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

IN THE

Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

BRIEF OF THE CATO INSTITUTE AND MOUNTAIN STATES LEGAL FOUNDATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, authorizes the Environmental Protection Agency to issue significant rules—including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, non-air impacts, and energy requirements?

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies was established to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, and produces the annual *Cato Supreme Court Review*.

The Mountain States Legal Foundation is a nonprofit, public-interest law firm dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions.

This case interests *amici* because the decision below threatens individual liberty by encouraging the EPA to resolve major questions of economic and social significance without a clear delegation from Congress.

INTRODUCTION AND SUMMARY OF ARGUMENT

In a line of modern cases, the Court has established a presumption against agencies'

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amici* funded its preparation or submission.

exercising implied authority to promulgate policies "of great economic and political importance." *See Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J.) (citing precedents). This interpretive principle is known as the major questions doctrine.

Here, however, the D.C. Circuit established the opposite presumption, something akin to an "anti-major questions doctrine." Despite this Court's repeated calls for interpretive caution in the absence of statutory clarity, the split panel below focused on the "striking . . . paucity of restrictive language" in the operative ambiguity, J.A. 120, which the majority took for "muscle that Congress deliberately built up," J.A. 131. As for any economic or political fallout, the majority reasoned that such "regulatory consequences" are immaterial, because they "are a product of the greenhouse gas *problem*, not of … the solution." J.A. 148. Therefore, under the majority's tautological logic, any climate regulation *must* be major, because global warming is a major problem. Putting it all together, the majority concluded that the interstices of the statute provide "ample discretion" to remake the electricity grid. J.A. 118.

It's worth elaborating on the ultra-attenuated textual basis for the D.C. Circuit's far-reaching conclusions. The majority below described the relevant delegation—Clean Air Act Section 111(d)—as a "gap-filler" that "is intended to reach pollutants that do not fit squarely within the ambit of the Act's" primary programs. J.A. 76, 119. Within this "catchall," the court located the agency's power in its authority to "fill the gap[s] the Congress left." J.A. 115. The upshot is that the panel read the statute to confer massive authority in the "gaps" of a "gap-filler."

No doubt emboldened by the D.C. Circuit, White House National Climate Adviser Gina McCarthy recently warned that if Congress doesn't enact grid-wide production quotas for low-carbon power producers, then the EPA will act on its own—based on the statutory provision at issue in the instant case. *See* Jennifer A. Dlouhy, "Biden Climate Czar Vows Clean-Energy Edict If Congress Fails," *Bloomberg Green*, July 13, 2021, https://bloom.bg/3zgd9Kk. Meanwhile, the Biden administration just announced that it will exercise Clean Air Act section 111(d) to achieve an "historic" expansion of regulatory authority over more than 300,000 existing oil and gas producers. *See* White House Briefing Room, "U.S. to Sharply Cut Methane Pollution that Threatens the Climate and Public Health" (Nov. 2, 2021), https://bit.ly/3rOoaCf.

As an immediate matter, the outcome of this case will determine whether the EPA can construe the gaps of a gap-filler into the Clean Air Act's most powerful authority. Yet the overall stakes are far greater. This case is illustrative of an alarming trend whereby presidents turn to implied authority, typically in long-extant statutes, to achieve what Congress fails to do.

Of course, the Court is attuned to the conspicuous constitutional problems attendant to interstitial lawmaking of this sort, as demonstrated by the development of the major questions doctrine. Setting aside these constitutional concerns, a robust major questions doctrine is needed to preserve reliance interests. What one president does, another will undo, and so on. The more significant the policy, the higher the political stakes, which only increases the odds it

will become a political football. Here, the entire electricity industry is caught in a dizzying back-and-forth; more broadly, the federal government is becoming an increasingly unreliable partner to the private sector and state governments.

In sum, reversing the D.C. Circuit is only a start. To protect reliance interests, this Court must build out its major questions principle. And to assist the Court with this doctrinal development, *amici* propose a framework for resolving an issue that has bedeviled lower courts: how to identify a "major" rule.

ARGUMENT

I. THE COURT MUST ESTABLISH A ROBUST MAJOR QUESTIONS DOCTRINE TO PROTECT RELIANCE INTERESTS FROM THE LEGAL INSTABILITY CAUSED BY PRESIDENTIAL ADMINISTRATION

"It's difficult to pass laws—on purpose." J.A. 219 (Walker, J., dissenting). In requiring legislation to endure bicameralism and presentment before taking effect, the Founders intended that "[m]ajor regulations and reforms either reflect a broad political consensus, or they do not become law." *Id.*

By contrast, presidential policymaking is much simpler. Thanks to overbroad delegations from Congress, presidents can achieve law-like regulations merely by wielding their "pen and phone." *See* Tamara Keith, "Wielding a Pen and a Phone, Obama Goes It Alone," *NPR*, Jan. 20, 2014, https://n.pr/3rOXUYw. All it takes is an executive order calling on an agency to "interpret" new authority in old statutes.

