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

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BRIEF OF *AMICI CURIAE* THE EDISON ELECTRIC INSTITUTE AND THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES IN SUPPORT OF RESPONDENTS

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INTERESTS OF *AMICI CURIAE*[1]

The Edison Electric Institute (EEI) and the National Association of Clean Water Agencies (NACWA) (collectively, *Amici*) submit this brief because certain legal theories advanced in this case, if adopted by the Court, could fatally undermine the Clean Air Act's[2] displacement of federal common law tort actions against electricity providers, clean water utilities, and other greenhouse gas (GHG) emitters,[3] with potentially dire consequences for the reliability of the Nation's electricity and water supplies. That displacement rests on the authority of the Environmental Protection Agency (EPA) to regulate GHG emissions under the Clean Air Act.[4] Absent that authority, "regulation" of electricity generation to control such emissions could occur via injunction and at the whim of the plaintiffs' bar, without regard to costs, technological feasibility, or effects on the Nation's electricity and water supplies.

EEI is the national association of all U.S. investor-owned electric companies—the largest entities regulated by the EPA rules under review. EEI members provide electricity and related services

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[1] No part of this brief was authored by counsel for any party, and no person or entity has made any monetary contribution to the preparation or submission of the brief other than *amici curiae* and their counsel. All parties have consented to the filing of this brief.

[2] 42 U.S.C. §§7401-7671q (CAA or Act). All statutory references in this brief are to Title 42 of the U.S. Code, unless otherwise specified.

[3] *See American Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410 (2011) (*AEP*).

[4] *See Massachusetts v. EPA*, 549 U.S. 497 (2007).

for about 220 million Americans and operate in all 50 States and the District of Columbia.

EEI members are leading a clean energy transformation, united in their commitment to provide reliable and affordable low- and zero-emission energy expeditiously. EEI members have undertaken a wide range of initiatives over the last 30 years to avoid, reduce, or sequester GHG emissions, with impressive results. More than four dozen EEI members have announced carbon reduction goals; over half of these intend to achieve net-zero carbon dioxide (CO_2) emissions by 2050. Indeed, EEI members had already achieved *more* GHG reductions than the Obama administration's Clean Power Plan[5] would have required *before* it was scheduled to take effect.

In addition, the mix of resources used to generate electricity in the United States has shifted dramatically over the last decade and is increasingly low-carbon. In 2016, natural gas surpassed coal as the main source of electricity generation in the United States, and in 2020 natural gas-based generation powered 40 percent of the country's electricity, compared to just 19 percent coal-based generation.[6] In 2017, more than half of the industry's

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[5] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661 (October 23, 2015) (CPP).

[6] *See* Energy Information Admin. (EIA), *Electric Power Monthly* (Feb. 2021), https://www.eia.gov/electricity/monthly/archive/february2021.pdf. According to data in the same EIA report, in 2020, U.S. annual electricity generation from renewable sources exceeded

Continued on next page…

investments in new electricity generation were in wind and solar,[7] and the pace has continued such that by 2020, 40 percent of America's electricity was generated from carbon-free resources, including nuclear, hydropower, solar, and wind.[8] As a result, CO_2 emissions in 2020 from the entire power sector were down 40% from 2005 levels—a 40-year low.[9] Emission reductions from current technologies are expected to continue, even as new technologies emerge. The potential for resurrection of tort-based injunctive relief to limit GHG emissions could upset these salutary trends.

NACWA is a nonprofit trade association representing nearly 350 municipal clean water agencies throughout the U.S. that own, operate, and manage publicly owned treatment works, wastewater and stormwater collection and treatment systems, and water reclamation districts.

Clean water utilities emit GHGs as a result of various wastewater treatment processes. Wastewater treatment facilities are also often the largest users of electricity in their communities. A decision from the Court opening power or clean water utilities to federal tort litigation, whether successful or not, would divert precious public funds

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coal-based generation, the first time that has occurred on an annual basis.

[7] *See* EIA, *Nearly Half of Utility-Scale Capacity Installed in 2017 Came from Renewables* (Jan. 10, 2018), https://www.eia.gov/todayinenergy/detail.php?id=34472.

[8] *See* EIA, n.6, *supra*.

[9] EIA, Monthly Energy Review (Mar. 2021), https://www.eia.gov/totalenergy/data/monthly/archive/00352103.pdf.

from critical public-health infrastructure projects and increase costs to the consumers that can least afford to bear them.

Petitioners and some *amici* seek to curtail EPA's authority to regulate GHG emissions under CAA §7411(d), whether through application of statutory interpretation doctrines or constitutional principles. Such a ruling could not only revive federal common law suits currently displaced by the CAA, but also those displaced by numerous other statutes, including the federal Clean Water Act.[10] The outcome here is therefore of critical importance to the Nation's power system and municipal clean water providers, and therefore to *Amici*'s members. While it may seem counterintuitive that the Nation's investor-owned electric companies, in particular, should favor EPA regulatory authority, the alternative could be the chaotic world of regulation by injunctive fiat. In short, *Amici* and their members seek to ensure that the Nation's emissions-reduction policies minimize impacts on consumers and avoid harm to U.S. industry and the economy. The surest path there is affirming EPA's authority to regulate GHG emissions under the Act, consistent with the Act's text and congressional intent.

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[10] Federal Water Pollution Control Act, 33 U.S.C. §§1251-1387 (CWA); *see City of Milwaukee v. Illinois and Michigan,* 451 U.S. 304, 332 (1981).

