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

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, *ET AL.*,
v.
ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*

THE NORTH AMERICAN COAL CORPORATION
v.
ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*

WESTMORELAND MINING HOLDINGS LLC
v.
ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*

THE STATE OF NORTH DAKOTA
v.
ENVIRONMENTAL PROTECTION AGENCY, *ET AL.*

On Writs of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF AMICUS CURIAE PUBLIC CITIZEN IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Public Citizen is a consumer advocacy organization that appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and the courts. Much of Public Citizen's research and policy work focuses on regulatory matters, and Public Citizen is often involved in litigation either challenging or defending agency action. Significant questions of administrative law are thus central concerns of Public Citizen, and Public Citizen has often filed briefs in cases raising such issues. *See*, *e.g.*, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019).

In this case, petitioners raise novel arguments requesting a substantial expansion of the interpretive guidepost sometimes referred to as the "major questions doctrine," which the Court has previously applied in extraordinary cases where it concludes that an agency has asserted broad authority over subjects outside those that a fair reading of the agency's governing statutes place within its purview. Although, as respondents explain, the procedural posture of this case does not properly place any merits issues before the Court, Public Citizen submits this brief addressing the proper scope of the interpretive principles that petitioners invoke to assist the Court in resolving their claims should it conclude that they are properly considered in this case.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae made a monetary contribution to preparation or submission of the brief. Counsel for all parties have consented in writing to its filing.

SUMMARY OF ARGUMENT

Petitioners in these cases assert that any view of the authority of the Environmental Protection Agency (EPA) under the Clean Air Act that is broader than the view reflected in the rules vacated by the decision below would violate the "major questions doctrine." As the respondents' briefs explain, the current absence of any operative rule reflecting the construction of EPA's authority that petitioners challenge makes this case inappropriate for exploring that issue. Indeed, as respondents point out, there is no Article III case or controversy over the scope of EPA's authority under the Clean Air Act provision at issue both because petitioners do not articulate any injury from the current *absence* of a regulation reflecting the exercise of that authority and because the abstract legal issue they seek to present is not ripe for review. Even aside from Article III concerns, petitioners' arguments are premised on the notion that the agency has taken some action based on the wrongful assumption of authority to decide some issue of great social or economic import without a sufficiently clear delegation of authority by Congress. In the absence of an extant agency action that actually reflects such an assumption of authority, petitioners' claims would necessarily fail on the merits even if they presented a case or controversy, as respondents explain.

Public Citizen submits this brief not to repeat those points, but to elaborate on the reasons why the interpretive guidepost that members of the Court have labeled the "major questions doctrine" provides no support to petitioners' position, even on the assumption that the merits of their arguments are, to some degree, properly before the Court. As the court recently summarized that guidepost, "[w]e expect

Congress to speak clearly when authorizing an agency to exercise powers of vast economic and political significance." *Nat'l Fed'n of Indep. Business v. OSHA*, 142 S. Ct. 661, 665 (2022) (*NFIB*). That summary does not, and does not purport to, provide a complete definition of the circumstances to which the guidepost applies or how it operates when applicable. In particular, it does not suggest that Congress is subject to a heightened standard of clarity whenever an agency undertakes an important task within its assigned area of responsibility.

Rather, the Court has followed the guidepost in exceptional cases where it concluded that an agency had sought to assert authority over a subject matter outside the scope of its delegated powers, and where the consequences of that assertion were so great as to displace the normal presumption that Congress intended to allow the agency to resolve ambiguities as to the precise bounds of its authority. Outside of those unusual circumstances, however, the Court has recognized that no standard of heightened clarity applies to legislation defining the way an agency acting within its sphere of authority exercises its powers: Agency action that reasonably falls within the scope of broad statutory language authorizing it is lawful even if the action addresses a highly important matter and uses means that are not explicitly identified in the statute. *See*, *e.g.*, *Biden v. Missouri*, 142 S. Ct. 647 (2022). Indeed, resolving important issues that fall within the bounds of a regulatory agency's authority "is what [a federal agency] does." *Id.* at 653.

