

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

IN THE
Supreme Court of the United States

WEST VIRGINIA, ET AL.

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE NORTH AMERICAN COAL CORPORATION

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NORTH DAKOTA

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

**On Writs of Certiorari to The United States Court of
Appeals for the District of Columbia Circuit**

**BRIEF OF *AMICUS CURIAE* THE BUCKEYE
INSTITUTE IN SUPPORT OF PETITIONERS**

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INTEREST OF AMICUS CURIAE

Amicus curiae The Buckeye Institute was founded in 1989 as an independent research and educational institution—a think tank—whose mission is to advance free-market public policy in the states.¹ The staff at The Buckeye Institute accomplishes the organization’s mission by performing timely and reliable research on key issues, compiling and synthesizing data, formulating free-market policy solutions, and marketing those policy solutions for implementation in Ohio and replication throughout the country. The Buckeye Institute is a nonpartisan, non-profit, tax-exempt organization as defined by I.R.C. section 501(c)(3). The Buckeye Institute’s Legal Center files and joins amicus briefs that are consistent with its mission and goals.

Consistent with its mission, The Buckeye Institute seeks to protect individual liberties, especially those liberties guaranteed by the Constitution of the United States, against government overreach. More and more often, that government overreach comes in the form of agency rules and regulations imposed by unelected bureaucrats. The result is the insulation of important public policy decisions from any political or judicial accountability. This is incompatible with the representative democracy guaranteed by the Constitution. More specifically, the expansive regulatory authority that

¹ Pursuant to Rules 37.2(a) and 37.3(a), The Buckeye Institute states that it has obtained written consent to file this amicus brief from all parties in the case. Further, pursuant to Rule 37.6, no counsel for any party has authored this brief in whole or in part and no person other than the amicus has made any monetary contribution to this brief’s preparation or submission.

the Court of Appeals' decision would permit the Environmental Protection Agency (EPA) to exercise would fundamentally alter Ohio's economy without allowing Ohio voters any voice in the process, which is of substantial concern to The Buckeye Institute.

SUMMARY OF THE ARGUMENT

The energy required to keep the global economy moving forward—the energy that powers innovations in manufacturing, travel, science, medicine, and that maintains the standard of living that much of the world takes for granted—relies significantly on burning fossil fuels. Burning fossil fuels necessarily emits carbon dioxide into the atmosphere. The EPA has determined that these emissions contribute to climate change. U.S. Environmental Protection Agency, *Causes of Climate Change*, <https://www.epa.gov/climatechange-science/causes-climate-change> (accessed Dec. 16, 2021). But the economic impact of transitioning from fossil fuels to renewable power sources that produce less carbon emissions would be staggering and would result in both increased energy prices and job losses.

Policy makers have long debated these seemingly competing interests. The Court of Appeals' decision unfortunately adds to this muddle the question of who gets to make these decisions.

The major questions doctrine preserves political accountability in the administrative state by providing a commonsense check on administrative overreach. *See FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000) (expressing confidence that “Congress could not have intended to delegate a

decision of such economic and political significance to an agency in so cryptic a fashion.”). Simply put, when Congress aims to assign to an agency decisions of “vast economic and political significance” it speaks clearly in making that assignment. *Util. Air Regulatory Group v. E.P.A.*, 573 U.S. 302, 324, citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2014). Or, as Justice Scalia memorably put it, when fundamentally altering or expanding an agency’s regulatory authority, Congress does not “hide elephants in mouseholes.” *Whitman v. American Trucking Assoc.*, 531 U.S. 457, 468 (per curiam).

This case turns in large part on whether the major questions doctrine applies to the EPA’s purported power to rescind in its entirety the American Clean Energy (ACE) rule, which had—following this Court’s decision in *West Virginia v. Environmental Protection Agency*, 136 S. Ct. 1000 (2016) and a change in presidential administrations—repealed the Clean Power Plan (CPP). While regulatory policy may change from one administration to the next, the architecture of the Constitution—with its three co-equal branches and separation of powers—remains constant.

The Court of Appeals’ decision upends that balance by holding that the general grant of power to regulate stationary sources of air pollution under Section 111 of the Clean Air Act gives the EPA near absolute authority to rearrange the nation’s power generation infrastructure, regulating any industry, anywhere, if such regulation might reduce carbon dioxide emissions at power plants. In other words, the mousehole of Section 111 houses not a Borneo

elephant, but a prehistoric woolly mammoth. In reaching its conclusion, the Court of Appeals sidestepped the major questions doctrine and overlooked the “vast economic and political significance” of the EPA’s rule to states like Ohio.

