No. _____

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL REGAN, ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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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—without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements?

PARTIES TO THE PROCEEDING AND RELATED PROCEEDINGS

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.

Respondents 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).

Respondents who were petitioners below are, by court of appeals case number, as follows:

In Case No. 19-1140: American Lung Association and the American Public Health Association.

In Case No. 19-1165: 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 (CO), City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, and the City of South Miami (FL).

In Case No. 19-1166: Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and

Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club.

In Case No. 19-1173: Chesapeake Bay Foundation.

In Case No. 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 Case No. 19-1176: Westmoreland Mining Holdings, LLC.

In Case No. 19-1177: City and County of Denver (CO).

In Case No. 19-1179: The North American Coal Corp.

In Case No. 19-1185: Biogenic CO2 Coalition.

In Case No. 19-1186: Advanced Energy Economy.

In Case No. 19-1187: American Wind Energy Association and Solar Energy Industries Association.

In Case No. 19-1188: Consolidated Edison, Inc., Exelon Corp., National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Inc., and Sacramento Municipal Utility District.

Respondents who were petitioner-intervenors below are, by court of appeals case number, as follows:

In Case No. 19-1140: State of Nevada.

Respondents who were respondent-intervenors below are, by court of appeals case number, as follows:

In Case No. 19-1140: State of North Dakota; Commonwealth of Kentucky by and through Governor

Andy Beshear; Mississippi Public Service Commission; 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.; America's Power; Basin Electric Power Cooperative; 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 and Newmont Nevada Energy Investment; PowerSouth Energy Cooperative; Westmoreland Mining Holdings, LLC.

In Case Nos. 19-1175, 19-1176, and 19-1179: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club; 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 (CO), City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, and the City of South Miami (FL).

There are no other directly related proceedings.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners 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 respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the D.C. Circuit (App. 1a-203a) is reported at 985 F.3d 914.

JURISDICTION

The D.C. Circuit entered judgment on January 19, 2021. This petition is timely filed consistent with the Court's March 19, 2020 Order. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant provisions of the Clean Air Act are set forth at App. 204a-209a.

STATEMENT

The court below held that a rarely used, ancillary provision of the Clean Air Act grants an agency unbridled power—functionally "no limits"—to decide whether and how to decarbonize almost any sector of the economy. App. 56a. Five years ago the Environmental Protection Agency ("EPA") claimed to find similar powers in the same provision—authority to reshape the nation's utility

power sector by mandating standards impossible for coal and natural gas power plants to meet without limiting operations, shutting down, or subsidizing investment in alternate electricity generation that EPA preferred. This Court took the extraordinary step of staying EPA's "Clean Power Plan" rule even before the lower court finished its review, strongly signaling that EPA (and by extension the court below now) were wrong.

The Court never had a chance to resolve that case on the merits because the D.C. Circuit ultimately dismissed it. EPA, however, heeded the Court's unsubtle nod and repealed the rule in 2019 on the basis that it exceeded the agency's statutory authority. Asked in the consolidated challenges below whether EPA's revised assessment was correct, a divided panel answered "no" without even acknowledging the Court's stay. Instead, it insisted that EPA had *more* statutory power than the agency had originally claimed.

The decision below is wrong. To reach its momentous result, the court deviated from the text-based reading that the statute creates a process for EPA and the States to work together to ensure that power plants and other stationary sources use proven equipment and practices to reduce their own emissions. And it purported to find grounds for EPA to dictate huge shifts in most sectors of the economy even though nothing in the statute approaches the clear language Congress must use to assign such vast policymaking authority—assuming, of course, it can delegate enormous powers like these in the first place.

The decision also has massive consequences. EPA now has a judicial edict not to limit itself to measures that can be successfully implemented at and for individual facilities. It can set standards on a regional or even

national level, forcing dramatic changes in how and where electricity is produced, as well as transforming any other sector of the economy where stationary sources emit greenhouse gases. Power to regulate factories, hospitals, hotels, and even homes would have tremendous costs and consequences for all Americans; EPA's steps on remand and every regulation under the statute to follow will be shaped by this new and wildly expansive authority.

Only the Court can resolve whether EPA has this unilateral power—or if Congress must take up the mantle instead. How we respond to climate change is a pressing issue for our nation, yet some of the paths forward carry serious and disproportionate costs for States and countless other affected parties. Continued uncertainty over the scope of EPA's authority will impose costs we can never recoup because EPA, the States, and others will be forced to sink even more years and resources into an enterprise that is—at best—legally uncertain. The Court should intervene now.