ARGUMENT

The interpretive guidepost sometimes referred to as the "major questions doctrine" has no application to this case.

If any merits question involving application of the "major questions doctrine" is presented by this case, it is no more than this: Does the major questions doctrine bar *any* construction of EPA's Clean Air Act authority that would allow the agency to consider pollution control measures other than inside-the-fenceline controls in determining the "best system of emission reduction" for purposes of regulation of pollutants from existing stationary sources under 42 U.S.C. § 7411? Under the circumstances of this case, answering that question would effectively amount to issuance of an advisory opinion. If, however, the Court chooses to address it, the answer must be no. Whether EPA possesses such authority is a question that might have significant consequences, perhaps even consequences that could be characterized as "major"—or not, depending on how EPA chose to exercise its authority. *See* U.S. Br. 43, 46–48. But the possibility that an agency may exercise its assigned powers in ways that are highly consequential is not enough to require that the statute granting such powers satisfy a clear-statement rule.

A. The principle that members of this Court have, in recent years, "sometimes call[ed] … the major questions doctrine," *NFIB*, 142 S. Ct. at 667 (Gorsuch, J., concurring), has never been articulated in a way that conditions all important exercises of agency authority on a clear statement by Congress. Rather, the guidepost that the Court's majority has found instructive in a small number of cases is that Congress is expected

to "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air. Reg. Group v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). The principle, then, might be more aptly labeled the "vast significance" doctrine.

Even that phrase, however, would fail to describe the doctrine adequately. The decisions of this Court that have stated this principle have done so in exceptional circumstances where the Court has concluded that an agency has broadly asserted authority over a subject-matter entirely beyond that defined by a fair reading of its organic statutes. In addition, the Court has generally pointed to textual and structural statutory features that strongly indicate that Congress did not intend to confer such authority, and/or to the absence of limiting principles that would cabin the agency's power if its assertion of authority were accepted. The extraordinarily broad economic or social consequences of the agency's assertion of authority have formed part of the reason for the Court's invocation of the importance of congressional clarity in such cases, but not its sole basis.

For example, in *Brown & Williamson*, this Court rejected the FDA's assertion of authority to regulate tobacco products as "drugs" under decades-old provisions of the Food, Drug, and Cosmetic Act (FDCA) that had never before been applied to tobacco products. The Court concluded that it was "clear that Congress intended to exclude tobacco products from the FDA's jurisdiction," 529 U.S. at 142, because if the FDCA (as it then existed) applied to tobacco products, it would necessarily have required that they be banned—a result that would conflict with numerous statutes

specifically applicable to tobacco products that unambiguously reflected congressional directives that they *not* be banned, *id*. at 143. The Court concluded that Congress had repeatedly enacted legislation that ratified the FDA's longstanding prior position that it lacked authority over tobacco products, *id*. at 144, and that would be contradicted by the assertion of such authority—for example, a statute precluding any agency from issuing labeling requirements, *id*. at 149. The Court rested its decision principally on the legislative structure enacted by Congress, which it found incompatible with the FDA's assertion of authority. *See id*. at 155.

Although the Court in *Brown & Williamson* observed that in "extraordinary cases … there may be reason to hesitate before concluding that Congress has intended such an implicit delegation," *id*. at 159, it did so only after exhaustively explaining how the statutory framework applicable to tobacco at that time precluded FDA regulation. The FDA's new assertion of "jurisdiction to regulate an industry constituting a significant portion of the American economy" and holding "a unique place in American history and society," *id*., placed the case in that "extraordinary" category, *id*. at 160. It was in this context that the Court observed that "we are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id*. But neither the Court's assessment of the political and economic significance of the agency's action nor the application of a clear-statement requirement was the principal driver of the Court's decision. Rather, its decision rested on the Court's conclusion that it *was* "clear" that "Congress *ha[d]* directly spoken to the question at issue," *id*. at 160–61 (emphasis added),

and had *foreclosed* the agency's "expansive construction of the statute," *id*. at 160.