This brief provides an analysis of the significant economic impact that such sweeping regulatory decisions will have on the State of Ohio and similarly situated industrial midwestern states that produce and rely on fossil fuels to power their economies. As Ohio’s example demonstrates, the EPA’s proposed rule squarely falls within the major questions doctrine, because the EPA’s policy decision implicates “vast economic” and “politically significant” consequences. Because Congress did not speak clearly in assigning authority over these decisions to the EPA, the decision of the Court of Appeals should be reversed.

ARGUMENT

A. The Major Questions Doctrine As Protection Against Agency Overreach.

The Constitution makes no mention of administrative agencies. Yet, as Justice Jackson lamented over half a century ago, “[t]hey have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories much as the concept of a fourth dimension unsettles our three-dimensional thinking.” *Fed. Trade Commission v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J. dissenting). Simply put, the executive agency is always—to some extent—at odds with the Constitution’s directive that “All legislative Powers

herein granted shall be vested in a Congress of the United States. . . . U.S. CONST. art. I, §1, cl. 1.

In protecting this distinction between legislative power and executive authority to execute the laws, this Court has articulated the “major questions doctrine,” which holds that when Congress aims to assign to an agency decisions of “vast economic and political significance” it speaks clearly in making that assignment. *U.A.R.G.*, 573 U.S. at 324, citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2014). In the Court of Appeals’ dissent, Judge Walker argued that the sweeping authority the majority granted to the EPA implicated decisions of “vast economic and political significance.” Judge Walker noted that in describing the scope and magnitude of the EPA’s Clean Power Plan, and by extension the of rescinding its repeal in the American Clean Energy (ACE) rule, no metaphor was too small for its proponents. *See American Lung Assoc. v. EPA*, 985 F. 3d 914, 999 (2021) (“Minor questions do not forestall consequences comparable to ‘the extinction event that wiped out the dinosaurs 65 million years ago.’ Minor questions are not analogous to ‘Thermopylae, Agincourt, Trafalgar, Lexington and Concord, Dunkirk, Pearl Harbor, the Battle of the Bulge, Midway and Sept. 11’ Minor rules are not the ‘single most important step America has ever taken in the fight against global climate change.’”) (internal citations omitted).

Indeed, when President Obama announced the final rule of the CPP in August 2015, he did not downplay its significance. The plan aimed to cut

carbon emissions by 32 percent by 2030. In his words, without the CPP:

Power plants can still dump unlimited amounts of carbon pollution into the air. For the sake of our kids and the health and safety of all Americans, that has to change. For the sake of the planet, that has to change.

Barack Obama, Remarks by the President in Announcing the Clean Power Plan, (Aug. 3, 2015). <https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/remarks-president-announcing-clean-power-plan> (accessed Dec. 16, 2021).

President Biden has announced even more ambitious plans to cut carbon emissions. According to the New York Times, “[t]he new American goal nearly doubles the pledge that the Obama administration made to cut emissions 26 percent to 28 percent below 2005 levels by 2025 . . .” Lisa Friedman and Coral Davenport, *Biden Will Pledge to Cut Greenhouse Gas Emissions Nearly in Half*, N.Y. TIMES (April 20, 2021, updated Oct. 27, 2021), <https://www.nytimes.com/2021/04/20/climate/biden-climate-change.html>. As the New York Times reports, this target “would require Americans to transform the way they drive, heat their homes and manufacture goods.” *Id.* Particularly relevant here, President Biden seeks to eliminate all carbon emissions from the electric sector by 2035. John Muyskens and Juliet Elperin, *Biden Calls for 100 Percent Clean Electricity by 2035. Here’s How Far We Have to Go*, WASH. POST (July 30, 2020).

As set forth below, there should be little debate about “vast economic and political significance” of these policy decisions, especially for states like Ohio.