Due in large part to the relative ease of executive policymaking, "[w]e live today in an era of presidential administration." Elena Kagan, *Presidential Administration*, 114 Harv. L. Rev. 2245, 2246 (2001). In contemporary American government, it is the presidency, rather than Congress, that leads "in setting the direction and influencing the outcome of" administrative policymaking. *Id.* Because "regulatory activity . . . [is] more and more an extension of the President's own policy and political agenda," *id.* at 2248, there occurs a wholesale shift in administrative policymaking whenever the presidency switches hands—especially when there's a party changeover.

This case provides a quintessential example of presidential administration. Faced with congressional inaction on climate policy, President Obama ordered the EPA to regulate power plants, leading to the Clean Power Plan. *See* Presidential Memorandum—Power Sector Carbon Pollution Standards (June 25, 2013), https://bit.ly/3EVALHA; 80 Fed. Reg. 64,662 (Oct. 23, 2015). But then President Trump commanded the EPA to undo that order, resulting in the Affordable Clean Energy rule. *See* Exec. Order No. 13,783, 82 Fed. Reg. 16,093 (Mar. 31, 2017); 84 Fed. Reg. 32,520 (July 8, 2019). And now the pendulum has swung back: On his first day in office, President Biden called for an "immediate[] review" of his predecessor's policy. *See* Exec. Order 13,990, 86 Fed. Reg. 7,037, 7,037 (Jan. 25, 2021).

To be sure, voters should guide administrative policy, and "presidential leadership establishes an electoral link between the public and the bureaucracy." Kagan, *supra*, at 2332. In most

instances, therefore, the policy flip-flops inherent to presidential administration reflect a necessary tradeoff between efficiency and accountability.

But not always. For a narrow class of major policies, such as remaking the electrical grid, ping-pong policymaking is too unsettling to pass constitutional muster. Unless the Court stabilizes the law, our present era of presidential administration will bring about a crisis of "reliance interests." *See DHS v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891 (2020) (explaining importance of reliance interests to judicial review of administrative policymaking).

Here, for example, the regulated parties—the entire electricity sector—comprise a capital-intensive industry that "require[s] many years to plan, develop, site, and construct the billions of dollars of new facilities and new infrastructure required to implement EPA's mandates." *See* Appl. of Utility and Allied Parties for Immediate Stay of Final Agency Action Pending Appellate Review at 2, *West Virginia, et al. v. EPA, et al.*, 136 S. Ct. 1000 (2016) (No. 15A773). At present, this crucial industry is caught in a spin cycle. Democrat presidents claim that § 111(d) confers implicit authority to remake the electricity sector; Republican presidents deny such authority exists. In lurching back and forth between their respective partisan preferences, these flip-flopping administrations deny any semblance of regulatory certainty to the electric industry.

States, too, suffer sovereign harms from the unreliability of their federal partner. States have "exclusive" jurisdiction over "retail sales of electricity," *FERC v. Elec. Power Supply Ass'n*, 577

U.S. 260, 266–67 (2015), and also play a lead role in air quality control under the Clean Air Act's "cooperative federalism." J.A. 74 (describing states' role under statutory scheme). It follows that states must "design and enact transformative legislative and regulatory changes" whenever the federal government changes the rules of the game. *See* Appl. by 29 States and State Agencies for Immediate Stay of Final Agency Action During Pendency of Petitions for Review at 39, *West Virginia, et al. v. EPA, et al.*, 136 S. Ct. 1000 (2016) (No. 15A773). As a result, states, are forced to flip-flop in line with the back-and-forth of presidential administration.

Enough is enough. It is incumbent on the Court to protect the interests harmed by the legal instability afflicting the major question here and elsewhere. *Cf.* White House Briefing Room, "Fact Sheet: List of Agency Actions for Review" (Jan. 20, 2021), https://bit.ly/3AM85ha (identifying 104 Trump-era rules to be immediately reviewed). A duty to "say what the law is" sometimes requires this Court to say what the law isn't. Here, the Court must make clear that it is constitutionally impermissible for agencies to make "major" law based on interstitial authority.

