below, Section 111(d) standards subordinate energy diversity, consumer protection, reliability, and other policies in current state dispatch law to the single overarching goal of shifting the generation of electricity to zero- or low-carbon resources. And the reason EPA proposed regulation of GHG under Section 111(d) in the first place was specifically that Congress had *not* authorized such changes. Evan Lehmann & Nathanael Massey, *Obama Warns Congress to Act on Climate Change, or He Will*, Scientific American (Feb. 13, 2013), ("'But if Congress won't act soon to protect future generations, I will,' Obama said. 'I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.'").[15] There are few historical examples of such brazen and well-documented attempts of the Executive Branch seeking to arrogate Congress's legislative power.

This Court's review is also needed to resolve confusion among the courts of appeals as to the scope and substance of this Court's major rules doctrine (or "major questions doctrine"). The court below gave short shrift to this Court's admonition against implying authority for rules of vast political and economic significance in the absence of a clear and specific statement

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[15] *Available at* https://www.scientificamerican.com/article/obama-warnscongress-to-act-on-climate-change-or-he-will/ (last accessed June 16, 2021).

from Congress, disparaging the "so-called" major questions doctrine and its lineage of only a "few" cases. Pet.App.83a. As recently as 2017, the D.C. Circuit has refused to even take a position on "the precise contours" or even the "existence" of the doctrine, *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 384 (D.C. Cir. 2017), and other courts have likewise expressed confusion over the scope and status of the doctrine, *see, e.g.*, *Chamber of Com. v. U.S. Dep't of Labor*, 885 F.3d 360, 387–88 (5th Cir. 2018) (recognizing confusion over "the precise status of a 'major questions'" doctrine); *Int'l Refugee Assistance Project v. Trump*, 883 F.3d 233, 328 n.3 (4th Cir. 2018), (Wynn, J., concurring) ("[N]o judicially accepted standard appears to have emerged for determining when a question is sufficiently 'major' to warrant application of the doctrine") *judgment vacated*, 138 S. Ct. 2710 (2018). This Court's review is needed to provide guidance to the lower courts as well as agencies now contemplating rules of vast political and economic import based on ambiguous grants of authority.

B. The Court's intervention is needed now. For nearly a decade, uncertainty over the basic question of EPA's authority in this area has hamstrung both government at every level and industry. The most recent two administrations have seen their signature climate policies upended by court decisions on the precise issues presented here. Congress, meanwhile, has been sidelined by the prospect of administrative action by a third, and current, Administration on a politically contentious issue, when it may turn out that

the prospect was illusory all along. And even the Judicial Branch has faced confusion and consternation, with the D.C. Circuit hearing argument on these issues three separate times to date and this Court entering a stay of a major executive action. States, in turn, have no ability to plan for their energy needs in the face of massive regulatory uncertainty and have wasted untold sums in rushing to comply with measures, like the CPP and ACE, that may never go into full force. Meanwhile, industry is stymied in its ability to make long-term investments in electrical infrastructure, resource projects, and other capital expenditures.

The decision below only exacerbates these problems by extending and amplifying the uncertainty over EPA's authority. By reviving the CPP, while recognizing the need for EPA to revise it, the court below gave EPA marching orders to continue down the path blazed by the CPP notwithstanding the real risk that this Court may ultimately rule against EPA's assertion of authority to so proceed. Indeed, the new rule is likely to target an even broader swathe of the economy, based on the view of the decision below that Section 111(d) effectively imposes "no limits" on EPA's power and its suggestion that EPA "tied its own hands" in believing that it was limited to considering only things that "reduce emissions." Pet.App.90a. The current administration has indicated that it will accept that invitation to impose even greater disruption. *See, e.g.*, David Vetter, *Biden Commits U.S. To Halving Greenhouse Gas Emissions By 2030*, Forbes (Apr.

