No. 20-1530

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR PETITIONERS

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS*
Special Counsel

THOMAS T. LAMPMAN
CALEB A. SECKMAN
Assistant Solicitors General

Counsel for Petitioner State of West Virginia

[additional counsel listed after signature page]

QUESTION PRESENTED

In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize 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—with no limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements?

PARTIES TO THE PROCEEDING

Petitioners are the States of West Virginia, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming; and Mississippi Governor Tate Reeves. Each petitioner was a respondent-intervenor below.

Petitioner in 20-1531 is The North American Coal Corporation.

Petitioner in 20-1778 is Westmoreland Mining Holdings, LLC.

Petitioner in 20-1780 is the State of North Dakota.

Respondents in 20-1530 who filed briefs in support of certiorari were America's Power, Basin Electric Power Cooperative, and the National Mining Association. Each was a respondent-intervenor below.

Respondents in 20-1530, 20-1531, 20-1778, 20-1780 who were petitioners below and filed briefs in opposition to certiorari are Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Sacramento Municipal Utility District, 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 & Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, the Sierra Club, Advanced Energy Economy, American Clean Power Association (successor of the American Wind Energy Association), Solar Energy Industries

Association, State of New York, State of California, State of Colorado, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, People of the State of Michigan, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, State of Wisconsin, District of Columbia, City of Boulder (Colorado), City of Chicago, City and County of Denver, City of Los Angeles, City of New York, City of Philadelphia, and the City of South Miami (Florida).

Respondent in 20-1530, 20-1531, 20-1778, 20-1780 who was a petitioner-intervenor below and filed a brief in opposition to certiorari is the State of Nevada.

Respondents in 20-1530, 20-1531, 20-1778, 20-1780 who were respondents below are the United States Environmental Protection Agency and Michael Regan, in his official capacity as Administrator of the United States Environmental Protection Agency (substituted for the previous administrator under Supreme Court Rule 35.3).

Respondents who were petitioners below and did not file any brief at the certiorari stage are, by court of appeals case number, as follows:

In 19-1175: Robinson Enterprises, Inc., Nuckles Oil Co., Inc., DBA Merit Oil Co., Construction Industry Air Quality Coalition, Liberty Packing Co. LLC, Dalton Trucking, Inc., Norman R. "Skip" Brown, Joanne Brown, The Competitive Enterprise Institute, and the Texas Public Policy Foundation.

In 19-1185: Biogenic CO_2 Coalition.

Respondents who were respondent-intervenors below and did not file any brief at the certiorari stage are Indiana Michigan Power Co., Kentucky Power Co., Public Service Co. of Oklahoma, Southwestern Electric Power Co., AEP Generating Co., AEP Generation Resources, Inc., Wheeling Power Co., Chamber of Commerce of the United States of America, Indiana Energy Association and Indiana Utility Group, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, Murray Energy Corp., National Rural Electric Cooperative Association, Nevada Gold Mines, Newmont Nevada Energy Investment, and PowerSouth Energy Cooperative.

TABLE OF CONTENTS

TABLE OF CONTENTS
(*continued*)

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Statutes

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Regulations

Other Authorities

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

INTRODUCTION

Seven years ago, the Environmental Protection Agency tried to name itself the country's central energy planning authority by reshaping the power grids and seizing control over electricity production nationwide. Through reverse-engineered performance standards and a convoluted reading of Section 111(d) of the Clean Air Act, EPA would have forced certain power plant owners to slash hours, close their facilities, or subsidize competitors in the renewable-energy industry. States would have had to oversee these transformations, and they and their residents would have borne the heavy costs of lost generation and jobs. EPA thus weaponized a statute intended to improve pollution controls at regulated facilities, using it to bankrupt industries that the agency disfavored instead.

EPA reconsidered a few years after conceiving this idea and found that it did *not* have statutory power to launch an effort of that scale. The D.C. Circuit, however, held that Section 111 did not justify that return to restraint. Save for a few general factors EPA was to take into account, the lower court told EPA it has "no limits" on the emission-related measures it can impose—on any economic sector or almost any actor.

EPA does not have this kind of "roving commission to achieve pure air or some other laudable goal," *Michigan* v. *EPA*, 268 F.3d 1075, 1084 (D.C. Cir. 2001). But the decision below threatens to give it one. First, it allows EPA to resolve questions of vast political and economic importance without a clear textual statement that Congress wanted it to do so. Second, it strips traditional state authority with—again—no clear statement that Congress agreed. Third, it ignores statutory constraints that limit EPA to measures that regulated facilities can

achieve, giving EPA multi-billion-dollar power through overbroad readings of a few select words. And fourth, it raises serious constitutional concerns because it permits EPA to exercise extraordinary lawmaking power with no intelligible standards to keep it in check.

Ultimately, EPA's efforts were no ordinary regulatory action. And no matter "how serious the problem" at stake, an agency "may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125 (2000) (cleaned up). The Court should reverse.

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (JA.53-255) is reported at 985 F.3d 914.

JURISDICTION

The D.C. Circuit entered judgment on January 19, 2021. The petition for certiorari was timely filed on April 29, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The Clean Air Act's relevant provisions appear at No. 20-1530 Pet.App.204a-209a.

STATEMENT

1. The Clean Air Act targets air pollution "at the source." 42 U.S.C. § 7401(a)(3). Sources can be mobile, like cars, or stationary. *Id.* § 7602(z). A "stationary source" is "*any* building, structure, facility or installation

which emits or may emit *any* air pollutant." *Id.* § 7411(a)(3) (emphases added).

The CAA deploys two approaches for controlling emissions.

In the first, Congress set metrics that limit emissions to a specific amount or level—regardless whether sources can meet those standards and continue to operate. The Act's Acid Deposition Control program is one example: It creates a cap-and-trade system to reduce total sulfur dioxide and nitrogen oxide emissions by a set number. 42 U.S.C. § 7651(b). Covered sources receive an emission "allowance," and (with certain exceptions) they must do whatever it takes to stay within it. See *Am. Mun. Power-Ohio* v. *EPA*, 98 F.3d 1372, 1373 (D.C. Cir. 1996). The Stratospheric Ozone Production Program is more ambitious, aiming to "phase-out" certain ozone-depleting substances through a detailed statutory process and schedule. 42 U.S.C. § 7671d. In the same way, EPA may "prohibit[]" certain "offending" substances outright when regulating mobile sources. *Id.* § 7545(c)(1).

In the second and more common approach, Congress pushed emission-specific goals through improved technologies and procedures. Unlike the narrower programs targeting specific pollutants, these provisions tie standards to what individual sources can do with available techniques. In New Source Review, for example, EPA ensures that new or modified stationary sources use the "best *available* control technology" or match the "lowest *achievable* emission rate." 42 U.S.C. §§ 7475(a)(4), 7503(a)(2) (emphases added). The Hazardous Air Pollutants program's first phase similarly requires "the maximum degree of reduction in emissions" that sources can achieve through source-specific "measures, processes, methods, systems or techniques."

Id. § 7412(d)(2). Likewise, Congress relieved nonferrous smelters from certain requirements if they cannot comply using "reasonably available" technology. *Id.* § 7419. And for solid-waste incinerators, EPA sets standards "based on methods and technologies" that have "site specific" effects. *Id.* § 7429(a)(3).

2. Congress took the second, process-focused approach in Section 111, which provides for "standards of performance" for stationary sources. Embracing notions of achievability and real-world impact, Congress defined "standard of performance" as a

> standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of 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.

42 U.S.C. § 7411(a)(1).

Under Section 111(b), EPA sets standards of performance for new stationary sources. 42 U.S.C. § 7411(b)(1)(B). But under Section 111(d), the agency plays a secondary role to the States in regulating existing ones. *Id.* § 7411(d). EPA first determines the "best system of emission reduction." *Id.* § 7411(a)(1), (d)(1). Then it promulgates a "procedure" ("similar" to that for state implementation plans under Section 110) for States to submit "plan[s]" setting "standards of performance" for individual sources within their borders. *Id.* § 7411(d)(1). These standards should "reflect[]" the "degree of emission limitation achievable" through the EPA-identified "best

system," but EPA "shall permit" States to tailor standards based on source-specific factors like a facility's "remaining useful life." *Id.* § 7411(a)(1), (d)(1). Section 111(d)'s repeated emphasis on state discretion tracks Congress' finding that air pollution prevention and control "is the primary responsibility of States and local governments." *Id.* § 7401(a)(3). Indeed, EPA may directly regulate existing sources only if a State fails to submit or enforce a "satisfactory plan." *Id.* § 7411(d)(2).

Section 111's text and context confirm that Congress had available, on-site controls in mind. See, *e.g.*, 40 Fed. Reg. 53,340, 53,344 (Nov. 17, 1975) (explaining in preamble to original Section 111(d) regulations that a "technology-based approach" allows for source-specific, "meaningful controls"). Section 111 specifically defines a source "owner or operator," for instance, 42 U.S.C. § 7411(a)(5), but never says that EPA can impose standards of performance on "owners or operators." Instead, it bars them from "operat[ing]" a "source" in violation of the performance standard "applicable to such source." *Id.* § 7411(e). When numbers-based emission standards are infeasible, EPA may mandate a "design, equipment, work practice, or operational standard" to accomplish the same regulatory goals. *Id.* § 7411(h)(1). And the requirements for case-specific waivers focus on what individual sources can achieve, too. Waivers encourage "innovative technological system[s]" that have not yet been adequately demonstrated; before issuing one, EPA must consider "the design, installation, and capital cost of the technological system or systems." *Id.* § 7411(j)(1)(A), (D), (F).