Similarly, *Gonzales v. Oregon*, 546 U.S. 243 (2006), invoked by petitioners as an example of the "major questions doctrine," also involved an expansive assertion of agency authority over a field not previously within its scope: specifically, the Attorney General's attempt to leverage his authority over illicit traffic in controlled substances to issue a rule regulating the practice of medicine. The Court declined to afford deference to that assertion of regulatory authority because it determined that the language and structure of the governing legislation did not confer such authority. *See id*. at 258. The Court relied principally on the "plain language," "design," and "structure" of the statute. *Id*. at 264–65. The Court pointed out that it would be "anomalous" to construe the provisions relied on by the Attorney General as implicitly conferring the claimed authority because such a construction would effectively confer "unrestrained" authority incompatible with the limits Congress had "painstakingly" imposed on his authority in other provisions. *Id*. at 262.

As in *Brown & Williamson*, the Court in *Gonzales* supported its conclusion that the agency's claim of broad new authority was at odds with the statutory design by observing that Congress would not have altered "fundamental details of a regulatory scheme in vague terms," *id*. at 267 (quoting *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001)), and by citing *Brown & Williamson*'s rejection of "cryptic" delegations of power to make decisions with "such economic and political significance," *id*. (quoting 529 U.S. at 160). Ultimately, however, the Court emphasized that its decision rested on the "text and structure" of the Controlled Substances Act, *id*. at 275, and that it

was "unnecessary even to consider the application of clear statement requirements" to reject the claim of agency regulatory authority, *id*. at 274.[2]

UARG, the decision that is the source of the sentence now used to encapsulate the "major question doctrine," *see* 573 U.S. at 324, similarly turned on the Court's reading of statutory language and structure, *see id*. at 321. There, the Court rejected EPA's reading that the language of the Clean Air Act compelled or permitted it to regulate certain greenhouse gas emissions from small stationary sources—a reading that would have expanded the sources potentially subject to regulation under the relevant provisions of the Act by many orders of magnitude. Analyzing the statutory text in its full context, the Court explained that the agency's construction of the statute did not, as the agency thought, follow from the use of the term "air pollutant" in the provisions at issue. *See id*. at 315–20. The Court went on to hold that the agency's construction was unreasonable, and hence impermissible, because the agency itself had acknowledged that its interpretation "would be inconsistent with—in fact, would overthrow—the Act's structure and design." *Id*. at 321. Indeed, EPA had concluded that its construction of the statute would be unworkable and would "severely undermine what Congress sought to accomplish," *id*. at 322, unless the agency established new permitting thresholds excluding many small sources from regulation in disregard of "unambiguous

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[2] Justice Scalia's dissent, joined by Chief Justice Roberts and Justice Thomas, stated unequivocally that *no* clear-statement principle was applicable to the Attorney General's assertion of broad and highly consequential authority to prohibit otherwise permissible conduct. 546 U.S. at 291–92.

statutory terms," *id.* at 325, that required regulation of such sources if they really were, as EPA posited, properly subject to the provisions at issue. "[R]eaffirm[ing] the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate," the Court concluded that "the need to rewrite clear provisions of the statute" to make EPA's construction workable signaled that the agency's "interpretation was impermissible." *Id.* at 328.