SUMMARY OF ARGUMENT

For the fourth time since 2007, this Court is asked to adjudicate one of the most important environmental matters of our time: the scope of the federal government's authority to regulate GHG emissions under the Clean Air Act. While this case has potentially profound implications for the Nation as it addresses climate change, of particular concern to *Amici* are the implications this case could have for the Court's 2011 ruling in *AEP* that EPA's authority to regulate GHG emissions under the Act displaces federal common law tort claims against GHG emitters.

Fundamentally, *AEP* embodies this Court's conclusion that Congress preferred the Act's nationwide regulatory scheme—guided by EPA and the States acting cooperatively—over a regime controlling GHG emissions through myriad federal tort claims for injunctive relief against individual GHG emitters. Yet certain outcomes in this case—such as one stripping EPA of authority to regulate GHG emissions under the guise of the constitutional nondelegation doctrine, or one that revisits and reverses *Massachusetts v. EPA*, 549 U.S. 497 (2007), as a way of avoiding that constitutional question—could fatally undermine the Act's displacement of such lawsuits. This in turn could lead to a deluge of tort litigation against GHG emitters, which if successful could effectively shift GHG regulation from a sensible and consistent nationwide regime governed by EPA and the States pursuant to a statutory scheme Congress designed, to a chaotic system dictated by the interests of individual plaintiffs, untethered from all consideration of

commonsense statutory factors like technological feasibility, cost, and reliability of supply.

The Court can and should resolve this case using traditional statutory construction tools—including through a reasoned and careful application of either the two-step statutory construction doctrine established in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (*Chevron*), or the major questions doctrine, *see King v. Burwell*, 576 U.S. 473 (2015). The Court can appropriately delineate EPA's authority to regulate GHGs under the Act with these tools, without stripping EPA of its authority. *Amici* respectfully urge the Court to reach first to these doctrines of statutory construction to resolve this case, lest it undermine the foundations of *AEP* displacement and result in a raft of climate-related tort litigation against the Nation's providers of electricity and clean water.

I. The displacement of federal common law provided by EPA's regulatory authority is important to the reliability of our Nation's electricity and clean water supply. In *AEP*, private and state litigants sued individual private electric companies in tort, seeking to compel emission reductions through injunctive relief, regardless of cost, feasibility, or effects on the affordability or reliability of the Nation's electricity supply. But this Court, relying upon prior precedent and specifically noting then-pending EPA rulemaking action under §7411, concluded that the Act displaces federal common law tort suits against GHG emitters in favor of a unified federal regulatory scheme. Central to this ruling was the Court's decision just four years earlier in *Massachusetts* that EPA has the authority and, if it

finds endangerment to public health or welfare from GHG emissions, a duty under the CAA to regulate GHGs as pollutants.

Regulated entities have come to rely on EPA's authority to establish a predictable, level playing field in which control of GHG emissions is based on consideration of statutory factors such as technological feasibility, cost, and reliability. Any undermining of *AEP* could subject the power industry, and public utilities more generally, to a multiplicity of tort suits, allowing myriad litigants, instead of Congress, EPA, and the States, to attempt to dictate through all manner of injunctive relief the level of GHG-emission reductions that each stationary source must achieve. This would be chaos. *Amici* urge the Court to avoid any ruling that could lead to such an outcome.

II. Certain petitioners raise concerns regarding the constitutional implications of an expansive view of EPA's authority under §7411(d) and accordingly urge the Court to *constrain* EPA's authority in some manner. Numerous *amici* go farther, urging the Court to rule, either by invocation of the nondelegation doctrine or by taking up issues not presented by the petitioners at all, that EPA lacks *any* authority whatsoever under the CAA to regulate the emission of GHGs from fossil fuel-fired electric generating units, or from stationary or mobile sources generally.

Amici urge the Court to give due consideration to the adverse consequences of adopting these legal theories. Invocation of the nondelegation doctrine to strip EPA of regulatory authority that this Court previously recognized could resurrect the tort

lawsuits rejected in *AEP*, which could create a patchwork of inconsistent GHG emission decisions across the Nation. Revisiting *Massachusetts* under principles of constitutional avoidance could yield a similar result, as could certain (but not all) applications of the major questions doctrine.

But the Court need not go there. It should instead resolve this case—preserving, even if potentially limiting, EPA's regulatory authority under §7411(d)—through the application of traditional statutory construction tools. In this way, the Court can both clearly delineate EPA's authority under the Act *and* protect the Nation's supply of reliable electricity from the countless climate-related tort lawsuits that could, through inconsistent or ill-considered injunctive relief, otherwise disrupt it.

ARGUMENT

Below, we recount the threat to this Nation's electricity supply that was posed by federal common law tort suits against GHG emitters, and how this Court concluded in *AEP* that Congress displaced such relief by authorizing EPA to regulate air pollutants, including GHGs. Then, we briefly discuss the traditional statutory construction tools available to the Court to ensure EPA acts within the bounds Congress intended, without invoking constitutional doctrines that could spell the end of such displacement.

I. IN AMERICAN ELECTRIC POWER THIS COURT CORRECTLY ARTICULATED THE DISPLACING EFFECT OF THE CLEAN AIR ACT ON FEDERAL COMMON LAW CLAIMS RELATING TO GREENHOUSE GAS EMISSIONS.