Given these constraints, EPA correctly expected Section 111(d) would be narrowly applied, State plans would "be much less complex" than those under other

parts of the Act, and "the number of designated facilities per State should be few." 40 Fed. Reg. at 53,345 (1975 regulations). Before 2015, EPA issued only seven Section 111(d) regulations in over 40 years. JA.75-76 (listing regulations). These rules concerned four localized pollutants from five source categories, 79 Fed. Reg. 34,830, 34,844 (June 18, 2014), and none was directed toward ubiquitous pollutants like carbon. Nor did EPA try to use Section 111(d) to regulate activities beyond a specific source's fenceline. The closest it came was one rule issued under multiple CAA provisions and another that succumbed to a court challenge on other grounds—both allowed trading as a compliance mechanism but grounded the substantive standards in what individual sources could achieve. 60 Fed. Reg. 65,387, 65,402 (Dec. 19, 1995); 70 Fed. Reg. 28,606, 28,616 (May 18, 2005), *rule vacated by New Jersey* v. *EPA*, 517 F.3d 574 (D.C. Cir. 2008).

Congress gave little thought to Section 111(d), either. The House did not even propose to regulate existing sources in the original 1970 legislation. H.R. 17255, 91st Cong. (1970), *as reprinted in* 2 1970 Leg. Hist. at 910-40. Section 111(d) emerged as a compromise with the Senate, a minor provision nestled in a section focused on new sources. See S. 3546, S. 4358, 91st Cong., 116 Cong. Rec. 20601 (1970). Years later, a lead architect of the 1990 CAA amendments called Section 111(d) "some obscure, never-used section of the law." *Clean Air Act Amendments of 1987: Hearings on S.300, S.321, S.1351 & S.1384 before the Subcomm. on Env't Pro. of the S. Comm. on Env't & Pub. Works*, 100th Cong. 13 (1987).

3. Things changed when EPA finalized the Clean Power Plan, or CPP, in October 2015. JA.273. After four-and-a-half decades of obscurity, the CPP transformed

Section 111(d) into a tool to do unilaterally what Congress purportedly "wouldn't"—"lead[] global efforts to address climate change." JA.222. EPA took a new approach to curbing emissions designed to alter the makeup of the nation's energy grids—changing which plants generate electricity and where they generate it.

The CPP required States to achieve reductions that EPA admitted individual sources could not meet using current or even near-future technologies and process improvements. JA.853-54. To address this otherwise fatal flaw, EPA asserted new authority to regulate source owners and operators, as opposed to the sources themselves. JA.543, 737, 761-62.

EPA then crafted a figure it termed the "adjusted CO_2 emission rate." This accounting trick nominally counted the emission reductions individual plants could achieve, but it relied mainly on how much EPA believed source owners could invest in *different* generators more acceptable to the agency. Specifically, EPA divided the amount of emissions from a given source by the amount of that source's generation and the amount of generation from EPA-preferred, zero-emitting sources. JA.1604-06. The more generation from agency-approved sources regulated source owners helped fund, the bigger the denominator and the lower the "adjusted" rate. In this way, EPA baked into its metric the idea that owners and operators would subsidize renewable-energy sources like windmills and solar panels.

EPA used this approach to impose an impossible-to-achieve standard on coal-fired plants—limiting them to two-thirds of the emissions the agency calculated they could achieve using then-current technology. See JA.300; EPA, DKT. NO. EPA-HQ-OAR-2013-0602-36850, CO_2 EMISSION PERFORMANCE RATE AND GOAL COMPUTATION

TECHNICAL SUPPORT DOCUMENT FOR CPP FINAL RULE 12 (Aug. 2015); see also JA.1661 (setting similarly unachievable limit for natural gas plants). What's more, EPA had long said that Section 111(d) regulations would be "less stringent" than corresponding new-source rules, considering the relative costs and benefits of retrofitting existing facilities versus incorporating new technologies into a construction blueprint. 40 Fed. Reg. at 53,340. Yet the CPP's targets for existing sources were lower than the standards EPA issued the same day for new sources. 80 Fed. Reg. 64,510, 64,513 (Oct. 23, 2015).

The CPP, then, did not impose traditional emission limits. Instead, EPA created a restrictive credit system that required sources to subsidize "energy generated or saved with zero associated CO_2 emissions" elsewhere. JA.1605, 1615-16.

EPA was candid about the consequences of a "standard" that made coal- and gas-fired plants' business models functionally unlawful. The CPP would have forced some operators into new lines of business, cutting existing operations and investing in alternate generation types instead. JA.593-94. Others would have had to subsidize their competitors' or out-of-State companies' investments to keep existing power plants online. JA.668-69. And economic realities as they were, some plants would have closed. JA.226-29.

Source owners and operators would have also faced staggering implementation costs, and consumers would have paid much higher utility bills. JA.226. The CPP would have forced the States to reorder their electricity infrastructure to meet energy needs—those most dependent on fossil-fuel-fired energy sources would have borne the brunt of it. The CPP also did away with States' guaranteed flexibility to adjust performance standards

based on sources' individual characteristics. JA.1237. Instead, it required States to impose EPA's investment preferences unless they adopted mass-based emission allowances that would achieve the same dramatic changes, or could somehow create equivalent state-level programs. JA.1008-37.

4. Faced with this alarming scheme, twenty-seven States and many other parties challenged the CPP in the D.C. Circuit. JA.1738. The challengers urged that court to stay the CPP, but it refused. Order, *West Virginia* v. *EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016).

This Court, however, responded. In February 2016 it stayed the CPP, sounding the alarm that EPA's new approach to Section 111(d) was likely defective. *West Virginia* v. *EPA*, 136 S. Ct. 1000 (2016) (No. 15A773). The lower court then held the challenges in abeyance while EPA reconsidered the rule. JA.88. It later dismissed the petitions before issuing a decision. JA.88.

5. Meanwhile, EPA heeded this Court's "not-so-subtle hint," JA.224, and repealed the CPP in July 2019. JA.1725. EPA concluded that the CPP had "significantly exceeded" the agency's statutory authority, and it returned to Section 111(d)'s traditional reading—one limited to control systems that can be applied at individual sources. JA.1731. The major questions canon of construction bolstered this approach given the CPP's consequences and broad scope. JA.1770-71. EPA also explained that the rule undermined the CAA's cooperative federalism framework and infringed areas of traditional state sovereignty. JA.1773-78. And it found telling the "absence of a valid limiting principle" in the CPP's contrary approach. JA.1771-72. EPA thus saw no way to divine "[c]ongressional intent to endow the Agency with

discretion of this breadth"—including power to regulate "fundamental sector[s] of the economy." JA.1772.

EPA replaced the CPP with new Section 111(d) guidelines for existing coal-fired power plants, saving natural-gas-fired plants for another rulemaking. JA.1786. EPA's Affordable Clean Energy rule ("ACE") affirmed that measures achievable on only a regional or grid-wide level could not be a valid "system of emission reduction." JA.89-94.

6. A new group of States and other parties challenged the CPP repeal and ACE replacement, with many others (including Petitioners) intervening to support both rules. JA.95-96, 224. In January 2021, the D.C. Circuit issued a 2-1 decision vacating and remanding ACE and the CPP's repeal. JA.53-215, 224.

The majority rejected EPA's position that Section 111(d) requires a more inhibited view of EPA's powers than the agency had claimed in the CPP. The majority relied on an expansive understanding of two words—"system" and "application," JA.108-10—found in Section 111(a)(1)'s definition of "standard of performance." These standards in turn apply to a particular source, but the majority concluded that EPA could rely on systems that apply to "the source category" as a whole or all "emissions" in general. JA.115, 118.

The majority also rebuffed the renewed regulatory restraint that led EPA to repeal the CPP. According to the majority, EPA unduly "tied its own hands" even in the CPP by considering only systems that "target supply-side" activities or reduce emissions directly rather than offset their effects. JA.143 n.9. The majority thought Section 111 was a broader statute—"Congress imposed no limits on the types of measures the EPA may consider" as

long as EPA satisfies the minimal directive to "take account" of cost, nonair health and environmental impacts, and energy requirements. JA.108. It rejected EPA's view that the statute includes more substantive constraints, JA.106-08, and all but instructed the agency to wield the full swath of powers it concluded Congress had bestowed, JA.137.

The majority further concluded that Section 111 does not offend what it labeled the "so-called 'major questions doctrine.'" JA.135. Applying a self-created standard, the majority asked only whether "it [was] implausible in light of the statute and subject matter in question that Congress authorized such unusual agency action." JA.135-36. It concluded it was not, emphasizing that Congress gave EPA power to regulate generally power plants' greenhouse gas emissions. JA.188-93.

Similarly, the court rejected the idea that federalism concerns triggered a separate clear-statement requirement. Many States argued that the CPP infringed their primary authority over electricity generation and intrastate energy needs. The majority, however, declared that "[i]nterstate air pollution is not an area of traditional state regulation." JA.154-61. So long as EPA exercises its power in the name of pollution mitigation, the majority saw nothing wrong with mandating measures with serious, direct consequences for States' electricity-generation fleets. JA.154-61.

7. Concurring in part and dissenting in part, Judge Walker would have held that EPA "was required to repeal [the CPP] and wrong to replace it" under Section 111. JA.217. Although he based that conclusion on a separate

question no longer at issue,[*] he was also highly skeptical that Congress implicitly delegated the vast power the CPP and majority opinion reflect—particularly considering the major consequences that would have followed. JA.217-33. The CPP was designed to push "groundbreaking" restructuring of the country's power sector and slash carbon emissions "equal to the annual emissions from more than 166 million cars," while levying "almost unfathomable costs." JA.225-26 (footnotes omitted).