B. The State of Ohio and Energy Production

For decades, the State of Ohio has advertised itself as “The Heart of it All,” owing to its distinctive shape and its centrality to the rest of nation. Ohio History Central, Ohio’s State Tourism Slogans, https://ohiohistorycentral.org/w/Ohio%27s_State_Tourism_Slogans (accessed Dec. 15, 2021). Ohio is geographically and culturally diverse, with rolling farmland, wooded Appalachian foothills, as well as major urban centers. Ohio thus provides a test case for how expansive regulatory changes to the power generation industry might affect the country as a whole.

Ohio is rich in natural resources, particularly fossil fuels. Sitting atop the Utica Shale formation, Ohio has increased its production of natural gas by 3,000% in the last decade. U.S. Energy Information Administration, *Ohio, State Energy Estimates*, <https://www.eia.gov/state/?sid=OH> (accessed Dec. 16, 2021). Ohio is currently the sixth largest producer of natural gas. *Id.* In addition, Ohio has almost 5% of all estimated U.S. coal reserves and is the nation’s tenth-largest producer of bituminous coal. *Id.* In 2019, slightly more than two-thirds of the coal mined in Ohio was used in Ohio, predominantly in power plants. *Id.*

But Ohio plays a key role in U.S. coal exports as well, with coal from Ohio and nearby states transported by rail to Lake Erie ports like Cleveland, Toledo and Lorain. This traffic also flows south down

the Ohio River from Cincinnati, which is “one of the nation’s largest inland coal ports.” *Id.* Similarly, “[b]ecause Ohio produces more natural gas than it consumes, a larger amount of natural gas leaves the state by interstate pipelines than enters.” U.S. Energy Information Administration, *State Profiles and Energy Estimates, Ohio*, <https://www.eia.gov/state/analysis.php?sid=OH> (accessed Dec. 15, 2021). In addition, with 24 underground storage fields with a combined capacity of 575 billion cubic feet, Ohio has the seventh largest natural gas storage capacity among the states. *Id.*

All of this is say that, in Ohio, the mining, extraction and export of fossil fuels means jobs. According to the U.S. Bureau of Labor statistics, nearly 20,000 Ohioans work directly in mining, extraction, or mining support services. The true impact of fossil fuels, particularly natural gas, on Ohio’s economy is far greater, however. A 2021 analysis commissioned by the American Petroleum Institute and performed by Price Waterhouse Coopers (PwC) estimates that “the US oil and natural gas industry’s operations directly or indirectly supported 9.0 million full-time and part-time jobs in the national economy in 2019.” *Impacts of the Oil and Natural Gas Industry on the U.S. Economy in 2019*, PricewaterhouseCoopers LLP, 7 (July 2021), <https://www.api.org/-/media/Files/Policy/American-Energy/PwC/API-PWC-Economic-Impact-Report.pdf>. (accessed Dec. 16, 2021).

Ohio ranked seventh in the nation, with 375,000 people employed directly or indirectly in oil and gas production. *Id.* at 13. The PwC study estimated the

total economic impact of the oil and gas industry at \$58.8 billion. *Id.* at 14. According to a 2014 study by the Heritage Foundation, if the CPP were enforced, roughly 45% of coal-mining jobs would be lost. Based on this prediction, Ohio can anticipate 9,000 lost jobs in mining, extraction, or mining support services alone. The report also claims that under the CPP, average personal family income (inflation-adjusted) would be reduced by approximately \$7,000. Kevin D. Dayaratna, Nicolas D. Loris, and David W. Kreutzer, HERITAGE FOUNDATION, *The Obama Administration's Climate Agenda: Underestimated Costs and Exaggerated Benefits*, Backgrounder No. 2975, (November 13, 2014), <http://report.heritage.org/bg2975>.

The same report predicted that the CPP would cause a national peak employment shortfall of more than 1 million jobs, with over 500,000 of those coming from manufacturing. *Id.* Because over 12% of Ohio workforce was employed in the manufacturing sector, the effect on Ohio would be severe. National Association of Manufacturers, *2019 Ohio Manufacturing Facts*, <https://www.nam.org/state-manufacturing-data/2019-ohio-manufacturing-facts> (accessed Dec. 16, 2021).

According to the Heritage study, Ohio would lose approximately 31,700 manufacturing jobs under the CPP regime. Dayaratna and Loris, *supra*. Further, renewable energy currently supplies only 3% of Ohio's in-state electricity generation. Thus, goals articulated by the current administration to create a carbon-pollution free power sector by 2035—less than 14 years from today—present a steep climb. This goal is

no small thing or mere “gap” to be filled by agency rulemaking.