In the lawsuits leading up to *AEP*, private litigants and States sought to enjoin certain power providers to reduce their CO_2 emissions, generally through curtailment or shuttering of operations, without regard for the broader consequences on industry or the American populace. This Court correctly recognized that through the Clean Air Act Congress displaced such claims, providing a structure for EPA to regulate power plant emissions after considering such factors as cost, achievability, energy requirements, and other environmental impacts.

While no party or *amicus* has expressly advocated that this Court overturn *AEP* or *Massachusetts*, the invitation to do so is apparent. This Court has expressly taken up the question of the constitutional nondelegation doctrine, the application of which could nominally leave *Massachusetts* in place, but nonetheless strip EPA of all meaningful regulatory authority over GHG emissions under the theory that only Congress can issue such regulatory commands. One *amicus* takes *Massachusetts* on more directly, arguing that when Congress passed the Act, it was *not* concerned with the potential impact of air pollutants on climate.[11] It

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[11] Brief of *Amicus Curiae* Competitive Enterprise Institute in Support of Petitioners 3-4.

is hard to read this as anything other than an assault on *Massachusetts*, in which this Court stated:

> While the Congresses that drafted §202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.

549 U.S. at 532. The Court may be tempted to accept some or all of these invitations in an effort to restore what it views as the intended balance of powers between the federal Executive and Legislative Branches. But the Court should understand the potential costs of treading this path: stripping EPA of its regulatory authority over GHGs would also undermine the foundation of *AEP* and potentially resuscitate the threat of federal common law causes of action, including injunctive relief, against *Amici*'s members, who are responsible for providing the Nation a reliable supply of electricity and access to clean water.

A. AEP Demonstrates That the Nation's Climate Policy Should Not Be Dictated by Tort-based Injunction.

1. In 2004, eight States, New York City, and three land trusts separately sued five electric power companies that owned and operated fossil fuel-fired power plants in twenty states, alleging that their

"carbon-dioxide emissions created a substantial and unreasonable interference with public rights, in violation of the federal common law of interstate nuisance, or, in the alternative, of state tort law." *AEP*, 564 U.S. at 418 (internal quotation marks omitted).

The plaintiffs sought injunctive relief, including

> an order … enjoining each of the Defendants to abate its contribution to the nuisance by capping its emissions of carbon dioxide and then reducing those emissions *by a specified percentage each year for a least a decade*.

Connecticut v. American Elec. Power Co., Inc., 406 F. Supp. 2d 265, 270 (S.D.N.Y. 2005) (cleaned up, emphasis added). The district court noted this would require it to:

> (1) determine the appropriate level at which to cap the carbon dioxide emissions of these Defendants; (2) determine the appropriate percentage reduction to impose upon Defendants; (3) create a schedule to implement those reductions; (4) determine and balance the implications of such relief on the United States' ongoing negotiations with other nations concerning global climate change; (5) assess and measure available alternative energy resources; and (6) determine and balance the implications of such relief on the United States' energy sufficiency and thus its national security….

Id. at 272. In ruling that this raised nonjusticiable political questions, the court acknowledged that

"'Congress has vested administrative authority' over the 'technically complex area of environmental law'" in EPA, which "ha[d] been grappling with the proper approach to the issue of global climate change for years." *Id.* at 273 (quoting *New England Legal Found. v. Costle*, 666 F.2d 30, 33 (2d Cir. 1981)).

2. Putting aside the district court's reticence to undertake this inherently political task, in 2005 injunctive relief of this sort would simply have been unachievable for the defendants, except through curtailment of operations or shuttering of plants. The technology required to implement plaintiffs' desired remedy was unavailable at the scale required. Moreover, injunctive relief would have taken no account of existing regulatory and other requirements imposed by federal and state governments and public utility commissions. Nor would injunctive relief have accounted for the effects of hasty, drastic carbon-emission reductions on the reliability and affordability of electricity. In *AEP*, this Court recognized the problematic nature of tort remedies, particularly injunctive relief, in this context.

B. The Court in AEP Reaffirmed EPA's Authority to Regulate GHGs under the Act and Found That It Displaced Federal Common Law Remedies.

1. After the federal district court dismissed based on the political question doctrine and the Second Circuit reversed, this Court took up, *inter alia*, whether the Clean Air Act displaces federal common law nuisance actions seeking to force GHG

emitters to abate their emissions.[12] In a resounding 8–0 ruling, the Court answered "yes."

To determine "whether congressional legislation excludes the declaration of federal common law is simply" to ask "whether the statute speaks directly to the question at issue." *Id.* at 423-24 (cleaned up). The Court recalled it had previously answered that very question: "*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the [Clean Air Act]," and thus the Act "'speaks directly' to emissions of carbon dioxide from the defendants' plants." *Id.* at 424. And once EPA identifies "categories of stationary sources that, 'in [the Administrator's] judgment,' 'caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare,'" *ibid.* (quoting §7411(b)(1)(A)), EPA *must* regulate existing sources within that category, *ibid.* (citing §7411(d)). Moreover, because the Act "provides multiple avenues for enforcement" and allows States and private parties to petition for rulemaking if EPA does not act, the Act "provides a means to seek limits on emissions of carbon dioxide from domestic powerplants—the same relief the plaintiffs seek by invoking federal common law." *Id.* at 425. The Court found "no room for a parallel track" in federal common law. *Ibid.*

Critically for the present case, the Court also credited the Act's "prescribed order of