The dissent accordingly found nothing "minor" about "one of the most consequential rules ever proposed by an administrative agency." JA.225. How to address climate change and "who should pay" for solutions are matters of "vast economic political significance." JA.229 (quoting *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) ("*UARG*")). And a little play in the enabling statute's joints was not enough to give EPA the go-ahead to address so great an issue: "Either a statute clearly endorses a major rule, or there can be no major rule." JA.230, 232.

SUMMARY OF ARGUMENT

I. Section 111 of the Clean Air Act does not clearly give EPA authority to upend the power industry. Two independent canons of construction confirm that the D.C. Circuit misconstrued that provision.

First, EPA now wields power to decide major questions implicating hundreds of billions of dollars, tens of thousands of potentially regulated parties, and years of

[*] Judge Walker thought that Congress had disabled EPA from regulating under Section 111 pollutants "emitted from a source category which is regulated under [Section 112]" already—like coal-fired power plants. JA.232 (quoting 42 U.S.C. § 7411(d)).

congressional wrangling. The agency may compel plant owners to pay competitors. It can even force plants to shut down. Yet Congress did not clearly say in any part of the CAA, much less Section 111, that EPA can exercise this transformative power. That omission dooms any claim that EPA can.

Second, the D.C. Circuit's opinion reordered the traditional "division of responsibilities" between States and the federal government—over clean air and energy-related issues alike. *Train* v. *Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79-80 (1975). Regulating electricity generation is the States' domain. The CAA, too, assigns the States primary responsibility for regulating existing emission sources. Yet the D.C. Circuit's approach to Section 111 allows EPA to drive the essential decisions in both areas. If Congress meant for that result, it would have clearly said so. Here again, it did not.

II. The text Congress set down limits EPA's power, too. Section 111 directs EPA to identify an "achievable" "best system of emission reduction"; that system is then used to calculate guidelines, and the States must develop plans for sources within their borders to meet them. Everything about Section 111—the words Congress used, the structure, the context—shows that "system" means measures implemented at the source level, that is, inside a facility's fenceline.

The D.C. Circuit, however, concluded that Congress put "no limits" on what "systems" EPA may use. The court plucked select words from a definitional provision and read them broadly, then refused to test its construction against the statute's operative provisions to see if it held up in practice. This approach was wrong. A plain reading of the statute does not give EPA power to reorder entire economic sectors.

III. Lastly, the lower court construed Section 111 in a way that raises grave doubts about its constitutionality. If the D.C. Circuit majority is right, then Section 111 is an enormous delegation of legislative power with only trifling standards to guide EPA's work. The Court should reject that reading because the canons- and context-based alternative avoids this serious non-delegation concern.

ARGUMENT

I. Section 111 Does Not Vest EPA With Industry-Transforming, State-Displacing Power.

The lower court faulted EPA for not assuming a broader mandate under Section 111(d). It urged EPA to not just reorder the power sector, but also undertake whatever other sweeping changes it decides will help reduce carbon emissions. Yet neither Section 111 nor anything else in the CAA provides a clear statement from Congress that it intended EPA to take this power on. Without a clear statement, two independent canons of construction—the major-questions doctrine and the federalism canon—confirm that the text does *not* grant EPA these powers. Congress must delegate with unmissable clarity if it intends to give an agency economy-transforming abilities to decide major questions or alter the power balance between the States and the federal government. Here, it did no such thing.

A. Congress Did Not Clearly Delegate to EPA Power to Tackle the Major Questions Inherent in Restructuring Full Industries.

1. The "nature of the question" is critical when answering whether Congress delegated powers to an agency. *Brown & Williamson*, 529 U.S. at 159. Ambiguous statutory text may be enough to delegate

smaller efforts—the routine, interstitial work of the administrative state. See *Zuni Pub. Sch. Dist. No. 89* v. *Dep't of Educ.*, 550 U.S. 81, 90 (2007). But the Court "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *UARG*, 573 U.S. at 324 (cleaned up).

The reason? Major questions are poor candidates for agency decision-making. Top-level, political decisions "should be made by the national legislature, the branch best equipped by its structure and constituency" to respond to competing interests and priorities. *United States* v. *District of Columbia*, 669 F.2d 738, 744 (D.C. Cir. 1981). Further, "[a]dministrative knowledge and experience largely account for the presumption that Congress delegates interpretive lawmaking power to [an] agency." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2417 (2019) (cleaned up). Major questions, however, implicate crosscutting matters extending beyond one agency's core expertise.

The major-questions doctrine therefore responds to "the danger posed by the growing power of the administrative state." *City of Arlington* v. *FCC*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting). It rests on "two overlapping and reinforcing presumptions"—that Congress "intends to make major policy decisions itself," and that Congress *should* make those choices under a "separation of powers-based" default against delegating "major lawmaking authority." *U.S. Telecom Ass'n* v. *FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc). The doctrine also acts "in service of the constitutional rule that Congress may not divest itself of its legislative power." *Gundy* v. *United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting); see also, *e.g.*, William N.

Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules As Constitutional Lawmaking*, 45 VAND. L. REV. 593, 631 (1992) (clear-statement canons "assure that the political branches make the most important policy choices in democracy").

With considerations like these in mind, the Court has repeatedly called the major-questions doctrine into action. Four decades ago, a plurality of the Court found it "unreasonable to assume" Congress delegated "unprecedented power over American industry" without "a clear [textual] mandate." *Indus. Union Dept., AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 645-46 (1980) (plurality op.). Last summer, the Court found it equally unlikely that statutory ambiguity empowered the Centers for Disease Control and Prevention to impose a nationwide eviction moratorium. *Ala. Ass'n of Realtors* v. *Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2486 (2021). The same reasoning permeates decisions in the decades between. See *King* v. *Burwell*, 576 U.S. 473, 486 (2015) (IRS lacked authority without an "express[]" delegation to determine applicability of Affordable Care Act tax credits that involved billions in spending and affected millions of people); *Gonzales* v. *Oregon*, 546 U.S. 243, 267-68 (2006) (Attorney General lacked authority from "oblique" statutory provision to criminalize assisted suicide); *Brown & Williamson*, 529 U.S. at 160 (FDA lacked authority to regulate cigarettes because delegation on a matter of "such economic and political significance" would not occur "in so cryptic a fashion"); *MCI Telecomms. Corp.* v. *Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994) (FCC lacked authority to excuse non-dominant long-distance carriers from rate-filing requirements, as "a subtle [statutory] device" did not establish that Congress left "determination of whether an industry will be entirely,

or even substantially, rate-regulated to agency discretion").

Major-questions review is no stranger to the CAA, either—the Court has already deployed the doctrine to hold that Congress did not give EPA certain powers it claimed. *UARG* considered whether EPA could extend permitting requirements to a vast category of greenhouse gas-emitting sources. 573 U.S. at 315. It could not. Otherwise, EPA would have worked "an enormous and transformative expansion [of its] regulatory authority without clear congressional authorization." *Id.* at 324. If EPA "lay[s] claim to extravagant statutory power over the national economy," then it must explain why the statute "compel[s]" that interpretation. *Id.*; see also *Whitman* v. *Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (holding EPA could not consider implementation costs when setting national ambient air quality standards without a "clear" "textual commitment" on that score).

This case is cast from the same mold. The decision below improperly reads Section 111 to extend EPA's regulatory powers to a major issue "without clear congressional authorization." *UARG*, 573 U.S. at 324.

2. Make no mistake: Congress never provided a clear statement of authority that could permit the powers the D.C. Circuit read into Section 111(d). No one below offered a "serious and sustained argument that § 111 includes a clear statement." JA.206. The majority instead went hunting through "the statute and subject matter" for something that might make a broad delegation to EPA "implausible." JA.135-36. Demanding a clear denial rather than a clear grant of authority, however, gets the analysis backward. Cf. *Atl. City Elec. Co.* v. *FERC*, 295 F.3d 1, 9 (D.C. Cir. 2002) ("Were courts to *presume* a delegation of power absent an express *withholding* of such

power, agencies would enjoy virtually limitless hegemony.").

The majority also chased irrelevancies. It led with skepticism of the whole major-questions enterprise. JA.135 (referring to the "so-called" major-questions doctrine with a lineage of "few" cases). Then it emphasized EPA's charge to regulate power plants' greenhouse gas emissions in some fashion. JA.147. Yet it is one thing to say Congress spoke clearly to *what* and *whom* EPA may regulate. JA.141; but see *Massachusetts* v. *EPA*, 549 U.S. 497, 555-60 (2007) (Scalia, J., dissenting) (disagreeing that the CAA includes greenhouse gas emissions). It is quite another to find a clear statement for *how* EPA may do so—particularly when the majority read "how" to mean any method EPA deems necessary. See *Am. Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 427 (2011) (explaining that Section 111 does not give EPA a "roving license"). *Gonzales* confirms this method-blind approach cannot be right. Though the Attorney General concededly has powers to fight drug diversion and certain authority over physicians, the Court held he overstepped in asserting a major new *way* of exercising anti-diversion power over physicians without a clear textual statement that he could. *Gonzales*, 546 U.S. at 259-68.

The sole potential candidate for a clear statement is the phrase "best system of emission reduction," a subset of the "standard of performance" definition in Section 111(a)(1). But that provision, like the rest of Section 111, "is a wafer-thin reed on which to rest such sweeping power." *Ala. Ass'n*, 141 S. Ct. at 2489. Even the majority was only willing to call Section 111 "ambig[uous]." JA.214. By definition, Congress does not speak clearly through ambiguous text.