Furthermore, there are immediate human and civic costs built into those future gains. For example, in November, 2016, Dayton Power & Light (DP&L) announced the closure of its two coal-fired power plants in Adams County, Ohio. Alec MacGillis, *Forced to Choose Between a Job—and a Community*, PROPUBLICA (May 23, 2018), <https://www.propublica.org/article/adams-county-ohio-coal-forced-to-choose-between-a-job-and-a-community>. The DP&L plants were the largest employers in the rural county. *Id.* The Adams County plants provided good paying jobs, with a total of “\$60 million in annual payroll” and drew workers from across Southwestern Ohio and Northern Kentucky. *Id.* The Manchester school system was one of the best funded in the state. *Id.*

But the closure of these plants meant that the county general fund lost \$787,800 in property tax revenue. *Id.* It meant that the once well-funded school system now scrambled to pay bills. It meant that the truck dealerships, where plant workers, confident in well-paying union jobs, no longer made sales. It also meant that many workers decided to leave Adams County. *Id.* The consequences of closing two fossil fuel power plants in Southwestern Ohio were enormous. The effect of the type of EPA regulation envisioned by the CPP and needed to meet the President’s ambitious goals will be exponentially greater.

C. Increased Energy Costs for Ohio Consumers and Manufacturers.

Beyond the economic upheaval of lost jobs, as Ohio transitions from fossil fuels to renewable energy, the fundamental shift envisioned by the CPP and President Biden's goals would significantly increase the price of energy for Ohio's manufacturers and consumers. For instance, an October 2014 report produced by NERA Economic Consulting forecast that the price of natural gas would rise between 2% and 29% depending upon the scenario. NERA Economic Consulting, *Potential Energy Impacts of the EPA Proposed Clean Power Plan*, (October 16, 2014) <https://www.nera.com/publications/archive/2014/potential-impacts-of-the-epa-clean-power-plan.html>. The report's baseline expected 51 gigawatts of coal fired electricity generation to be retired, with a resulting loss of jobs and tax revenue for the impacted communities. *Id.* The CPP would cause an additional 45 gigawatts to 169 gigawatts of coal plants to retire. *Id.* Based on expected changes in the generation technology mix needed to comply with the CPP, the delivered electricity price is expected to rise 12% to 17% as a direct result of implementing the CPP. *Id.*

These costs would not be shared equally. A December 2014 report produced by the Pacific Research Institute (PRI) demonstrates how the expected rise in the cost of electricity would hurt low-income and African American families the hardest. Wayne Winegarden, PhD, PACIFIC RESEARCH INSTITUTE, *The Regressive Impact on Ohio's Lower-Income and African-American Families from EPA's Proposed Regulations on Carbon Dioxide Emissions*,

(December 2014) https://www.pacificresearch.org/wp-content/uploads/2017/03/EPA_Ohio_rFweb.pdf. The report explained that in 2014, the electricity expenditures in Ohio were 2.9% for the average household. *Id.* However, household electricity expenditure rates vary: in parts of Summit County (Akron area), the burden is as high as 16.1%—nearly six times the state average. *Id.* The report forecasts that average household electricity expenditure would rise to 3.8% under the CPP, and the same Summit County residents’ burden would rise to 20.9%. *Id.*

Further changes to how power is generated—such as those contemplated by the CPP—would also disproportionately impact those who live in cities, particularly African-Americans. According to PRI’s analysis, the average electricity expenditures in Ohio for African-American households was 4.5% at the time of the report. *Id.* The burden was significantly higher, however, in specific parts of Cuyahoga County (Cleveland area), with the pre-CPP electricity expenditure rates hitting more than 20.0%. *Id.* Worse still, under the CPP, the average household electricity expenditures of African-American families in Ohio is forecast to rise to 5.8%, with Cuyahoga County residents’ electricity cost rising to 26% of household income. *Id.*

As illustrated above, the impacts of the CPP on Ohio industry, employment, taxation, education, and household budgets would be profound. Congress did not speak clearly in assigning authority over these decisions—which have “vast economic” and “politically significant” consequences—to the EPA.

CONCLUSION

For the reasons stated above, the decision of the United States Court of Appeals for the D.C. Circuit should be reversed.

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