Along the way, the Court stated that the agency's interpretation was "also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Id.* at 324. In this context, the Court said, "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* at 324 (internal quotation marks omitted). But the Court's holding was not that EPA's action failed for lack of clear authorization: It was that EPA's action was *clearly unauthorized* because the Act's structure and language made it "patently unreasonable" for the agency to exercise authority that "the statute is not designed to grant." *Id.*

The Court's most recent applications of the interpretive approach taken in *Brown & Williamson*, *Gonzales*, and *UARG* similarly focus on circumstances in which the Court has concluded that statutory language and design fail to support what it has seen as a dramatic expansion in the subjects over which an agency asserts authority. In *Alabama Ass'n of Realtors v. Department of Health & Human Services*, 141 S. Ct. 2485 (2021), the Court invoked *UARG*'s "vast … significance" language in vacating a stay pending

appeal of a district court's decision invalidating an eviction moratorium imposed by the Centers for Disease Control (CDC) as a measure to control the spread of COVID-19.

The Court started by holding that the district court's opinion was likely to be affirmed because the statutory language relied on by the CDC to authorize its action, read in context, did not support its assertion of authority over matters "markedly different from the direct targeting of disease that characterizes the measures identified in the statute." *Id.* at 2488. The Court went on to state that, "[e]ven if the text were ambiguous," the scope of the CDC's claim of authority would "counsel against the Government's interpretation." *Id.* at 2489. Quoting *UARG*, the Court observed that the CDC had claimed "vast" power, of a type never before asserted, over landlord-tenant relations and that the CDC's view of the statute would give it "a breathtaking amount of authority," without obvious limiting principles, over economic transactions that might affect the spread of disease. *Id.* Such authority, the Court stated, could not be supported by the "wafer-thin reed" of the statutory language invoked by the agency. *Id.*[3]

Similarly, in *NFIB*, the Court addressed an assertion of authority by the Occupational Safety and Health Administration (OSHA) over what the majority concluded was a matter of public health rather than workplace safety. While framing the issue as whether Congress had "plainly" conferred authority to regulate public health, 142 S. Ct. at 665, the majority

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[3] The Court also invoked federalism concerns, 141 S. Ct. at -2489, which, as respondents' briefs explain, are not similarly implicated here.

concluded that Congress plainly had *not*. *See id.* (stating that the "Act empowers the Secretary to set *workplace* safety standards, not broad public health measures," and that "no provision of the Act addresses public health more generally"). Indeed, the majority found that "the text of the agency's Organic Act … *repeatedly makes clear* that OSHA is charged with regulating 'occupational' hazards and the safety and health of 'employees.' " *Id.* (emphasis added). As in previous cases articulating the Court's expectation that Congress speak clearly when authorizing agencies to exercise "powers of vast political and economic significance," *id.*, the Court emphasized what it saw as the "breadth of" and "lack of historical precedent" for the agency's claim of authority as a further indication that the agency lacked authority. *Id.* at 666.

The common thread among these decisions is what the Court finds to be an agency's unprecedented and expansive assertion of broad authority over matters outside its normal ken, and beyond what the Court determines is a fair reading of the language and structure of the statutes conferring authority. In such extraordinary circumstances, the Court has seen the "vast political and economic significance," *id.* at 665, of the agency's action as a factor weighing against the assertion that Congress implicitly authorized such action through arguably ambiguous provisions that, read broadly, would run counter to the overall design of the statutory scheme. None of the decisions, however, holds or suggests that Congress must meet a heightened clear-statement requirement whenever it delegates to an agency the power to take some important action within the sphere of authority it has conferred on the agency.

B. While the decisions discussed above principally concern limits on broad assertions of agency authority, petitioners and their amici also invoke a line of decisions holding more generally that minor ambiguities in statutory language generally do not serve as authorization for agency actions that would work fundamental changes to a regulatory scheme—including changes that would lessen the impact of regulation. *See*, *e.g*, *Whitman*, 531 U.S. at 468; *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 231 (1994).

In *Whitman*, for example, the Court held that plain language of the Clean Air Act did not permit EPA to consider cost in setting ambient air quality standards. *See* 531 U.S. at 465. The Court declined to read such authority into "modest words" in the statute that did not appear to address the issue because "Congress … does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions." *Id*. at 468.