3. So the only issue remaining—and it is no close one, really—is whether the broad powers EPA may now wield under Section 111(d) implicate a major question. They do.

According to the majority, EPA may use Section 111(d) to employ any "common plan," JA.108, that applies to whatever pollutant, source, or category EPA designates, JA.112, so long as the plan "concern[s]" a regulated source, JA.117. In doing so, EPA need only "tak[e] into account" cost, nonair health and environmental consequences, and energy needs. 42 U.S.C. § 7411(a)(1). The statute says nothing about how the agency must weigh these factors, and agency-deference principles would set a high barrier for any challenge to their use.

The D.C. Circuit thus extended Section 111 beyond even the CPP's unprecedented scope. The breadth of this new regulatory supremacy is hard to overstate. Outside the electricity sector, any buildings that draw from or produce carbon-generating power—manufacturing plants, homes, hospitals, and otherwise—now fall under EPA's mandate. The rationale below instructs EPA to consider demand-side (that is, consumer-focused) measures as an option. JA.143 n.9. EPA could view fees—de facto taxes—as a new incentive "system" to promote using sources it prefers at the expense of others. Or EPA could force financial divestment from carbon-producing activities, or determine that the "best system" includes banning import or export of carbon-intensive goods. And nothing but administrative grace would prevent EPA from issuing rules that require shutting down carbon-emitting sources in any economic sector. So while EPA must justify its choice by reference to the three statutory factors, the decision below finds "no limits on the types of measures that EPA may consider." JA.118.

Given the CPP's consequences, the dissent was right to characterize the plan—a *narrower* one than those the D.C. Circuit blessed—as "one of the most consequential rules ever proposed." JA.225. Every factor for deciding whether a question is "major" says the same. See, *e.g.*, *U.S. Telecom Ass'n*, 855 F.3d at 422-23 (Kavanaugh, J., dissenting from denial of rehearing en banc) (listing cost, overall economic impact, number of affected persons, and degree of public and political attention).

First, take the money involved. It is hard to reduce the colossal scale of the EPA's new mandate to dollars and cents. Implementing even the CPP's vision would have cost hundreds of billions of dollars. See, *e.g.*, NERA ECONOMIC CONSULTING, POTENTIAL ENERGY IMPACTS OF THE EPA PROPOSED CLEAN POWER PLAN 21 (Oct. 2014), https://perma.cc/HFU2-QZSA. Costs of wholesale electricity were expected "to rise by $214 billion," with another $64 billion needed to replace the capacity the CPP axed. JA.226. EPA itself acknowledged these costs—not to mention spikes in consumer electricity rates and the tens of thousands of energy-sector jobs projected to disappear before 2025. See EPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE 6-25 (Oct. 23, 2015), https://perma.cc/7FDZ-8M2C. These numbers tower over even those for the major rules in *King*, 576 U.S. at 486, and *Alabama Ass'n*, 141 S. Ct. at 2489; those cases involved "only" billions.

Second, economic costs fail to capture the broader transformative effects of the majority's view of EPA's power. Electricity is an "essential" and foundational element of modern life. See *Puerto Rico* v. *Franklin Cal. Tax-Free Tr.*, 136 S. Ct. 1938, 1950 (2016). The electric-power industry is thus an even more "significant portion of the American economy" than tobacco, and this Court

considered an attempted overhaul of the latter to be a major question. *Brown & Williamson*, 529 U.S. at 159. What EPA already tried under Section 111 is no less an overhaul: EPA designed the CPP to be "groundbreaking" and economy-changing. JA.225. Starting from the premise that "lives are at stake," it was intended to mark "the moment when the rise of the oceans began to slow and our planet began to heal." JA.227, 229. EPA was forthright about its goals, too: It wanted to boost "zero-emitting generation" and reduce significantly "CO_2-emitting generation." JA.558-59, 572-73. Yet the D.C. Circuit looked at all this and told EPA, "Do more."

The court below dismissed the breadth and costs of the CPP by linking them to the size of the "*problem*, not of the best-system's role in the solution." JA.148. But a regulation's scope is most always tied to the scale of the issue it aims to solve; an agency's decision to "assert jurisdiction" over vast questions like these is what triggers the need for a clear statement. *Brown & Williamson*, 529 U.S. at 159; see also *MCI*, 512 U.S. at 229 (agency action could "be justified only if it ma[de] less than radical or fundamental change" to the regulatory scheme). Similarly, the lower court was wrong to brush aside costs by guessing that *any* "system of emission reduction" might have a similar price tag. JA.148-49. No one suggests source-specific measures would have imposed extraordinary and system-wide expense. The ACE rule's projected costs, for instance, were orders of magnitude lower than the CPP's. See EPA, FACT SHEET: PROPOSED AFFORDABLE CLEAN ENERGY RULE—OVERVIEW (Aug. 2018), https://perma.cc/U79K-ZYX9 (estimating $400 million in annual savings).

Third, the vast powers claimed in the CPP and extended in the decision below are new. Just as

longstanding agency "practice may shed light on the extent of power" Congress delegated, failure to assert "power by those who presumably would be alert to exercise it" is telling. *FTC* v. *Bunte Bros.*, 312 U.S. 349, 352 (1941).

EPA's first Section 111(d) regulations contemplated on-site measures—"construction or installation of emission control equipment or process change." 40 C.F.R. § 60.21(h)(3). Consistent with that view, EPA did not use Section 111(d) before the CPP to require measures *other* than on-the-scene technologies. See, *e.g.*, 61 Fed. Reg. 9,905, 9,914 (Mar. 12, 1996) (standards for landfill gas emissions based on gas collection and control systems). The only potential outliers allowed sources to use outside-the-fenceline measures to comply with standards derived from inside-the-fenceline "control technology available at the time." 70 Fed. Reg. at 28,616-17, *rule vacated by New Jersey*, 517 F.3d 574; see also 60 Fed. Reg. at 65,402. In other words, although EPA had at times given incentives to use cost-effective trading options, it had not compelled owners to shift capital to other sources in a gambit to restructure the industry. Thus, the CPP used a "decades-old statute" to justify sweeping regulations of a new kind. *Ala. Ass'n*, 141 S. Ct. at 2486. Courts are rightly suspicious of claims to "discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *UARG*, 573 U.S. at 324 (cleaned up).

The majority downplayed the CPP's novelty by pointing to prior EPA regulations that could have had "some generation-shifting effect" because they affected the "cost of doing business for particular plants." JA.151. That approach conflates a rule's ripple effects with its primary aim. Authority to take steps with "implications

for criminal enforcement," after all, did not empower the Attorney General to "declare[] certain conduct criminal" in the first place. *Gonzales*, 546 U.S. at 262. Neither can EPA dictate industry shakeups because some of its prior rules had second-order consequences for electricity generation.

Fourth, the lower court's interpretation sanctions regulatory authority over countless new entities. The CPP asserted for the first time power to regulate source "owners and operators" directly, rather than identifying technology and setting standards for individual sources. JA.543 (quoting 42 U.S.C. § 7411(d)(1)). Untying Section 111(d) from "the sources themselves" allowed EPA to appoint itself regulator of the "complex machine" of "the North American power system." JA.543, 569. And though the CPP focused on the energy sector, the same move in the majority's hands now allows EPA to regulate any producer in any economic sector—or really any building owner. Yet remember what *UARG* said: Imposing new regulatory burdens on "the operation of millions[] of sources nationwide falls comfortably within the class of authorizations" the Court has been "reluctant to read into ambiguous statutory text." 573 U.S. at 324; see also, *e.g.*, *Brown & Williamson*, 529 U.S. at 159-60 (rejecting expanded agency jurisdiction over new "portion[s] of the American economy"). The CPP's reach alone thus more than suggests a major question; the D.C. Circuit's reading confirms it.

The majority again moved too quickly past this factor. Yes, Section 111(d) has covered existing power plants before. JA.136, 140-41, 147. But nothing before the CPP suggested that their owners, or power grids as singular units, were subject to standards of performance, too. To view this shift as within "the heart of the EPA's mandate,"

JA.150, confuses the CAA's purposes with its textual reach. See *Mexichem Fluor, Inc.* v. *EPA*, 866 F.3d 451, 460-61 (D.C. Cir. 2017) ("[W]ell-intentioned policy objectives with respect to climate change do not on their own authorize [EPA] to regulate."). And the D.C. Circuit ignored the myriad other people and entities swept within Section 111's expanded scope—homeowners, for instance, are a potential regulated class tens of millions strong.

Fifth, it would be especially wrong to assume Congress charged EPA with taking on these new issues and parties when the questions at stake span multiple sectors—including many well outside EPA's lane. In the CPP, EPA assumed authority to direct investment decisions, assess consumer energy use, resolve questions of energy reliability and need, manipulate energy prices, drive employment markets, and more. Of course, the federal government already has an energy regulator for some of these concerns: FERC. And the Court has had no patience for similarly unauthorized, multi-jurisdictional rulemakings. *Gonzales* is again a good example. There, forbidding doctors from prescribing regulated drugs for physician-assisted suicide fell outside the Attorney General's authority in part because the issue involved "quintessentially medical judgments" beyond his "expertise." 546 U.S. at 248, 267. *Gonzales* was no fluke, either. The Court was also concerned when the IRS asserted power over insurance markets in *King*, 576 U.S. at 486, and when the CDC regulated housing markets in *Alabama Ass'n*, 141 S. Ct. at 2488.