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[12] Because the Second Circuit had reached only the question of displacement of *federal* common law, this Court had no occasion to pass upon the question of state law preemption. *Id.* at 429.

decisionmaking"—first "the expert administrative agency, [] second, federal judges"—as "yet another reason to resist setting emissions standards by judicial decree under federal tort law." *Id.* at 427. The Court concluded that "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector" requires "informed assessment of competing interests." *Ibid.* Congress "entrust[ed] such complex balancing to EPA in the first instance, in combination with state regulators." *Ibid.* EPA, as the expert agency, is simply better equipped to do that job than are federal judges who "lack the scientific, economic, and technological resources an agency can utilize in coping with issues of this order." *Id.* at 428. The alternative—federal judges determining "what amount of carbon-dioxide emissions is 'unreasonable'" and "what level of reduction is 'practical, feasible and economically viable,'" sometimes on a plant-by-plant basis—simply "cannot be reconciled with the decisionmaking scheme Congress enacted." *Id.* at 428-29.

Ultimately, the Court considered as the "*critical point*" in its displacement conclusion the fact "that Congress delegated *to EPA* the decision whether and how to regulate carbon-dioxide emissions from powerplants." *Id.* at 426 (citation omitted, emphasis added).

2. The tort-based remedy the *AEP* plaintiffs sought to impose on a handful of defendants—injunctions uninformed by considerations of feasibility, costs, or energy impacts—stands in sharp contrast to the thoughtful regulatory structure §7411(d) applies to existing sources nationwide. Section 7411(d) requires EPA to identify the "best

system of emission reduction" for sources in a category, after "taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements." Using this "BSER," States develop standards of performance for each existing source within their borders, after considering a source's "remaining useful life" and other relevant factors. EPA and the States must support their decisions with facts and analysis, and the public—from regulated entities to individual citizens—may comment during the process. To be sure, emission reductions achieved this way may take longer than the *AEP* plaintiffs would have preferred. But that reasoned process is far preferable to a system under which individual plaintiffs attempt to commandeer the country's climate policy through *ad hoc* tort litigation and inconsistent injunctive relief.

In addition to recognizing Congress's intended regulatory framework, *AEP* also serves as a crucial bulwark against piecemeal, time- and resource-consuming litigation, regardless of the outcome. *See AEP*, 564 U.S. at 428-29 (recognizing the potential for "similar suits" to be "mounted … against thousands … of other defendants" (cleaned up)). As the Court accurately observed, federal and state regulatory bodies with relevant expertise are better equipped to evaluate the propriety of emission limitations and technological requirements, and to balance the policy issues inherent in such regulation, than are federal judges acting in response to individual tort suits.

Yet "regulation" of GHG emissions could return to this insensible tort-based regime if the Court strips EPA of its authority to regulate GHGs under

§7411(d) under certain theories advanced in this case. This fear is not theoretical. To the contrary, it is playing out in real time elsewhere, where the courts have found no barrier to suits against individual GHG emitters.[13]

No one in this case has openly suggested that a return to such a regime makes sense. Yet some of the legal theories advanced by petitioners and *amici* lead inescapably to that result. The Court thus should take care, when evaluating the arguments before it, not to issue a decision expressly or implicitly undermining its wise ruling in *AEP* that Congress displaced federal common law tort suits against GHG emitters by vesting regulatory authority over such pollutants with EPA.

C. This Court Concluded in Massachusetts That a Commonsense Reading of the Act Authorizes EPA to Regulate GHGs.

Crucial to the Court's ruling in *AEP* was its decision four years earlier in *Massachusetts* that GHGs are "air pollutants" within the Act's broad, general definition and that EPA must regulate their emissions if it finds that those emissions are reasonably likely to endanger public health or welfare. 549 U.S. at 529. In reaching that result, the Court simply looked to the statute's plain text, which remains unchanged.

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[13] *See* Stanley Reed and Claire Moses, "A Dutch court rules that Shell must step up its climate change efforts," The New York Times (May 26, 2021), https://www.nytimes.com/2021/05/26/business/royal-dutch-shell-climate-change.html.

At issue in *Massachusetts* was EPA's denial of a petition for rulemaking asking the agency to regulate GHG emissions from new motor vehicles under §7521. *Id.* at 510. Section 7521 provides that EPA "shall by regulation prescribe … standards applicable to the emission of any air pollutant from any … new motor vehicles … which in [the EPA Administrator's] judgment cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare." EPA based its denial in part on the determination that it lacked regulatory authority to regulate GHG emissions from new motor vehicles because GHGs do not qualify as "air pollutant[s]" under the Act. 549 U.S. at 528.

The Court rejected this view, holding that GHGs are unambiguously "air pollutant[s]" within the meaning of the Act. *Id.* at 529. It reasoned that GHGs are "without a doubt" physical and chemical substances emitted into the ambient air and therefore squarely within the Act's "sweeping definition of 'air pollutant.'" *Id.* at 528 (quoting §7602(g)). As to the clause of §7521(a)(1) concerning the required endangerment finding, the Court noted that the Act defines "welfare" to include pollutants' "effects on … weather … and climate." *Id.* at 506 (quoting §7602(h)). Accordingly, the Court held that the Act *requires* EPA to regulate GHGs if the agency finds they contribute to climate change or otherwise endanger public health and welfare. *Id.* at 529.