22, 2021) (reporting that the Biden Administration intends to implement far greater reductions in emissions than its predecessors).[16]

The directive of the court below to adopt regulations consistent with its interpretation of EPA's Section 111(d) authority as functionally limitless is a powerful reason for prompt review by this Court, not a reason to "stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery." *Util. Air Regul. Grp.*, 573 U.S. at 328. Whatever action EPA eventually takes under that directive will necessarily be contingent on the decision below remaining good law despite the strong indications by this Court that it is not. Absent this Court's intervention now, the inevitable result will be another half-decade of uncertainty as EPA undertakes another round of rulemaking, followed by judicial review involving vast litigation across various industries, and, in all likelihood, more rounds of stay and merits proceedings and potentially review by this Court at the end of it all. Such delay would force EPA to waste significant time considering and proposing actions that are outside the scope of its authority, ultimately delay implementation of regulatory actions which actually would be within EPA's authority to implement, and hamstring industry actions to provide for the nation's energy needs, given the hesitancy of investors to commit to

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[16] *Available at* https://www.forbes.com/sites/davidrvetter/2021/04/22/biden-will-commit-us-to-halving-greenhouse-gas-emissions-by-2030/?sh=20b836dd7f1d (last accessed June 16, 2021).

projects that entail significant regulatory uncertainty, and the "considerable advance planning" which this Court has recognized is required for the capital investments necessary to build out new sources of electricity generation. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201–02 (1983).

Only this Court can end this turmoil by resolving the issue once and for all.

II. The Decision Below Is Wrong

When this Court stayed implementation of the CPP based on the same two arguments presented in this Petition, it necessarily found "a fair prospect" that one or both was likely to prevail. *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers). The decision below held to the contrary on the merits. In so doing, it waved away what Congress stated clearly, that Section 111(d) does not permit EPA to impose new performance standards on source categories already subject to the stringent regulatory regime of Section 112. And it embraced what Congress did not say at all, that EPA has authority under Section 111(d) to restructure the entire utility sector and regulate based on practically anything that might affect emissions.

A. Coal Power Plants Cannot Be Regulated Under Section 111(d)(1) So Long as EPA Regulates Them Under Section 112

At the same time that Congress expanded Section 112's stringent "hazardous air pollutant" program, Congress restricted Section 111(d) to bar new standards for source categories already subject to the more stringent program. As amended, Section 111(d) prohibits EPA from imposing "standards for performance for any existing source for any air pollutant…which is not…emitted from a source category which is regulated under section 7412." Pet.App.207a. For a decade—across three administrations and numerous official publications and statements—EPA acknowledged that the literal reading of this prohibition bars EPA from regulating under Section 111(d) any existing "source category … regulated under section [1]12." 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005). This Court also had no trouble in discerning what this language means: "EPA may not employ § 7411(d) if existing stationary sources of the pollutant in question are regulated under…the 'hazardous air pollutants' program, § 7412. See § 7411(d)(1)." *AEP*, 564 U.S. at 424 n.7; *see also New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (holding Section 111(d) "cannot be used to regulate sources listed under section 112.").

The only thing that changed since then was that EPA adopted the policy objective of restricting the carbon-dioxide emissions of a Section 112-regulated

source category, coal-fired power plants. What did not change, however, was the clear statutory prohibition.

The court below proffered three independent rationales to circumvent that prohibition, none of which withstands scrutiny.

First, its convoluted textual analysis is indefensible. *Contra* Pet.App.130a–132a. The court below purported to apply the "last antecedent" rule to ascertain that the limiting language of Section 111(d)(1)(i) excludes from regulation only the "same pollutants [that] are already regulated under the NAAQS or [Section 112]," Pet.App.131a—a complete *non sequitur* that rests on nothing more than the court's say-so. Repeating its error of assuming the result, the court then reasoned that, because Section 112 regulates "only [the] emission of hazardous air pollutants," the limiting language of Section 111(d)(1)(i) necessarily excludes only *pollutants* subject to Section 112, as opposed to Section 112-regulated *sources*. Pet.App.131a–132a. This is less interpretation than contrivance, wielding a particular view of what Congress should have done to override the language Congress actually enacted. The court's justification for its novel interpretation is statutory "context," but context makes clear that Congress intended to prohibit sources from being whipsawed in exactly the situation faced here: EPA imposing stringent emissions standards under Section 112, with billions in compliance costs, and then socking the same facilities with additional standards and billions more in compliance costs under Section 111(d).