Sixth and finally, these issues are at the center of substantial political and public attention. On the political side, Congress has remained heavily engaged in climate-change-related issues. Before the CPP, Congress considered a carbon tax, S. Con. Res. 8, S. Amdt. 646,

113th Cong. (2013); fees on greenhouse gas emissions, Climate Prot. Act of 2013, S. 332, 113th Cong. (2013); and a greenhouse gas cap-and-trade program, Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009); Am. Clean Energy & Security Act, H.R. 2454, 111th Cong. (2009). It has continued debating approaches to emission regulation in the years since. See, *e.g.*, Am. Energy Innovation Act of 2020, S. 2657, 116th Cong. (2020); *Massachusetts*, 549 U.S. at 506-09 (describing congressional efforts to address climate change). And it has created programs encouraging investment in natural gas and renewables in the meantime. See, *e.g.*, Further Consolidated Appropriations Act of 2020, Pub. L. No. 116-94 (extending Renewable Energy Production Tax Credit through 2020); EIA, DIRECT FEDERAL FINANCIAL INTERVENTIONS AND SUBSIDIES IN ENERGY IN FISCAL YEAR 2016, at 3, 16 (Apr. 24, 2018), https://perma.cc/YPY8-F4B6 (identifying billions in subsidies to the renewable-energy industry). The Court should not permit EPA to short-circuit this ongoing legislative process.

For that matter, when EPA *did* try to assume control of these major issues, Congress condemned the attempt by passing a joint resolution under the Congressional Review Act to overturn the CPP. S.J. Res. 24, 114th Cong. (2015) (later vetoed). This "unique political history" is yet another reason to think Congress did not silently shunt the task of reordering the energy system to EPA. *Brown & Williamson*, 529 U.S. at 159.

As for public attention, EPA received over 4.3 million comments when it proposed the CPP—the most the agency had ever received. JA.284. The rule spurred litigation before EPA even finalized it. See generally *In re Murray Energy Corp.*, 788 F.3d 330 (D.C. Cir. 2015). More generally, everyone agrees "[c]limate change has

staked a place at the very center of this Nation's public discourse." *Nat'l Rev., Inc.* v. *Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari); see also, *e.g.*, *Janus* v. *Am. Fed'n of State, Cnty. & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (referring to the "controversial subject[]" of "climate change"). "[E]arnest and profound debate" like this provides one last signal that the question EPA seized is major. *Gonzales*, 546 U.S. at 249.

All told, if the decision below does not involve a major question, it is hard to imagine what would. An unbridled reinterpretation of Section 111 allows an agency without political accountability to impose measures that affect millions of Americans and impose hundreds of billions in costs. Worse still, EPA can only address environmental matters. While this mission is vital, it renders EPA's regulatory solutions necessarily incomplete—EPA cannot, for instance, help States dull the economic pain its rules exact. Without clear evidence that Congress intended these results, the Court should not construe Section 111 to permit them implicitly.

B. Congress Did Not Clearly Delegate to EPA Power to Upend Traditional State and Federal Roles.

Enlarging Section 111's reach violates a second "well-established principle" of statutory construction—that Congress must provide a "clear statement" if it wants to alter the "usual constitutional balance of federal and state powers." *Bond* v. *United States*, 572 U.S. 844, 858 (2014) (citations omitted). This choice requires "exceedingly clear language," *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020); Congress must make its intent "unmistakably clear in the language

of the statute," *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989). The Court thus demands even plainer terms when a statute implicates federalism concerns than when Congress delegates major questions.

1. Regulating utilities, including electricity generation, is "one of the most important … functions traditionally associated with the police power of the States." *Ark. Elec. Co-op Corp.* v. *Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983); see also *Cent. Hudson Gas & Elec. Corp.* v. *Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 568-69 (1980). States have "traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 212 (1983). They also have wide discretion when modifying existing energy systems or exploring new ones. See *Hughes* v. *Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016).

The federal government can play a role in this space—within limits. In statutes focused on power and energy needs, for instance, Congress assigned only certain regulatory duties to federal agencies and maintained States' existing authority over many others. *FERC* v. *Elec. Power Supply Ass'n*, 577 U.S. 260, 266-73 (2016) ("*EPSA*"). Regulations under these statutes "would exceed [the agencies'] authority" if they intrude on "a job for the States alone." *Id.* at 280. Respect for the traditional assignment of power is even more important here. State regulators have "the greatest knowledge regarding questions of grid reliability" in their States, while power-grid-related issues lie outside EPA's expertise. *Texas* v. *EPA*, 829 F.3d 405, 433 (5th Cir. 2016).

2. Nothing in the CAA suggests Congress crossed this time-honored, state-federal line. Quite the opposite. The

Act reflects a calibrated mix of federal and state roles, with an emphasis on the States. Congress found that preventing and controlling air pollution—the statute's overarching goal—"is the *primary* responsibility of States and local governments." 42 U.S.C. § 7401(a)(3) (emphasis added). This federalism-advancing policy is on full display in Section 111(d): Congress established a structure that, as in other cooperative-federalism statutes, "allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel* v. *Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 288-89 & n.30 (1981). States, not EPA, set the performance standards that bind each existing source. Only if States fail to submit "satisfactory" plans may EPA step in, and then only with certain procedural safeguards. 42 U.S.C. § 7411(d)(2)(A); see also *Train*, 421 U.S. at 79 (explaining that Section 111(d) "relegate[s]" EPA "to a secondary role").

The D.C. Circuit reasoned that Section 111 might implicitly reorder federal and State roles precisely *because* the CAA embraces cooperative federalism. JA.156-58. But it is hard to square Congress' statutory choices to preserve States' authority with a construction that allows EPA to trample those same prerogatives. The lower court, at least, could not convincingly do it. In the first case it marshaled Congress had "unquestionably" taken "regulation of [certain] local telecommunications competition away from the States," *AT&T Corp.* v. *Iowa Util. Bd.*, 525 U.S. 366, 378 n.6 (1999); in the second, the Court did not address the federalism canon, see *Alaska Dep't of Env't Conservation* v. *EPA*, 540 U.S. 461 (2004).

Nor does federalism fall aside—and with it the unmistakably clear statement requirement—because

"interstate air pollution is not an area of traditional state regulation." JA.156. That broad-brush notion suggests that an agency need only invoke a traditional federal interest to erase a traditional state interest. But Congress always has *some* federal interest in mind when it delegates to an agency. Particularly when Congress went out of its way to reinforce the States' roles in the CAA, there is vanishingly little basis to assume it authorized this agency mission creep.

3. With no clear statement in sight, the CPP and the decision below significantly upend the federal-state balance of power.

The CPP handicapped States by taking away even Section 111's express avenues for tailoring. First, it required stringent, region-wide emission reductions that state plans could meet only by restructuring. See JA.578-79, 705. Second, despite Section 111(d)'s guarantee that EPA "shall permit" States to consider "remaining useful life" and similar factors, EPA decreed that "consideration of facility-specific factors" would not have justified "further adjustments to [sources'] performance rates." JA.1237. Both elements are far from FERC's "notable solicitude toward the States" in the form of "veto power" over issues States worried skirted too close to their core powers. *EPSA*, 577 U.S. at 287.

The CPP's follow-on consequences would have been worse. States would have had to account for *EPA's* judgments touching on electricity reliability. They would have needed to reorder their regulatory regimes to allow new ways to dispatch electricity—moving fossil-fuel-fired sources from the front of the pack to the back. The agency also knew the CPP would create generation gaps, and it expected state regulators to make non-fossil-fuel generators "responsible for compliance and liable for

violations" if they failed to fill them in. JA.1148; 40 C.F.R. §§ 60.5745(a)(7), 60.5780(a)(5)(iii) (2015). And, of course, the concrete task of building up EPA's preferred generation sources would have required immense state investment. Consequences like these are a significant affront to state sovereignty—if not outright commandeering. See, *e.g.*, *Nat'l Fed. of Indep. Business* v. *Sebelius*, 132 S. Ct. 2566, 2602 (2012) ("forc[ing] the States to implement a federal program" threatens vital "political accountability").

The lower court dismissed these impositions by suggesting that the CPP "merely … alter[ed] consumers' incentives." *EPSA*, 577 U.S. at 284 (cited at JA.156). Yet the CPP's entire purpose was to force grid-wide changes through standards custom-made for that goal—generation shifting was not an incidental effect of the CPP, but the key variable in its "adjusted CO_2 emission rate." JA.1605.

The lower court also supposed that the CPP gave States flexibility in how to hit the CPP's targets. JA.159-60. This response forgets, though, that the targets were reverse-engineered to be "unachievable or too costly to meet" *without* shifting generation. JA.223; see also JA.890, 928-29, 966-67. EPA calculated how much change it thought the grids could tolerate without collapsing and set standards accordingly. JA.993-1008. Because of that uncompromising approach, EPA admitted that every purported "choice" led back to implementing the CPP's mandate. JA.579-80 (recognizing that States would "need to" replace some forms of generation with others). States would have had to "ensure" that any alternate program incorporated the CPP's "relative incentives," which advanced EPA's goals of shuttering fossil-fuel-fired plants and promoting other generators. JA.1008-14. Those

States unlucky enough to lack the wind, solar, or other power generators that EPA preferred would have also become necessarily reliant on resources or emission credits from their more fortunate neighbors. With many losers in this scenario already among our nation's most economically disadvantaged States, these federalism intrusions deserve more than the majority's passing glance.

In the end, Congress must decide whether and how to assign federal pieces of a problem to a federal agency. When that choice comes at the expense of traditional state power, Congress must state it with "exceeding[]" clarity. *Cowpasture*, 140 S. Ct. at 1849-50. Lack of that clear statement—what Congress *did not* say in the text—is reason enough to reverse.