Similarly, in *MCI*, the Court rejected an agency's attempt to deregulate long-distance rates, where the "essential characteristic" of the statutory scheme was the requirement that rates be filed. 512 U.S. at 231. There, the agency had upended that scheme by eliminating rate-filing altogether, invoking a provision allowing it to "modify" statutory requirements. Holding that this provision did not by its plain terms authorize the agency's action, the Court observed that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion—and even more unlikely that it would achieve that through such a subtle device as permission to 'modify' rate-filing requirements." *Id*.

Notably, neither *Whitman* nor *MCI* suggests the existence of a clear-statement rule applicable whenever an agency takes any action pursuant to its authority that would have a major impact on regulated entities. Instead, they hold that agencies cannot alter the fundamental nature of regulatory schemes to *reduce* their impact based on out-of-context readings of words or phrases that are at odds with the language and design of the statutory scheme viewed as a whole.[4]

C. None of the decisions invoked by petitioners as the basis for the "major question doctrine" applies to circumstances in which an agency is regulating the subjects over which Congress has granted it authority and has not sought to alter the fundamental nature of

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[4] In another case included in the litany of "major questions doctrine" decisions by petitioners, *King v. Burwell*, 576 U.S. 473 (2015), the Court declined to afford *Chevron* deference to an IRS interpretation of the applicability of the tax-credit provision of the Affordable Care Act, where deferring to that view would effectively determine the viability of the insurance exchanges established under the Act. The Court held that the significance of the issue made it unlikely that Congress would have implicitly delegated resolution of the legal question to an agency, and especially unlikely that it would delegate the question to the IRS, which lacked any responsibility for or expertise in health care policy. *Id.* at 486. Thus, the Court decided the issue for itself. Notably, however, in doing so, the Court ultimately agreed with the agency's decision, and its substantive statutory construction did not rest on a presumption against statutory readings with significant political and economic impacts. Instead, the Court reasoned that it was implausible that Congress intended a reading of one provision that would effectively overturn the remainder of the statutory scheme. *See id.* at 497. *King* has little bearing on this case, where the issue is not whether to defer to EPA's construction of the statute, and where the interpretive principle invoked by petitioners to determine the substantive scope of the provision at issue is different from the one applied to that question in *King*.

the statutory scheme designed by Congress. When an agency remains within those bounds, this Court's decisions have continued to recognize that its actions—even if highly consequential for those subject to regulation and for the general public whom that regulation is intended to protect—are subject to review under the standards defined by the Administrative Procedure Act, under which actions may be set aside if they are arbitrary, capricious, an abuse of discretion, or contrary to law. *See* 5 U.S.C. § 706(2)(A).[5] Under that standard, ambiguities in statutes defining the details of an agency's regulatory authority are usually treated as implicit authorization for the agency to adopt a reading of the statute that a court should accept if reasonable and within the permissible scope of the statutory language. *See City of Arlington v. FCC*, 569 U.S. 290, 296 (2013); *accord id.* at 312 (Roberts, C.J., dissenting). Absent an agency construction entitled to deference, moreover, courts reviewing the lawfulness of an agency's action should supply the "best reading" of the statutory language. *See Encino Motorcars, LLC v. Navarro*, 138 S. Ct. 1134, 1140 (2018). Whether applying *Chevron* or supplying its own reading, however, a court is not required by this Court's decisions to apply special tools of statutory construction, requiring a clear congressional statement to authorize any agency actions that have "major" political or economic significance.

Quite the contrary. When an agency acts within its statutorily conferred sphere of authority and exercises that authority consistently with a statute assigning it a particular function, this Court has held that a court

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[5] The Clean Air Act sets forth an identical standard of review. 42 U.S.C. § 7607(d)(9).

must sustain its action and may not "impos[e] limits on [the] agency's discretion that are not supported by the text." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020). Thus, in *Little Sisters*, the Court sustained a regulation on a matter of great political, social, and economic significance: the creation of a broad religious exception to the requirement that health plans provide contraceptive coverage—an exemption that would potentially impede many women's access to contraception. Far from requiring an explicit, clear statement that the agency was authorized to create such an exemption, the Court held that it fell within the agency's general authority to require health plans to offer preventive care "as provided for" by the agency, absent statutory language *precluding* the agency from creating a religious exemption. *See id.* at 2379–81.