Confirming its error, the decision below actually interprets the same statutory language in two different ways. The term "air pollutant" appears only once in Section 111(d)(1) and is used to define both the scope of the Exclusion and the scope of the emissions that may be subject to Section 111(d) standards. It was nothing more than atextual opportunism for the court below to hold that the term "air pollutant" extended beyond HAPs so as to empower EPA to reach carbon dioxide under Section 111(d), Pet.App.145a, but to restrict the same language to HAPs so as to avoid the Section 112 Exclusion, *id.*

Second, the court's attempt to find discretion-conferring ambiguity in an unexecuted Senate amendment that EPA has admitted was a scrivener's error fares no better. Omnibus legislation often includes conforming amendments to update statutory cross-references, and the ordinary rule is that such amendments fail to execute when, as here, the cross-reference is itself deleted by another provision.[17] Consistent with that ordinary rule and its own consistent practice, the Office of the Law Revision Counsel understood and codified the 1990 Amendments in precisely that fashion. *See* 42 U.S.C. § 7411, 1990 Amendments, Subsec. (d)(1)(A)(i) (2012) (explaining that Senate amendment 302(a) "could not be executed, because of the prior amendment by…§108(g)"). Anyway,

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[17] *National Bituminous Coal Group Comments to Affordable Clean Energy Rule Proposal*, Docket ID No. EPA-HQ-OAR-2017-0355, at 34–35 & n.22 (Oct. 31, 2018) (identifying dozens of such examples).

even executing the Senate amendment would not change the answer to the statutory question here, as that amendment does not conflict with the House amendment's exclusion of Section 112-regulated sources. *See* Pet.App.197a (Walker, J., dissenting). And even if there were a conflict, "the House Amendment controls" because "the most lucid piece of legislative history says the Senate intended to recede to the House." Pet.App.191a (Walker, J., dissenting).

Third and finally, the court below laid its policy cards on the table in its contention that applying the Section 112 Exclusion according to its terms would be a "trojan horse" that would "cripple Section 7411's correlative function in the statutory scheme" by creating a regulatory gap that "broadly insulated stationary sources from regulatory oversight for their non-hazardous but still dangerously polluting emissions." *See* Pet.App.133a–135a. The court's policy analysis was obviously misplaced: not "even the most formidable policy arguments" can "overcome a clear statutory directive" like the Section 112 Exclusion, *BP p.l.c. v. Mayor and City Council of Balt.*, 141 S. Ct. 1532, 1542 (2021) (cleaned up); *see also SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358–59 ("[P]olicy considerations cannot create an ambiguity when the words on the page are clear").

Far from formidable, the policy argument embraced by the court below is flat-out wrong. As EPA has acknowledged, the Section 112 Exclusion reflects Congress's considered decision to avoid double-regulation of sources under Section 112 and Section

111(d). 70 Fed. Reg. at 16,031. During the legislative process that resulted in the 1990 Amendments, this precise issue arose at a key hearing, and the EPA Assistant Administrator testified that imposing double regulation of source categories "in seriatim," even for different pollutants, would be "ridiculous."[18] The House, in turn, wrought that sensible view in legislative language. It determined that existing sources, which have significant capital investments and sunk costs, should not be burdened by both the expanded Section 112 program and performance standards under Section 111(d). 70 Fed. Reg. at 16,031–32. The CPP itself illustrates the wisdom of this approach, given that it would have imposed tens of billions of dollars only three years after EPA, in one of its most expensive regulations ever, promulgated Section 112 standards for the same coal-fired power plants that the CPP severely burdens.

Interpreting Section 111(d) according to its terms does not, as the court below asserted, "cripple" the provision by undermining its gap-filling function. By its terms, Section 111(d) authorizes regulation of non-criteria emissions from sources that are not regulated under Section 112. 42 U.S.C. § 7412(c)(3); *Id.*

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[18] Energy Policy Implications of the Clean Air Act Amendments of 1989: Hearings Before the S. Comm. on Energy & Natural Res., 101st Cong. 7, at 603 (1990); *see also* Clean Air Act Amendments (Part 3): Hearings Before the Subcomm. On Health & the Env't of the H. Comm. on Energy & Commerce, 101st Cong. 356–58, 470–71 (1990) (expressing concerns about regulating power plants under Section 112 and the new Title IV acid rain program).