Massachusetts answered only the narrow questions of *whether* EPA has authority and a duty to regulate GHGs under the CAA; it did not opine on *how* EPA may regulate GHGs, or under which

specific provisions. The Court also declined to reach the question of whether on remand EPA *must* make an endangerment finding, leaving that question to the agency's exercise of its expertise. *Id.* at 534.

EPA ultimately did make such a finding,[14] which led, in turn, to the promulgation of regulations addressing GHG emissions from mobile sources, *e.g.*, 75 Fed. Reg. 25,324 (May 7, 2010), and stationary sources, *e.g.*, 75 Fed. Reg. 31,514 (June 3, 2010). EPA's attempt to regulate stationary sources would eventually become the subject of another case before this Court. *See infra* §II.B.

Taken together, the Court's reading of the plain text of the Act as both encompassing EPA's authority to regulate GHGs and displacing other federal remedies related to GHG emissions have provided a sometimes contentious but nonetheless workable scheme that protects industry from arbitrary, *ad hoc* attempts at emission control through injunction while ensuring some measure of predictability and uniformity. A decision voiding that authority could upend that predictability and uniformity and potentially subject individual GHG emitters to the idiosyncratic whims of individual district court judges.

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[14] *See* Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009) (Endangerment Finding).

II. THE COURT SHOULD RESOLVE QUESTIONS REGARDING EPA'S AUTHORITY UNDER §7411(D) UTILIZING TRADITIONAL TOOLS OF STATUTORY CONSTRUCTION.

Principles of constitutional avoidance command that the Court exhaust its traditional tools of statutory construction and interpretation before reaching constitutional questions such as application of the nondelegation doctrine.[15] Here, the Court can readily resolve the instant case utilizing those traditional tools, both clarifying and, as appropriate, constraining EPA's authority within the bounds of the statute, while preserving that authority in line with Congress's displacement of the federal common law nuisance suits that otherwise would rush to fill the regulatory void.

EEI, as the representative of the bulk of the electric power sector—the source category governed by the rules under review—along with NACWA, urge the Court to proceed with caution in entertaining application of the nondelegation or major questions doctrines in ways that could strip

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[15] Indeed, as far back as seventy years ago this Court characterized as "old and deeply imbedded in our jurisprudence" the fundamental principle "that this Court will construe a statute in a manner that requires decision of serious constitutional questions *only if the statutory language leaves no reasonable alternative*." *United States v. Five Gambling Devices*, 346 U.S. 441, 448-49 (1953) (emphasis added; citation omitted); *see also United States v. Rumely*, 345 U.S. 41, 45 (1953) (same and citing cases).

EPA of all authority to regulate GHGs under §7411(d) or otherwise call into question this Court's holdings in *Massachusetts* and *AEP*. Employing the nondelegation doctrine to conclude that the Act unconstitutionally delegates lawmaking authority to EPA would effectively defenestrate EPA in the area of climate change regulation, overturning *Massachusetts* and *AEP* in effect, even if not in name. Invoking the major questions doctrine, or at least the broader formulations of it put forward here, could have the same effect.

The better course is to apply traditional statutory construction tools to conclude that EPA has *some* authority to regulate sources of GHGs under §7411(d), even if the contours of that authority are subject to reasonable interpretation. To be sure, EPA has no "roving license to ignore the statutory text." *Massachusetts*, 549 U.S. at 533. But Congress did give the agency some room to maneuver to address new pollutants, such as GHGs, as their threats to public health and welfare became known, and it did not violate the Constitution in doing so.

A. Because the Act Provides Sufficient Direction for EPA to Follow in Regulating GHGs, the Nondelegation Doctrine Does Not Apply.

Since the mid-1930s, the Court has upheld every federal statute that has been challenged on nondelegation doctrine grounds, and it should do so again in this case—presuming the Court even takes up the issue, which as we explain it need not. Applying the nondelegation doctrine here to strip EPA of all authority to regulate GHGs could subject the power industry and clean water utilities to

federal common law nuisance and other tort suits based on their GHG emissions. Invalidating §7411(d) on nondelegation doctrine grounds could have even farther-reaching consequences, not only under the Clean Air Act, but under numerous other statutes instructing Executive Branch agencies to administer and execute policies Congress enacts. Such a ruling could lead to a deluge of federal common law tort litigation on a wide range of environmental and other issues previously displaced by the existence of a federal regulatory scheme. *Amici* urge the Court to avoid deciding this case on theories that could lead to such a result.

1. The nondelegation doctrine is rooted in the Constitution's separation-of-powers principle and prohibits Congress from delegating its lawmaking authority to another branch of government—typically the Executive. *Gundy v. United States*, 139 S. Ct. 2116, 2121 (2019). The doctrine originates from Article I of the Constitution, which vests all legislative powers in Congress. The Court first articulated the doctrine as it is understood today in *Marshall Field & Co. v. Clark,* in which it announced in dictum that "Congress cannot delegate legislative power to the president." 143 U.S. 649, 692 (1892). But the Court distinguished the impermissible "delegation of power to make the law, which necessarily involves a discretion as to what [the law] shall be," from "conferring authority or discretion as to its execution, to be exercised under and in pursuance of the law," which is permissible. *Id.* at 693-94 (internal punctuation and citation omitted). In this way, the doctrine "do[es] not prevent Congress from obtaining the assistance of its

coordinate Branches." *Mistretta v. United States,* 488 U.S. 361, 372 (1989).