II. Section 111's Text and Context Require Source-Specific Regulation.

No fair construction of what Congress did say in Section 111 supports the majority's near-boundless view, either. As EPA correctly explained when repealing the CPP, Section 111 operates "inside the fenceline." JA.1760-69.

Again, although EPA sets standards for new sources directly, 42 U.S.C. § 7411(b), EPA creates a process for *States* to set "standards of performance for any [covered] existing source," *id.* § 7411(d)(1). An "existing source" is any "stationary source" other than a new one, and a "stationary source" means "any building, structure, facility, or installation which emits or may emit any air pollutant." *Id.* § 7411(a)(3), (6). A "standard of performance," in turn, is:

> a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of 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.

Id. § 7411(a)(1).

Sections 111(a)(1), (b), and (d) operate as a funnel that narrows from EPA's system-identifying role to the specific standard for a particular stationary source. EPA identifies a best system that is adequately demonstrated and accounts for the three enumerated factors. That system is used to determine an achievable degree of emission limitation. The States or EPA then set standards of performance reflecting that limitation for individual sources to meet.

The D.C. Circuit went off course treating these interlocking provisions as discrete objects. It focused on select, isolated terms ("system" and "for") and used dictionaries that supported their most expansive meanings. It broadened its interpretation further by emphasizing the statute's use of a nominalization instead of a verb ("application" versus "apply") and lack of an express indirect object. Then it refused to test whether its capacious construction made sense by reading the "standard of performance" definition within the provisions where it is used. The result lets EPA pick effectively *anything* as a "system," then dictate rules through "application" of that system to *anything* else. JA.106-20.

That's not how statutory interpretation works. Courts "construe statutes, not isolated provisions." *Graham Cnty. Soil & Water Cons. Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280, 290 (2010). Statutory construction "is a holistic endeavor," and only context shows whether a term "may or may not extend to the outer limits of its definitional possibilities." *Koons Buick Pontiac GMC, Inc.* v. *Nigh*, 543 U.S. 50, 60 (2004); *Abuelhawa* v. *United States*, 556 U.S. 816, 819-20 (2009). Courts accordingly do not divorce definitions from the provisions where they operate. *Cyan, Inc.* v. *Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1071 (2018). Indeed, as the Court noted for another environmental law, the importance of reading together "interlocking language and structure of the relevant text" increases with a statute's complexity. *Territory of Guam* v. *United States*, 141 S. Ct. 1608, 1613 (2021) (CERCLA). The alternative—"[s]licing a statute into phrases while ignoring their contexts"—"is a formula for disaster." *Herrmann* v. *Cencom Cable Assocs., Inc.*, 978 F.2d 978, 982 (7th Cir. 1992) (Easterbrook, J.).

The Court should thus give fidelity to *all* the words Congress chose *and* the context where it used them—both immediate and "the broader context of the statute as a whole." *UARG*, 573 U.S. at 321. When properly read this way, Section 111 gives the lie to "no limits." It describes a process steeped in technological realities and focused on individual, achievable performance metrics. It does not empower EPA to regulate across industries, force shutdowns, or manage the nation's electricity supply.

A. Section 111(a)(1) Reveals A Source-Specific Focus.

Although the lower court was wrong to end with the definition of "standard of performance," that definition is

the right place to start. 42 U.S.C. § 7411(a)(1). The Court should read each of its pieces together to glean "more precise content" from "the neighboring words with which [they are] associated." *Life Techs. Corp.* v. *Promega Corp.*, 137 S. Ct. 734, 740 (2017). So construed, "standards of performance" refer to measures that particular, still-operating sources can adopt to reduce their own emissions.

1. To begin, Section 111(a)(1) defines a standard of "performance." "Performance" implies action, what a stationary source *does*. Although the majority overlooked this term, even its chosen dictionary agrees that "perform" denotes doing. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1678 (1968) ("act or process of carrying out something"; "execution of an action") (dictionary cited at JA.108-09). Focusing on action also makes sense of Section 111's "prohibited act[]"—*"operat[ing]"* a source contrary to a performance standard. 42 U.S.C. § 7411(e) (emphasis added). The CAA's general definitions agree, too. *Id.* § 7602(*l*) (defining "standard of performance" to include "any requirement relating to the *operation* or *maintenance* of a source to assure continuous emission reduction" (emphases added)), (k) (similar for "emission limitation").

In contrast, the CPP's and majority's views are indifferent to performance—a particular source can perform worse yet fully comply with a cap-and-trade or generation-shifting "system." And if that system is stringent enough to put disfavored sources out of business, then EPA has effectively mandated *in*action, which is no "performance" standard at all. Athletes, after all, do not perform better by retiring.

Standards of performance must also reflect "achievable" degrees of emission reduction through an

"adequately demonstrated" system. These terms carry a dose of empiricism. EPA must employ real-world solutions; "experimental" or "theoretical" will not do. *Nat'l Asphalt Pavement Ass'n* v. *Train*, 539 F.2d 775, 786 (D.C. Cir. 1976). Both terms align with source-specific technologies or processes—those in early research-and-development phases are not yet "adequately demonstrated," nor have they established what they might "achiev[e]." But the terms are a bad fit for many measures EPA could adopt under the majority's reading. Telling an operator to shift generation to hit an EPA-dictated target reflects a policy choice about emission *outcomes* and preferred *sources*; it does not assess evidence-based *techniques*. What would it mean for a system to be "adequately demonstrated" if EPA can pick any target it wants and instruct regulated parties to reduce or shift output until they meet it? And if EPA can average emissions across multiple categories of sources, zooming out far enough makes any "system" "achievable."

Section 111(a)(1) speaks to emission "limitation" and "reduction," as well. The D.C. Circuit (again) never defined these terms, but both imply lower emission levels, not elimination. See, *e.g.*, OXFORD ENGLISH DICTIONARY 436 (2d ed. 1989) (defining "reduction" as "diminution, lessening, cutting down"). Yet generation shifting involves a de facto bar on certain sources' emissions, potentially a complete one. The CAA refers to "reduction" and "elimination" separately, see 42 U.S.C. § 7401(a)(3), so treating the terms interchangeably would render one superfluous. See *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (courts "give effect, if possible, to every word Congress used" (cleaned up)). Congress also knows how to write statutes that stop sources from performing rather than pushing them to perform more efficiently. *E.g.*, 15 U.S.C. § 792(a)(1) (empowering

Federal Energy Administrator to prohibit "any powerplant" "from burning natural gas or petroleum products as its primary energy source"). Because Congress did not write Section 111 that way, "system of emission reduction" is different from "system of emission elimination."

2. Though the majority faulted the CPP repeal for purportedly adding words to Section 111(a)(1), JA.118, its own reasoning depends on subtraction. The court latched onto the terms "system" and "application" and gave them decisive weight—at the expense of the five other key words in the definition (just discussed) pointing another way. Even so, the majority's select words do not decide this case.

Take first its view of "system." The majority relied on a definition from a "widely criticized" dictionary, see *MCI*, 512 U.S. at 228 n.3 (discussing WEBSTER'S THIRD), to conclude that EPA could impose any "complex unity … subject to a common plan or serving a common purpose," so long as it "place[d] a high priority on efficiently and effectively reducing emissions." JA.118-19. The court thought this broad term gave EPA maximum "flexibility"—the genesis of its "no limits" holding. JA.118.

Yet "words that have one meaning in a particular context frequently have a different significance in another." *United States* v. *Raynor*, 302 U.S. 540, 547-48 (1938). All the more for a general term like "system": In one statute it refers to a device for making phone calls, *Facebook, Inc.* v. *Duguid*, 141 S. Ct. 1163, 1167 (2021) ("automatic telephone dialing system"), in another it describes a series of related waters, *United States* v. *Dist. Ct. In & For Eagle Cnty.*, 401 U.S. 520, 523 (1971) ("river system"). Particularly for a term like this, "construing

statutory language is not merely an exercise in ascertaining" its most expansive meaning, *FCC* v. *AT&T*, 562 U.S. 397, 407 (2011), as courts should not "indulge efforts to endow the Executive Branch with maximum bureaucratic flexibility," *Niz-Chavez* v. *Garland*, 141 S. Ct. 1474, 1484 (2021). The lower court erred in stopping with "system's" broadest meaning without asking whether context called for a more tempered read. At the least, "system's" context demands only "complex unities" that individual sources can perform.

The majority was also wrong to interpret "application" in an unbounded, context-free way. Standards of performance "reflect" the degree of limitation possible "through the application" of the best system of emission reduction. 42 U.S.C. § 7411(a)(1). As the noun form of the verb "apply," "application" means "to put to use with a particular subject matter." *Application*, BLACK'S LAW DICTIONARY (11th ed. 2019). Putting a system of emission reduction "to use" means using it *for* something. The obvious "something" here is the facility that emits—in Sections 111(b) and (d) terms, a new or existing stationary source. Thus, the "best system" "appl[ies]" to a stationary source—that is, a "building, structure, facility, or installation." 42 U.S.C. § 7411(a)(3).

The lower court resisted this conclusion by observing that a sentence can be grammatically correct with no express indirect object, particularly when it employs a nominalized verb like "application." JA.111-13. In its view, then, "best system" need not apply to any specific entity. JA.112-13. But the insight that a sentence without an indirect object may not break the rules of grammar does not change the reality that "apply" (no matter its form) must be directed to something (express or not). Plenty of words work this way. "They told the story" is a

grammatically correct sentence conveying that they told the story *to someone*.