§ 7412(n)(1). The existence of such sources was always envisioned by Congress, including when it authorized EPA to stop listing area sources after reaching 90 percent of area-source emissions of the 30 most dangerous hazardous pollutants. *Id.* § 7412(c)(3). In fact, Congress specifically contemplated that coal-fired power plants could have been among those non-Section 112 sources potentially subject to Section 111(d) if EPA had not found that their listing under Section 112 was appropriate and necessary. *Id.* § 7412(n)(1)(A). Particularly given the minor role of Section 111(d) to date, any remaining "gap" is not so "large…in any event" as to be "demonstrably at odds" with congressional intent because it would not in any way render "the regulatory scheme" "unworkable or absurd." *Engine Mfrs. Ass'n v. EPA*, 88 F.3d 1075, 1090–93 (D.C. Cir. 1996). Quite the opposite: the Section 112 Exclusion as written makes sound regulatory sense.

B. EPA Lacks Authority to Restructure the U.S. Energy System Under Section 111(d)

In addition to erring concerning the Section 112 Exclusion, the decision below further erred in finding that EPA was permitted to restructure the U.S. energy system under Section 111(d) based on perceived ambiguity in the Act.

Under this Court's precedent, administrative agencies require clear congressional authorization for major agency rules. As Justice Scalia put it clearly in *Utility Air Regulatory Group*, "We expect Congress to

speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" 573 U.S. at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). In other words, while an agency may resolve statutory ambiguity to issue ordinary rules resolving interstitial matters, the major rules doctrine prevents an agency from relying on statutory ambiguity to issue major rules that involve fundamental policy determinations that the Constitution delegates to Congress.

This is a firmly established doctrine. In a series of important decisions over the last three decades, this Court has repeatedly rejected agency attempts to take major regulatory action without clear congressional authorization. *E.g.*, *MCI Telecom. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (striking down an FCC rule that completely exempted certain telephone companies from rate-filing requirements, explaining that it was highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion); *Brown & Williamson*, 529 U.S. at 160 (striking down an FDA rule regulating the tobacco industry on grounds that despite the FDA's broad and general authority under the Food, Drug, and Cosmetic Act to regulate drugs and devices, that Congress did not intend to delegate a decision of such "economic and political significance" to an agency in so cryptic a fashion); *Gonzales v. Oregon*, 546 U.S. 243, 262 (2006) (striking down rule barring physi-

cians from prescribing controlled substances for assisted suicides on grounds that the Controlled Substances Act did not clearly permit the Attorney General to declare an entire class of activity outside the course of professional practice); *Util. Air Regul. Grp.*, 573 U.S. at 302 (holding that it was impermissible for EPA to interpret the Clean Air Act to subject millions of previously unregulated emitters of carbon dioxide to Clean Air Act permitting requirements absent Congress "speak[ing] clearly" on the subject).

"The lesson from [this Court's] cases is apparent. If an agency wants to exercise expansive regulatory authority over some major social or economic activity — regulating cigarettes, banning physician-assisted suicide, eliminating telecommunications rate-filing requirements, or *regulating greenhouse gas emitters*, for example — an ambiguous grant of statutory authority is not enough. Congress must clearly authorize an agency to take such a major regulatory action." *U.S. Telecom Ass'n*, 855 F.3d at 422 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (emphasis added).

There may be some cases where the question of the minor versus major nature of a rule is reasonably disputable. This is not one of them. If what the President has described as the single most important step America has ever taken in the fight against global climate change is not "major," if the transformation of the U.S. energy sector by shutting down coal power plans and shifting to energy sources preferred by EPA is not "major," if imposing billions of dollars of costs

on the coal industry and the regions of the country that rely on that industry for providing essential and reliable base load power and for the wellbeing of their communities and their citizens is not "major," then nothing is major.