II. A PROPOSED FRAMEWORK TO IDENTIFY "MAJOR" RULES

Unfortunately, the Court's major questions doctrine is incomplete, as lower courts lack guidance on how to distinguish major rules from non-major rules. *See, e.g.*, *Chamber of Commerce v. DOL*, 885 F.3d 360, 387–88 (5th Cir. 2018) (recognizing uncertainty over doctrine's scope). To be sure, a rule's price tag speaks to whether its economic and political

significance is sufficient to qualify as a major question. But the Court can't just pick a cost threshold, above which all rules would be considered "major." Such a one-size-fits-all approach couldn't possibly account for the complexities of administrative policymaking. Something more is needed. To assist the Court along these lines, *amici* propose the following non-exclusive criteria for determining what qualifies as a major question.

A. Is the Agency "Filling in the Details" or "Answering Major Questions"?

The first factor for distinguishing a "major" rule is "the nature of the question presented." *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). "The mere fact that a statutory ambiguity exists for some purposes does not mean it authorizes the agency to reach major questions." *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 403 (D.C. Cir. 2017) (Brown, J., dissenting from denial of rehearing en banc) (cleaned up). In determining where to draw the line between "filling in the details" and "answering major questions," the key is statutory context.

For example, here the narrow purpose of § 111(d) becomes obvious on consideration of the statute as a whole. With the Clean Air Act, Congress created comprehensive regulatory programs for two categories of pollution: "criteria pollutants" and "hazardous air pollutants." *See* 42 U.S.C. §§ 108, 109 (criteria pollutants); § 112(b) (hazardous air pollutants). Section 111(d), on the other hand, "is a catch-all . . . intended to reach pollutants that do not fit squarely within the ambit" of the Act's primary programs. J.A. 119.

With this statutory context in mind, it makes no sense that a "catch-all" provision authorizes the EPA to take on major questions, such as remaking the electricity sector. If Congress had intended as much, then lawmakers would have worked through one of the two comprehensive pollution regimes established by the Clean Air Act. "Congress … does not, one might say, hide elephants in mouseholes." *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

B. Is the Agency Action "Historic"?

The second factor for determining whether a rule qualifies as "major" is whether the agency is doing something far out of the ordinary considering the regulatory history at hand. Since 1970, the EPA has exercised its § 111(d) authority a few times without controversy, primarily to regulate far-flung industries like sulfuric acid production or Kraft pulping plants. *See* J.A. 75-76 (listing prior uses).

Yet in today's era of presidential administration, this once obscure provision now abets grandiose executive ambition. President Obama called his § 111(d) rule "the single most important step America has ever taken in the fight against global climate change." Remarks by the President on the Clean Power Plan (Aug. 3, 2015) https://bit.ly/31OPZ24. More recently, an unprecedented § 111(d) proposal for oil and gas producers served as the centerpiece of President Biden's marquee international climate policy, the Global Methane Pledge. *See* White House Briefing Room, "Fact Sheet: President Biden Tackles Methane Emissions, Spurs Innovations, and Supports Sustainable Agriculture to Build a Clean Energy

Economy and Create Jobs" (Nov. 2, 2021), https://bit.ly/31IVfEz.

Even a cursory review of § 111(d)'s regulatory history couldn't miss a clear-cut dichotomy. For decades after its enactment, this "catch-all" authority was used narrowly as intended. Now, it's the basis for historic rules at the forefront of presidential policy agendas. When, as here, "an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," courts are likely dealing with a major question. *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014).

C. Did Congress Try to Do What the Agency Is Doing?

The third factor to consider in identifying a "major" question is whether Congress recently tried, but failed, to legislate a comparable outcome. That's what happened here.

In 2009, the House of Representatives passed a "cap-and-trade" policy to fight global warming. *See* American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009). But the bill stalled in the Senate, where it ultimately expired when the clock ran out on the 111th Congress. "So President Obama ordered the EPA to do what Congress wouldn't," J.A. 222 (Walker, J., dissenting), and the agency promulgated the Clean Power Plan. *See* 80 Fed. Reg. 64,662. For compliance, the EPA proposed to operate nationwide "model trading rules," also known as a cap-and-trade. *See* 80 Fed. Reg. 64,966 (Oct. 23, 2015). The upshot is that the Clean Power Plan amounted to an executive enactment of the same major policy—nationwide cap-

and-trade—that Congress had declined to adopt after much deliberation.

Where, as here, a regulation is indistinguishable from a policy that Congress failed to enact, it is likely that the agency is broaching a major question. *See U.S. Telecom Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (explaining that the Federal Communication Commission's "net neutrality" rule raised a major question because Congress "considered (but never passed) a variety of bills relating to net neutrality").

CONCLUSION

For the above reasons, the judgment below should be reversed. In addition, the Court should use this case to guide lower courts on how to apply the major questions doctrine.

Respectfully submitted,

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