Though the D.C. Circuit imagined other potential indirect objects—such as "the air pollutant to be limited"—it explained neither the textual basis for those alternatives nor how they would work in practice. JA.113. This leap-before-you-look approach leaves States and regulated entities with empty assurance that the agency will figure it out later. Still, it is hard to fathom how "appl[ying]" a "system" to carbon dioxide in the abstract results in a standard of performance for an individual stationary source. Even EPA has not stretched so far. To offset the CPP's "very broad" view of "system," EPA understood "application" to mean "measures that can be implemented—applied—by the sources themselves." JA.543. The CPP tried to get around this concededly "important [textual] limitation" by improperly redefining "source" to include "owners and operators." But unlike the D.C. Circuit, it never snatched "application" from its context. Neither should the Court.

B. Other Parts Of Section 111 Confirm EPA's "Inside-the-Fenceline" Power.

Determining whether Section 111 is "plain" requires reading its "words in their context and with a view to their place in the overall statutory scheme." *King*, 576 U.S. at 486 (cleaned up). As the CPP repeal correctly concluded, Section 111's operative provisions also show that "best system" is narrower than the majority thought.

Section 111(a)(1)'s "standard of performance" definition applies to Sections 111(b) and (d) alike, so its construction must make sense of both provisions. The majority found "no basis" to read "the source-specific language of subsection (d)(1) … upstream into subsection

(a)(1)," asserting that these provisions describe "distinct steps" with different actors. JA.106. But while only EPA identifies a "best system," Section 111(a)(1) defines "standards of performance"—and under Sections 111(b) and (d), EPA *and* the States set those. This interplay makes Sections 111(a)(1), (b), and (d) quintessential examples of "interlocking language and structure." *Guam*, 141 S. Ct. at 1613.

More generally, courts routinely interpret definitions along with their statute's operative provisions, see *Cyan*, 138 S. Ct. at 1071, especially when "mechanical" constructions of a definition would create "incongruities" in how the statute operates, *Lawson* v. *Suwannee Fruit & S.S. Co.*, 336 U.S. 198, 200-01 (1949). *UARG* rejected an earlier attempt to expand EPA's powers through a CAA definitional provision based on how the definition operates in practice. See 573 U.S. at 316. The same principle counsels the same result here.

Starting with "source," Section 111 makes plain that standards of performance are individual targets, which in turn makes it hard to interpret "best system" (an essential input to those standards) apart from anything a particular source could achieve. Consistent with EPA's national mandate, Section 111(b) directs the agency to list categories of "sources" and issue performance standards for the "new sources" within each category. 42 U.S.C. § 7411(b)(1). In contrast, Section 111(d) starts and ends with "source" in the singular: States establish standards "for any existing source," and may consider factors specific to "the existing source" when applying them. *Id.* § 7411(d)(1). If the majority is right, though, then Section 111(d) becomes just another way to regulate groups or categories of sources. Congress' choice of singular *and* plural carries weight. *Niz-Chavez*, 141 S. Ct. at 1482. The

Court should construe "standard of performance" in a way that works with both.

Unlike their deliberate use of source and sources, neither Section 111(b) nor (d) refers to a source "owner or operator"—another defined term. 42 U.S.C. § 7411(a)(5). Section 111 regulates the "source," *id.* § 7411(b), (d)(1), and an owner violates the statute by operating "*such source* in violation of any standard of performance applicable *to such source*," *id.* § 7411(e) (emphases added). These textually required limits drove EPA to redefine "source" in the CPP to encompass owners and operators—the agency could order them to take economic actions *outside* their facilities in service of remaking the nation's power grids. JA.543. Yet courts have not sanctioned EPA's prior attempts to "change the basic unit" to which CAA obligations apply, *ASARCO Inc.* v. *EPA*, 578 F.2d 319, 327 (D.C. Cir. 1978), and the statute does not permit that sleight of hand here, either. Congress used "different terms to describe different categories of people or things." *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 456 (2012). That choice matters.

Section 111 also describes standards "for" an existing source. 42 U.S.C. § 7411(b)(1)(B), (d)(1). The D.C. Circuit thought this preposition unleashed EPA, allowing any standards that "concern" a source. JA.117 (citing OXFORD ENGLISH DICTIONARY (2d ed. 1989)). But as with "system," finding a definition "broad enough to encompass one sense of a word" does not mean "the word is ordinarily understood in that sense." *Taniguchi* v. *Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 568 (2012).

"Concern" is too broad a definition of "for," in general and in this context. "For" is "a function word to indicate the object or recipient of a perception, desire or activity." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 454

(10th ed. 1995). It is therefore narrower than terms akin to "concern," like "relating to." *United Rentals Nw., Inc.* v. *Yearout Mech., Inc.*, 237 P.3d 728, 732 (N.M. 2010) (explaining that "contracts for construction" describes a narrower category than "contracts relating to construction"); see also, *e.g.*, *United States* v. *Pinson*, 331 F.2d 759, 760 (5th Cir. 1964) ("easements for public utilities" meant easements for facility construction and maintenance, not all easements "belonging to public utility companies"). Even when a statute *does* use broader terms "like 'relating to' or 'in connection with,'" courts reject "hyperliteral meaning[s]" that risk allowing a statute to "assum[e] near infinite breadth." *EPSA*, 577 U.S. at 278. Here, if standards of performance need only "concern" an existing source, then EPA could use Section 111(d) to set standards for anything directly or indirectly connected to the source. Context joins with text to refute a construction of "for" this far afield, as performance standards are not only "for" any existing source, but also "apply[]" and are "applicable to" the source. 42 U.S.C. § 7411(d)(1), (e).

Finally, Section 111(d) requires EPA to preserve States' authority to "take into consideration" source-specific factors like an existing facility's "remaining useful life." 42 U.S.C. § 7411(d)(1). As retrofits can be pricier and harder to justify than incorporating measures into a new build, this Section 111(d) safeguard allows flexibility that Congress did not write into Section 111(b). If, however, best systems can apply across a source category, market, or pollutant, States would have little room to consider something as granular as "useful life." The CPP showed what that approach does to source-specific tailoring—when EPA both sets standards and effectively dictates how they apply, state "discretion" becomes an illusion. JA.537.

C. The CAA As A Whole Confirms Section 111(d)'s Limited Scope.

Going broadest still, the rest of the CAA confirms that best systems of emission reduction apply at the source. See *Ali* v. *Fed. Bureau of Prisons*, 552 U.S. 214, 222 (2008) (whenever possible, courts construe statutes to make "the statutory scheme … coherent and consistent").

When Congress wants an industry or source to hit an emission target by any means—including outside-the-fenceline measures—it says so directly. The CAA has express cap-and-trade programs, after all. Title IV's Acid Deposition Control program includes a trading system pegged to specific tonnage-based emission levels. 42 U.S.C. § 7651(b). Congress added that program in 1990—the same time it amended Section 111(d) and did *not* revise it to include cap-and-trade or other non-performance-based measures. The Stratospheric Ozone Protection Program uses a similar trading approach, *id.* § 7671d, and Congress approved market-based trading options under the national ambient air quality program, as well, *id.* § 7410(a)(2)(A).

Section 111 is not like these target-driven programs. Contrary to the majority's view that Congress' express discussion of cap-and-trade in the acid-rain program is evidence it silently authorized a similar program here, JA.151, Section 111 does not mention cap-and-trade or credits. So while the text creating those programs started elephant-sized, Section 111's requires the lower court's convoluted approach to get there. This Court should "presume[]" Congress acted deliberately when it "include[d] particular language in one section of [the CAA] but omit[ted] it in another." *INS* v. *Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).

Section 111 thus differs from parts of the CAA less concerned with source-specific operations. The majority stressed that Section 111(a)(1) does not read like other parts of the CAA that discuss "retrofit application[s]" or "retrofit technology." JA.120 (quoting 42 U.S.C. §§ 7651f(b)(2), 7491(b)(2)(A), (g)(2)). But retrofits are for existing buildings. It would be odd to see similar language in a definition that applies when regulating new construction, too. In reality, Congress designed Section 111 "exactly like other performance-based limits found throughout the environmental laws," as it "clearly contemplates individualized, performance-based standards." Lisa Heinzerling & Rena I. Steinzor, *A Perfect Storm: Mercury and the Bush Administration*, 34 ENV'TL L. REP. 10,297, 10,309 (2004). Its standards of performance focus on "pollution control devices." *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257 (1976). Lagging facilities must "install new control equipment." *Nat'l-Southwire Aluminum Co.* v. *EPA*, 838 F.2d 835, 841 (6th Cir. 1988). And emission limits must be "to the fullest extent compatible with the *available* technology and economic feasibility." H.R. REP. NO. 1146, 91st Cong., 2d Sess., at 10, *reprinted in* 1970 U.S. CODE CONG. & ADMIN. NEWS 5356, 5365 (emphasis added).

The lower court's contrary construction flowed from an unduly expansive view of the CAA's purposes. Though the Act advances the important goal of improving air quality, JA.129-30, that purpose is nuanced. The lower court elided, for instance, Congress' statutory finding that States and localities bear "primary responsibility" for preventing and controlling air pollution. 42 U.S.C. § 7401(a)(3). It also minimized the many ways the CAA balances environmental remediation with "the allowance of reasonable economic growth." *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 863 (1984).

Because Congress designed different parts of the statute to operate differently, a broad view of one of its purposes cannot drive the interpretive cart.

And if Section 111's proper construction leaves EPA with too little power to respond to the serious issues surrounding climate change, the solution is not reinterpreting it with a purposivist bent. The answer is the same as when Congress confronted the problem of acid rain: When "policy considerations suggest that the current scheme should be altered, Congress must be the one to do it." *Intel Corp. Inv. Pol'y Comm.* v. *Sulyma*, 140 S. Ct. 768, 778 (2020); see also *Fed. Power Comm'n* v. *La. Power & Light Co.*, 406 U.S. 621, 635-36 (1972) ("[The] need for federal regulation does not establish [agency] jurisdiction that Congress has not granted."). For better or worse, Congress designed Section 111 as a tool to improve the performance of individual stationary sources, not a springboard for market transformation.