Thus, the relevant question is whether these major policy questions have been answered by Congress and clearly delegated to EPA to implement. The answer is clearly "no."

Judge Walker's dissent below puts the point crisply:

> In its clearest provisions, the Clean Air Act evinces a political consensus. For example, according to *Massachusetts v. EPA*, carbon dioxide is clearly a pollutant, and the Act's § 202 unambiguously directs EPA to curb pollution from new cars. 549 U.S. 497, 532–35 (2007). But for every question regarding carbon dioxide answered in that case, many more were not even presented. For example, does the Clean Air Act force the electric-power industry to shift from fossil fuels to renewable resources? If so, by how much? And who will pay for it? Even if Congress could delegate those decisions, *Massachusetts v. EPA* does not say where in the Clean Air Act Congress clearly did so.

Pet.App.166a–67a.

The Clean Air Act—let alone Section 111(d)—answers none of these questions. Section 111(d) limits EPA to establishing emission guidelines under which states would apply "standard[s] of performance" to existing sources based on the "best system of emission reduction" that (1) has been "adequately demonstrated" for the type of "source" to be regulated and (2) will "assure continuous emission reduction" when the source is operating. 42 U.S.C. §§ 7411(a)(1), 7602(k), 7602(l). Section 111 further provides that a standard of performance must be "achievable through the application of the best system of emission reduction" to an individual "source," which the CAA defines as a "building, structure, facility, or installation" that emits air pollution. *Id.* § 7411(a)(3). Over the last 45 years, during which EPA has established over 75 "standards of performance" for new and existing sources under Section 111, all of these performance standards have been based on technological means of reducing emissions from a source.

Where these questions have been posed—but never answered—is in the parade of legislative attempts to address carbon dioxide. A generation of Members of Congress have spent their careers considering—some ending their careers by supporting—bills that would provide authority for regulation of carbon dioxide and energy generation shifting. *See, e.g.*, American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009) (a cap-and-trade regime similar to that attempted under the CPP); Save Our Climate Act, H.R. 3242, 112th Cong. (2011) (taxing carbon dioxide from

burning fossil fuels); American Renewable Energy and Efficiency Act, H.R. 5301, 113th Cong. (2014), (a renewable energy credit scheme); *see also* Pet.App.168a–69a (citing various carbon dioxide-related laws rejected by Congress). The CPP was a brazen attempt to answer a question that Congress has considered but so far declined to answer itself or delegate to EPA. And the decision below not only placed its imprimatur on this usurpation of congressional authority, but also declared that EPA now has "no limits" on its ability to restructure the economy to enact its climate change goals so long as it considers the costs of doing so. Allowing EPA to set its own scope of authority and approach to regulation based on its own policy preferences will provide a perpetually shifting target for defining compliance.

This Court's statement that Section 7411 "speaks directly to emissions of carbon dioxide" from fossil-fuel-fired plants does not counsel a contrary decision. *Contra* Pet.App.45a (quoting *AEP*, 564 U.S. at 424). Not only did *AEP* provide that any regulation of carbon dioxide under Section 111(d) was subject to the Section 112 Exclusion, *AEP*, 564 U.S. at 424 n.7, but there was no indication that the Court believed that EPA would attempt to employ Section 111(d) in the manner contemplated by the decision below as a means of restructuring the U.S. electric system, rather than employing the type of achievable carbon dioxide efficiency standards set forth in the now-vacated ACE Rule.

Accordingly, faithful application of this Court's precedents presents a simple and independently adequate reason to uphold the ACE rule's repeal of the CPP: Congress did not clearly authorize EPA to implement generation-shifting policies under Section 111(d). These are issues of major political and economic importance. Congress has debated generation-shifting policies, and greenhouse gas regulations for many years, but Congress has never enacted such legislation or clearly authorized EPA to impose generation shifting on electric generation providers. The lack of clear congressional authorization matters, and the decision below vacating repeal of the CPP and authorizing an even-more-transformative successor is therefore unlawful.

CONCLUSION

The Court should grant the petition.

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