Similarly, in *Biden v. Missouri*, this Court held that the Secretary of Health and Human Services was authorized to impose COVID vaccination requirements on health care providers by statutory provisions broadly providing for imposition of conditions on providers accepting Medicare and Medicaid funding to protect the health and safety of patients. 142 S. Ct. at 652. Despite the political and economic significance of the requirement, and in the face of the dissent's invocation of the "major questions doctrine," *see id.* at 658 (Thomas, J., dissenting), the Court required no explicit congressional authorization of vaccination requirements. Rather, emphasizing that the Secretary was acting squarely within his assigned area of regulatory responsibility and in accordance with broadly worded provisions authorizing measures to protect Medicaid and Medicare recipients, the Court held that the Secretary had the power to use new means to carry

out his assigned duties in the face of "unprecedented circumstances," and found "no grounds for limiting the exercise of authorities the agency has long been recognized to have." *Id.* at 654.

UARG also explicitly recognizes that no heightened clarity requirement applies to statutes authorizing agencies to take important actions within the scope of their authority. In addition to addressing EPA's novel and expansive assertion of authority over greenhouse-gas emissions from small sources, *UARG* considered whether EPA "reasonably interpreted" the Clean Air Act when it required sources that were concededly within its established regulatory authority to "comply with 'best available control technology' [BACT] emission standards for greenhouse gases." 573 U.S. at 329. Although such regulation also had significant economic consequences and the potential for very far-reaching effects, the Court did not require a clear statement from Congress explicitly authorizing imposition of BACT emission standards for greenhouse gases: It was enough that such regulation fell within a fair reading of Congress's authorization of such controls for "each pollutant subject to regulation under this chapter," *id.* at 331; that the agency's authority was not "unbounded," *id.*; that applying BACT standards to greenhouse gases was not "disastrously unworkable," *id.* at 332; and, critically, that such regulation involves no "dramatic expansion of agency authority" to encompass "previously unregulated entities," *id.* The mere "potential" that reading the statute to allow such regulation could "lead to an unreasonable and unanticipated degree of regulation" did not suffice for the Court to hold that the reading was beyond EPA's authority. *Id.*

D. That the Court has not required a clear statement to authorize even highly consequential regulations within an agency's established sphere of authority is understandable because such a requirement, in practice, would be incoherent and yield indeterminate consequences. When an agency has undertaken to regulate subjects wholly *outside* the recognized bounds of its regulatory authority, the consequences of such an assertion of authority can be avoided by setting aside its action. In those cases, the expectation of clear authorization for broad new assertions of authority works together with traditional tools of statutory construction to confine agencies to their proper roles—as cases such as *Brown & Williamson*, *Gonzales*, and *UARG* demonstrate.

Where, however, as in this case, the question concerns a matter *within* the scope of the agency's authority, requiring a clear statement from Congress to support any agency decision that may have highly significant consequences would lead to administrative paralysis. Such a requirement would not tell the agency *which way* it should decide a significant matter that is properly before it when the statutory language does not provide an unambiguous direction and a decision either way will have consequences that could be characterized as "major." And Congress cannot reasonably be expected to anticipate and plainly prescribe the exact answers to all consequential issues that may arise in the course of an agency's exercise of its assigned functions. Requiring it to do so would be both impossible and contrary to the basic reason for assigning tasks to regulatory agencies: the need, long perceived by Congress, to allow regulators to bring their expertise to bear on a range of problems and, upon considering all circumstances relevant to the range of

discretion conferred by the governing statute, arrive at reasonable solutions—including, at times, new solutions to unprecedented problems. *See Biden v. Missouri*, 142 S. Ct. at 654. After all, a regulatory agency is not a "mere bookkeeper," and addressing important issues within the established scope of its authority is "what [the agency] does." *Id*. at 653. Expanding the "major questions doctrine" to preclude the exercise of such authority would substantially alter the body of administrative law developed over the past century and impair the executive branch's ability to carry out the functions given it in legislation duly enacted by Congress.