Accordingly, the Court has long held that Congress may confer discretion on the Executive Branch and its departments and agencies to implement and enforce the laws so long as Congress supplies an "intelligible principle" defining the limits of that discretion. *Ibid.* (quoting *J.W. Hampton, Jr. & Co. v. United States,* 276 U.S. 394, 409 (1928)). Put another, more rigorous way:

> Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments?

Gundy, 139 S. Ct. at 2141 (Gorsuch, J., dissenting).

Under this rubric, the Court has only twice found congressional delegation to be unconstitutional, both instances in 1935, and in each case because "Congress had failed to articulate *any* policy or standard" to confine the Executive's discretion. *Mistretta,* 488 U.S. at 373, n.7 (emphasis added); *see A.L.A. Schechter Poultry Corp. v. United States,* 295 U.S. 495 (1935); *Panama Refining Co. v. Ryan,* 293 U.S. 388 (1935).

In the eighty-six years since *Schechter Poultry*, the Court has never once applied the nondelegation doctrine to invalidate any other statute. To the contrary, the Court has continued to uphold broad delegations of authority to the Executive under

various statutes. *See, e.g., Nat'l Broadcasting Co. v. United States,* 319 U.S. 190, 216 (1943) (approving delegation of authority to the Federal Communications Commission to regulate in the "public interest")*; Whitman v. American Trucking Ass'ns,* 531 U.S. 457, 472 (2001) (affirming delegation of authority to EPA to issue air quality standards necessary "to protect the public health"). Accordingly, and as demonstrated by the Court's precedent, delegation from Congress to the Executive is unconstitutional only in extreme cases—those in which Congress entirely fails to confine the Executive's discretion. *Whitman,* 531 U.S. at 474.

2. This is simply not one of those rare cases. Rather, in the CAA Congress directed EPA to engage in factfinding and to regulate emissions of a pollutant when articulable thresholds were met, "a practice that is … long associated with the executive function." *Gundy*, 139 S. Ct. at 2140 (Gorsuch, J., dissenting). Congress set forth a definition of "air pollutant" that this Court determined in *Massachusetts* included GHGs, and recognized that Congress included effects on "climate" and "weather" as among the effects of air pollution that could lead to an endangerment finding and a consequent obligation to regulate. *See* 549 U.S. at 506; J.A. 230 (concurrence and dissent of Judge Walker, recognizing continued validity of *Massachusetts*). Armed with that ruling and subsequent factfinding, EPA issued the Endangerment Finding—a challenge to which the lower court rejected, *Coalition for Responsible Regulation v. EPA*, 684 F.3d 102 (D.C. Cir. 2012), and this Court declined to take up, *id.*, *cert. denied*, No. 12-1253 (S. Ct. Oct. 15, 2013); *see*

also Util. Air Regulatory Grp. v. EPA, 573 U.S. 302, 314 (2014) (*UARG*) (noting grant of only one question, on stationary source permitting).

This Court may choose to determine that the court below erred in its broad reading of §7411(d). But if it does, it should do so using traditional tools of statutory construction; without doing violence to its prior rulings; and without entirely voiding EPA's authority to engage in factfinding regarding the effects of pollutants and to regulate emissions of those pollutants according to the policies Congress set forth. *Cf. Gundy*, 139 S. Ct. at 2140-42 (Gorsuch, J. dissenting). Because §7411(a)(1) imposes constraints on EPA's authority to regulate—specifically, that emission standards must be based on the "best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated"[16]—the Court should decline to resolve this case based on application of the nondelegation doctrine.

B. The Major Questions Doctrine May Constrain, but Does Not Void, EPA's Authority Under the Ambiguous Language of Section 7411(d).

The Court should also decline to find that the major questions doctrine precludes EPA from regulating GHGs under §7411(d), instead resolving

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[16] 42 U.S.C. §7411(a)(1).

this case using its traditional tools, such as the two-step *Chevron* analysis. Even under Step Two of that analysis, which governs where the statute is ambiguous, an agency's interpretation prevails only if it is "reasonable," 467 U.S. at 842–43, and the courts ultimately make that determination of reasonableness. In such circumstances, the major questions doctrine allows the courts to cabin agency authority where ambiguous language might otherwise result in transformational rulemakings without sufficient direction from Congress.

The issue before the Court in this case can readily be answered by applying *Chevron*—that is, by reading §7411(d) in context to determine the outer bounds of EPA's authority. In identifying those outer bounds, the Court can be aided by application of the major questions doctrine, asking—based on the specific rule the agency has promulgated—whether the statute "sufficiently guides executive discretion to accord with Article I" and thus allows the challenged regulation to stand. *Gundy*, 139 S. Ct. at 2123 (Kagan, J., plurality op.). In doing so here, the Court likely will obviate the need for further constitutional inquiry, *id.*, because, properly construed, §7411(d) sets forth a carefully crafted framework within which EPA and the States are to work together to feasibly and reasonably regulate emissions of GHGs and other pollutants from existing sources.

1.The major questions doctrine, in tandem with the closely related clear-statement canon, evolved as a way to check Executive Branch overreach into areas of significant political or economic import, without eviscerating acts of Congress as unconstitutional delegations of legislative authority

to the Executive. *See, e.g.*, *UARG*, 573 U.S. at 324. Thus,

> [w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.

Ibid.