III. The Court Should Construe Section 111 To Avoid Substantial Non-Delegation Questions.

Finally, while clear-statement canons and plain-text constructions ask whether Congress delegated power in the first place, the non-delegation doctrine demands that Congress provide sufficient guidance for *how* agencies should exercise it. Congress must make "fundamental policy decisions" itself—"the hard choices." *Am. Petroleum Inst.*, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment). So though agencies are a reality of modern life, holding delegation within proper bounds remains "vital to the integrity and maintenance" of our constitutional order. *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 692 (1982); see also *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting).

Yet courts do not jump to invalidate statutes on constitutional grounds. If "fairly possible," they will construe a statute "to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score." *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237-38 (1998). Thus, unless "plainly contrary to the intent of Congress," courts reject constructions that "would raise serious constitutional problems" even if they are "otherwise acceptable." *Solid Waste Agency of N. Cook Cnty.* v. *U.S. Army Corps of Eng'rs*, 531 U.S. 159, 173, (2001). Even if the lower court's interpretation were acceptable, it would raise grave doubts about Section 111's constitutionality because it endorses an improper delegation of legislative power. The Court should reject it on this basis, too.

First, the standard. Delegation is constitutional only through statutes with "specific restrictions" that "meaningfully constrain[]" agency discretion. *Touby* v. *United States*, 500 U.S. 160, 166-67 (1991). The Constitution bars Congress from giving "literally no guidance" or overly vague standards when conferring agency power. *Whitman*, 531 U.S. at 474. At a minimum, Congress must provide "an intelligible principle to which [the agency] is directed to conform." *Gundy*, 139 S. Ct. at 2123 (cleaned up); see also *id.* at 2139-40 (Gorsuch, J., dissenting) (questioning whether even a few "intelligible principles" are enough to save an overbroad delegation of legislative power). Agencies may fill in statutory gaps with "judgments of degree," *Whitman*, 531 U.S. at 475 (cleaned up), but Congress cannot ask them to set "the criteria against which to measure" their own decisions, *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting). Policymaking directives must instead be "sufficiently definite and precise" to know whether the agency stays

within its lane—or not. *Yakus* v. *United States*, 321 U.S. 414, 426 (1944).

How much discretion the Constitution tolerates also "varies according to the scope of the power" at stake. *Whitman*, 531 U.S. at 475. When delegation swells "to immense proportions," Congress' standards "must be correspondingly more precise." *Synar* v. *United States*, 626 F. Supp. 1374, 1386 (D.D.C. 1986) (three-judge panel). Delegations that "encompass[] all American enterprise," for example, require more rigorous standards than those limited to "a single industry." *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., UAW* v. *OSHA*, 938 F.2d 1310, 1317 (D.C. Cir. 1991). The Constitution therefore demands "substantial" guidance for air standards that, as here, "affect the entire national economy." *Whitman*, 531 U.S. at 475; see also *Michigan* v. *EPA,* 576 U.S. 743, 762 (2015) (Thomas, J., concurring) (noting "potentially unconstitutional delegation[]" if EPA had unfettered discretion over "which policy goals" it pursued). CAA Section 109 satisfied this standard because Congress limited EPA's authority to a "discrete set of pollutants" and tied its discretion to specific health-and-safety metrics and "air quality criteria that reflect the latest scientific knowledge." *Whitman*, 531 U.S. at 473 (analyzing 42 U.S.C. § 7409(b)(1)-(2)).

Properly understood, Section 111 satisfies the non-delegation doctrine, too. Cabining the statute to source-level "systems" leverages EPA's scientific and engineering expertise about techniques for optimizing a source's emission reductions. This guardrail is "intelligible." And by limiting Section 111 to sources (rather than their owners or entire markets), there is little risk of "delegation running riot." *A.L.A. Schechter*

Poultry Corp. v. *United States*, 295 U.S. 495, 553 (1935) (Cardozo, J., concurring).

Not so for the decision below. Section 111 applies beyond "a discrete set of pollutants" and does not specify "requisite" regulatory outcomes. *Whitman*, 531 U.S. at 473. This extended reach makes it even more troubling the majority untethered EPA from any meaningful statutory criteria. The majority found enough flexibility to support a broad delegation, yet left the central questions unanswered when it comes to how EPA may use it—including how to measure success and when, if ever, EPA must stop. Does a "best system of emission reduction" eliminate the source category's "significant contribution" to air pollution? 42 U.S.C. § 7411(b)(1). Should EPA aim at mitigating danger to "the public health" or "public welfare?" *Id.* § 7409(b)(1)-(2). And should—or even may—EPA worry about keeping some (all? many?) sources operational when identifying a "best system"?

To be sure, EPA must "take[] into account" three factors when identifying the best system: "cost," "nonair quality health and environmental impact," and "energy requirements." 42 U.S.C. § 7411(a)(1). Yet without the rest of the textual constraints the majority jettisoned, these are not "substantial" guidance. *Whitman*, 531 U.S. at 475. The majority itself recognized "no limits on the *types of measures* that EPA may consider." JA.108 (emphasis added). EPA must check the box to explain how the factors affect its ultimate choice, but it has a universe of options to start from. Nor does Section 111 explain what "taking into account" means or how strong countervailing factors must be to overlook even substantial downsides. The three factors will likely appear slight once EPA lines up the costs of *not* acting

against "the most pressing environmental challenge of our time." JA.71 (quoting *Massachusetts*, 549 U.S. at 505).

It bears repeating: the D.C. Circuit's decision has no limiting principle. Removing the "inside the fenceline" limit for how EPA may exercise its delegated powers allows the agency to fashion whatever "system" it chooses, with the entire economy compelled to respond accordingly. It could, for instance, bring demand-side measures to the table—administrative-speak for limited electricity use or other measures with significant consequences for consumers. Rolling brownouts, closure orders, and reconstructing power grids are in play. So too caps and quotas for all emitters, including manufacturing plants and private homes. EPA can pick economic winners and losers among States and source types based on its own preferences. In the lower court's view, Congress intended all this—and maybe more.

Contrast this approach with other statutes that expressly permit agencies to manage portions of the economy. The Natural Gas Act authorizes FERC to greenlight new natural-gas plants using the statutory benchmark of whether they are "or will be required by the present or future public convenience and necessity." 15 U.S.C. § 717f(c)(1), (e). The Clayton Act gives DOJ and the FTC pre-approval authority over mergers and other industry movements of capital, but charges them to focus only on market shifts that "substantially … lessen competition, or tend to create a monopoly." 15 U.S.C. §§ 18, 18a. Even the Emergency Price Control Act did not grant the unilateral discretion the majority handed EPA. It tasked the Office of Price Administration with setting "generally fair and equitable" prices and rents, but it measured "generally fair and equitable" against prices during a two-week period in 1941, and required the agency

to "effectuate" specific policy goals. *Yakus*, 321 U.S. at 420-21.

The D.C. Circuit's version of Section 111(d) contains none of these guardrails. It allows EPA to unilaterally reshape the American economy based on its important—but singular—mission to protect the environment. That reading at least "sail[s] close to the wind with regard to the principle that legislative powers are nondelegable." *Reynolds* v. *United States*, 565 U.S. 432, 450 (2012) (Scalia, J., dissenting). The Court should moor the agency back to a rightly construed Section 111.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted.

PATRICK MORRISEY
Attorney General

OFFICE OF THE
WEST VIRGINIA
ATTORNEY GENERAL
State Capitol Complex
Building 1, Room E-26
Charleston, WV 25305
lindsay.s.see@wvago.gov
(304) 558-2021

LINDSAY S. SEE
Solicitor General
Counsel of Record

MICHAEL R. WILLIAMS*
Special Counsel

THOMAS T. LAMPMAN
CALEB A. SECKMAN
Assistant Solicitors General

*admitted in the District of Columbia, Michigan, and Virginia; practicing under supervision of West Virginia attorneys

Counsel for Petitioner State of West Virginia

ADDITIONAL COUNSEL

STEVE MARSHALL
Attorney General
State of Alabama

TREG R. TAYLOR
Attorney General
State of Alaska

LESLIE RUTLEDGE
Attorney General
State of Arkansas

CHRISTOPHER M. CARR
Attorney General
State of Georgia

THEODORE E. ROKITA
Attorney General
State of Indiana

DEREK SCHMIDT
Attorney General
State of Kansas

JEFF LANDRY
Attorney General
State of Louisiana

ERIC S. SCHMITT
Attorney General
State of Missouri

AUSTIN KNUDSEN
Attorney General
State of Montana

DOUGLAS J. PETERSON
Attorney General
State of Nebraska

DAVE YOST
Attorney General
State of Ohio

MIKE HUNTER
Attorney General
State of Oklahoma

ALAN WILSON
Attorney General
State of South Carolina

JASON RAVNSBORG
Attorney General
State of South Dakota

KEN PAXTON
Attorney General
State of Texas

SEAN D. REYES
Attorney General
State of Utah

BRIDGET HILL
Attorney General
State of Wyoming

TATE REEVES
Governor
State of Mississippi

By counsel:
Joseph Anthony Scalfani
Office of the Governor of
Mississippi
550 High Street, Suite 1900
Post Office Box 139
Jackson, MS 39205
joseph.scalfani@
govreeves.ms.gov
(601) 576-2138