This Court's seminal decision in *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984), is illustrative. The statute at issue there required the agency to regulate air emissions from "stationary sources," but the statute did not express an unambiguous intent as to how that term should be applied to a single facility with multiple smokestacks: Was the facility a single stationary source or many? 467 U.S. at 845. A decision *either way* about the scope of the stationary-source definition in *Chevron* potentially had major economic consequences. The Court chose to treat the unclarity as a delegation of authority to the agency to decide. *See id*. at 843–45, 865–66. The Court could instead have chosen to determine the best answer for itself, rather than determining that the ambiguity reflected a delegation of decisional authority. The one thing it could *not* have done was use a clear-statement rule to make the decision, because such a rule would point in neither direction. None of the possible answers to the significant question facing the agency had been plainly provided by Congress.

The statutory question that petitioners here ask the Court to decide is similar. Petitioners' challenge seeks to raise concerns about how the agency should exercise its core powers over matters clearly within its authority. The Clean Air Act plainly provides EPA authority to designate categories of stationary sources that, in its judgment, cause or contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare. *See* 42 U.S.C. § 7411(b)(1)(A); *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*). No one questions that EPA long ago properly designated power plants as such a category of stationary sources. Nor is there any question that the statute requires regulation of existing sources within that category. *See* 42 U.S.C. § 7411(d); *AEP*, 564 U.S. at 424. It is equally clear that the pollutant at issue here—the greenhouse gas carbon dioxide—falls within the category of air pollutants for which the statute requires the development of standards of performance. *See* 42 U.S.C. § 7411(d)(1).

Thus, this case does not implicate the Court's expectation of clear congressional authorization for an agency's assumption of broad powers over significant matters formerly thought to be outside its regulatory authority. It is not one of those "extraordinary" cases where an agency has sought to expand its authority to regulate subjects beyond its purview. Instead, petitioners ask the Court to impose an extra-textual, inside-the-fenceline limit on EPA's authority to determine the "best system of emission reduction," which forms part of the basis for the performance standards called for by section 7411 of the Clean Air Act. Whether such a limitation applies is a question whose resolution in either direction *may* be a matter of significance, but it is exactly the kind of question to

which, as explained above, the expectation of heightened congressional clarity does *not* apply. Indeed, this Court's decisions reject the imposition of such limits on an agency's regulatory authority in the *absence* of some expression of congressional intent in the language or structure of a statute. *See Little Sisters*, 140 S. Ct. at 2381; *cf. Whitman*, 531 U.S. at 465–68. The mere possibility that a determination of the best system of emission reduction based on outside-the-fenceline methods of reducing emissions *could* be unreasonable—depending on how EPA applied the standard—provides no basis for invoking the "major questions" guidepost to impose a non-textual limit on EPA's authority. *See UARG*, 573 U.S. at 332.

In the odd circumstances of this case, in which the status quo is that there is no operative agency determination of the best system of emission reduction that either injures the petitioners or provides a basis for judicial review, this Court need not even explore the scope and limits of the expectation that Congress will speak clearly when assigning an agency regulatory authority of vast economic and political significance. Should the Court conclude, however, that some issue concerning the definition of "best system of emission reduction" under section 7411 is properly before it, the Court should address that issue with the recognition that the "major questions doctrine" has no bearing on its resolution.

CONCLUSION

The Court should dismiss the petitions for writs of certiorari as improvidently granted or for lack of jurisdiction, or affirm the judgment of the court of appeals.

Respectfully submitted,

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