Read in this light, the major questions doctrine is simply a brake on an agency's authority under Step Two of the *Chevron* analysis: if a statute is clear, then under Step One its language governs any rule, even a transformational rule, issued under it, so long as that rule comports with the statute's terms. If, however, the statute is ambiguous, the reviewing court must examine whether the challenged rule is transformational. If it is, then it is for the reviewing court (and not for the agency) to determine whether Congress's direction in the statute has been sufficient to accord with Article I and allow the rule to stand. In short, the major questions doctrine is a logical corollary of *Chevron*'s instruction that, even under Step Two, an agency's interpretation of an ambiguous provision must be "reasonable." 467 U.S. at 842–43. And it acts as a judicial intermediary between the chainsaw of the nondelegation doctrine (which strips away all authority when applied) and the scalpel of *Chevron* (which in some instances may allow too much legislating by the Executive Branch to pass constitutional muster). It is thus unsurprising that

the Court has frequently avoided difficult nondelegation doctrine questions by resorting to major questions principles. *E.g.*, *Burwell*, 576 U.S. at 485-86.

Here, broad application of the major questions doctrine to conclude that the Act does not authorize EPA to regulate GHGs *at all* under §7411(d) (or more broadly under the Act) would be tantamount to applying the nondelegation doctrine, stripping EPA of all authority to regulate GHGs under the section. As discussed previously, this would effectively repudiate *AEP*, which expressly relied upon EPA's authority *under §7411* to regulate GHGs as a key reason for concluding that the Act displaces federal common law tort suits. 564 U.S. at 425. The Court should take all reasonable steps to avoid this chaotic outcome.

But the Court could, for example, apply the major questions doctrine to a narrower question: Did Congress intend in §7411(d) to authorize EPA to mandate GHG emission reductions through a restructuring of the electricity grid? That is a question for the Court, to be resolved through a reading of the statutory language in the context in which it is used. *Burwell*, 576 U.S. at 485.[17] Even if

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[17] As the Court recently demonstrated via the twin orders of *Biden v. Missouri*, No. 21A240, 2022 WL 120950 (U.S. Jan. 13, 2022) (per curiam), and *National Federation of Independent Business v. Department of Labor* (*NFIB*), No. 21A244, 2022 WL 120952 (U.S. Jan. 13, 2022) (per curiam), the major questions doctrine, were it to be applied, should be used to evaluate *only* the precise regulation under review, not the statutory scheme more broadly. *NFIB*, 2022 WL 120952, at *3 (construing statutory authorization to issue broad vaccine-or-test

Continued on next page…

the Court concludes that is not the case, there is still authority for the agency to act. It may attempt another rulemaking using the same statutory authority, and the question then would be whether that rulemaking too is impermissibly transformational, or whether it instead falls within the reasonable bounds of the ambiguities in the statute.

In the end, regardless of the statutory construction tools employed, a reading of §7411(d) that possibly constrains but does not eviscerate EPA's authority under §7411(d) should control. And in that case, the displacing effect of the Clean Air Act on federal common law tort suits against GHG emitters would remain intact.

2. Congress through the Act, and this Court through its prior decisions, provided the Court with all the tools it needs to discern the metes and bounds of EPA's authority under §7411(d). Applying those traditional statutory construction tools demonstrates that those metes and bounds include reasonable regulation of GHGs in accordance with the Act's terms.

Take, for example, this Court's evaluation of the first suite of GHG regulations promulgated following EPA's Endangerment Finding. In *UARG*, this Court reviewed EPA's GHG emission standards for new motor vehicles and the agency's determination that

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requirement); *id.* at *5-6 (Gorsuch, J., concurring) (applying major questions doctrine to same); *Biden*, 2022 WL 120950, at *3 (concluding that vaccine requirement specific to facilities receiving Medicare and Medicaid funding "fits neatly within the language of the statute").

certain stationary sources of GHGs were subject to the Act's Prevention of Significant Deterioration (PSD) and Title V permitting programs "on the basis of their potential to emit greenhouse gases."[18] 573 U.S. at 312. EPA proposed to regulate in phases: First, it would require sources already regulated under the PSD program based on their emissions of other pollutants at above-threshold levels ("anyway" sources) to comply with GHG-emission limitations that reflect the "best available control technology" (BACT) for "each pollutant subject to regulation under" the Act. §7475(a)(4). Second, EPA would "tailor" the programs to accommodate GHG emissions (which are typically higher by orders of magnitude than emissions of other pollutants) by providing, among other things, that other sources would not become newly subject to PSD or Title V permitting on the basis of their potential to emit GHGs in amounts less than 100,000 tons per year, *id.* at 312-13, *i.e.*, as much as 100 times the threshold amount set by Congress.

The Court upheld EPA's authority to require BACT for anyway sources but rejected EPA's attempt to "tailor" the numeric statutory thresholds

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[18] The PSD provisions make it unlawful to construct or modify a "major emitting facility" in certain areas without a permit. §§7475(a)(1), 7479(2)(C). A "major emitting facility" is a stationary source with the potential to emit 250 tons per year of "any air pollutant" (or 100 tons per year for certain types of sources). §7479(1). In addition, Title V of the Act makes it unlawful to operate any "major source," wherever located, without a permit. §7661a(a). A "major source" is a stationary source with the potential to emit 100 tons per year of "any air pollutant." §§7661(2)(B), 7602(j).

to "reasonably" address GHGs through the PSD program.

a. First, as to the "tailoring" rule, the Court concluded that the PSD and Title V programs "cannot rationally be extended beyond[] a relative handful of large sources capable of shouldering heavy substantive and procedural burdens." *Id.* at 322. EPA's contrary interpretation—which effectively amended clear statutory language regarding the permitting thresholds—would "bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.* at 324. Requiring permits "for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text." *Ibid.* (cleaned up). EPA thus exceeded its authority when it adjusted the Act's permitting thresholds to accommodate GHGs. *Id.* at 327.

The Court squared its decision with its ruling in *Massachusetts* by explaining that there the Court had held that the *Act-wide* definition of "air pollutant" includes GHGs. 549 U.S. at 529. By contrast, "in the Act's operative provisions, including the PSD and Title V permitting provisions, EPA has routinely given ['air pollutant'] a narrower, context-appropriate meaning." *UARG*, 573 U.S. at 316. *Massachusetts* did not invalidate those "longstanding constructions." *Id.* at 318 (explaining that EPA is not compelled to regulate in a manner that is "extreme, counterintuitive, or contrary to common sense" (cleaned up)). Thus, while GHGs are air pollutants

as a general matter for purposes of the Act, actual regulation of them must fit within the context of each individual Clean Air Act program, according to those programs' terms.

b. Although the Court could not find authorization in the Act for EPA to amend the PSD permitting triggers to accommodate GHG regulation from a dramatically expanded universe of sources, it had no trouble applying *Chevron* and concluding that regulation of GHGs from "anyway" sources—those already subject to the program by virtue of their other emissions—fell squarely within EPA's authority. *Id.* at 331. The specific phrasing of the BACT provision—which requires BACT "for each pollutant subject to regulation under" the Act, §7475(a)(4)—"does not suggest that the provision can bear a narrowing construction." *Id.* at 331-32. And "even if the text were not clear, applying BACT to greenhouse gases is not so disastrously unworkable, and need not result in such a dramatic expansion of agency authority, as to make EPA's interpretation unreasonable." *Id.* at 332. In sum, in the context of the Act's distinct language in the BACT provision, the Court concluded that the inclusion of GHGs as an "air pollutant" accorded with the congressional scheme.

3. Instead of resorting to doctrines that would undercut decades of regulatory practice and upend industry reliance on uniform nationwide regulation, the Court can apply the principles set out in *UARG*, *AEP*, and *Massachusetts* to evaluate the lower court's decision here and, by extension, the contours of EPA's authority to regulate GHG emissions from existing sources under §7411(d).

A key lesson from *UARG* is that context-specific statutory language must be interpreted in a way that harmonizes with the remainder of the statute. Here, as in *UARG*, the general definition of "air pollutant" as including GHGs holds, because that term unambiguously includes pollutants of all stripes; but, also as in *UARG*, the language in §7411(d) provides important context regarding *how* and *the extent to which* EPA may regulate those GHGs as air pollutants under the new and existing source performance standards program. Precedent, canons of statutory construction, and common sense provide all the tools the Court requires to evaluate the contours of EPA's regulatory authority under §7411(d) in the context of GHGs.

Just as the Court recognized in *UARG* that applying the PSD and Title V requirements to an untold number of small entities would be contrary to congressional intent, but that the statute could be interpreted in a way that did not raise constitutional concerns, 573 U.S. at 324, so too here the Court may determine that there are bounds within EPA must stay if it chooses to regulate GHGs under §7411(d).

As explained above, §7411 provides guardrails within which EPA and the States are to steer the course of existing-source regulation, and those include considerations such as cost, technological feasibility, and remaining useful life of those sources. §7411(a), (d). Congress also tasked EPA with accounting for other health and environmental impacts and energy requirements when discharging its statutory obligation to regulate existing sources. §7411(a). Indeed, this Court referred to precisely these factors when concluding that EPA and the States, not litigants and judges, are to address GHG

regulation in the first instance. *AEP*, 564 U.S. at 427-28 (quoting §7411). EPA's regulatory decisions can readily be evaluated within these statutory parameters.

A reasoned application of the major questions doctrine or *Chevron* to the narrow question presented—whether Congress intended EPA to be able to restructure the Nation's electricity grid, or instead may regulate but only to some lesser extent—would allow the Court to constrain but still retain EPA's authority to reasonably regulate GHGs under §7411(d). Indeed, as the Court recognized in *UARG*, no party in *AEP* "argued [§7411] was ill suited to accommodating greenhouse gases." 573 U.S. at 319 n.5.

By contrast, a conclusion that the major questions doctrine *eliminates* EPA's authority to regulate GHGs under §7411(d) could have serious adverse consequences for the Nation's energy supply. The Court should thus similarly avoid a ruling that exceeds what is necessary to guide the regulating agency in this particular context.

CONCLUSION

Climate change is a challenge of near-unprecedented proportions, and one that no agency can resolve "in one fell regulatory swoop." *Massachusetts*, 549 U.S. at 524. But, as this Court recently explained, "unprecedented circumstances provide no grounds for limiting the exercise of authorities the agency has long been recognized to have." *Biden v. Missouri*, 2022 WL 120950 at *5.

The Court should decline invitations to use this case to revive the nondelegation doctrine. Neither

should the Court void EPA's authority to regulate GHGs entirely by ruling that such regulation is too major a question for Congress to have delegated to EPA without more specificity. Instead, the Court should employ time-tested statutory construction tools to read §7411(d) as allowing reasonable regulation of GHGs emitted by existing sources. In so doing, the Court can also preserve the federal common-law-displacing effect of the Act that is so critical to the Nation's reliable supply of electricity and clean water.

Respectfully submitted,

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