1. A key purpose of the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, is to address emissions from certain categories of buildings and facilities. Congress chose two approaches to address this goal:

The first is target-based, directing emission reductions to a specific amount or threshold level. On the more specific end of the spectrum, Title IV's Acid Deposition Control program includes a cap-and-trade system to reduce sulfur dioxide emissions by "ten million tons from 1980 emission levels," and nitrogen oxides emissions by "approximately two million tons." 42 U.S.C. § 7651(b). Similarly, the Stratospheric Ozone Protection Program "phase[s]-out" certain ozone-depleting substances through a detailed statutory process and schedule. *Id.* § 7671d. On the other end of the spectrum, National

Ambient Air Quality Standards target emission levels "requisite to protect the public health," "allowing an adequate margin of safety." *Id.* § 7409(b). And the second phase of the Hazardous Air Pollutants program aims to "provide an ample margin of safety to protect public health . . . or to prevent, taking into consideration costs, energy, safety, and other relevant factors, an adverse environmental effect." *Id.* § 7412(f)(2); see also *id.* § 7429(h)(3) (same authority for solid waste combustion units).

Congress's second approach focuses on improved controls and processes. Instead of targeting specific reductions or ambient air concentrations, emission-reduction goals in this category are tied to what individual sources can achieve using available technology.

New Source Review, for example, ensures that a new or modified stationary source—"any building, structure, facility, or installation which emits or may emit any air pollutant," 42 U.S.C. § 7411(a)(3)—employs the "best available control technology" or matches the "lowest achievable emission rate." *Id.* §§ 7475(a)(4), 7503(a)(2). In the first phase of the Hazardous Air Pollutants program, EPA's standards require "the maximum degree of reduction in emissions" that sources can achieve "through application of measures, processes, methods, systems or techniques." *Id.* § 7412(d)(2). And under Section 112 EPA can issue rules for smaller sources that "provide for the use of generally available control technologies or management practices." *Id.* § 7412(d)(5).

2. The performance standards program in Section 111—the provision at issue here—falls within the second category.

Section 111(b) directs EPA to establish "standards of performance" for *new* stationary sources. 42 U.S.C. § 7411(b)(1)(B). A "standard of performance" 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).

For *existing* sources, Congress forged a deliberate partnership between the States and EPA. 42 U.S.C. § 7411(d). EPA identifies the "best system of emission reduction" available for designated categories of sources, then promulgates a "procedure" for States to submit standards of performance for the individual sources within their borders. *Id.* § 7411(d)(1). The States follow that procedure to set particular "standard[s] for emissions of air pollutants," which "reflect[]" the best system of emission reduction but can be modified based on source-specific factors like a facility's "remaining useful life." *Id.* § 7411(a)(1), (d)(1). EPA may step in only if a State fails to submit or enforce a "satisfactory plan." *Id.* § 7411(d)(2)(A).

Several features confirm that Section 111 aligns with the statute's second category of individual source-focused programs. Section 111(a)(1) calls for standards based on an "achievable" degree of emission limitation after applying an "adequately demonstrated" system of emission reduction. 42 U.S.C. § 7411(a)(1); see *Essex Chem. Corp.* v. *Ruckelshaus*, 486 F.2d 427, 433-34 (D.C. Cir. 1973) (explaining that "achievable" means more than "purely theoretical or experimental," and "adequately demonstrated" has similar real-world meaning).

Similarly, EPA must issue periodic "information on pollution control techniques," 42 U.S.C. § 7411(b)(3), and States may seek revised performance standards for new sources based on "a new, innovative, or improved technology or process which achieves greater continuous emission reduction," *id.* § 7411(g)(4)(A). Where numbers-based emission standards are infeasible, EPA may use a "design, equipment, work practice, or operational standard" instead. *Id.* § 7411(h)(1). And EPA's discretion to issue waivers is likewise steeped in what individual sources can achieve: Waivers encourage "innovative technological system[s]" that have not yet been adequately demonstrated, and their length must consider "the design, installation, and capital cost of the technological system or systems being used." *Id.* § 7411(j)(1)(A), (D), (F).

3. Although EPA often uses Section 111(b) to set standards of performance for new sources, it has rarely deployed Section 111(d). App. 23a-24a (listing just seven regulations in over 40 years). During the debates considering the 1990 amendments to the Clean Air Act, in fact, one of the amendments' architects characterized Section 111(d) as "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 Subcmte. on Envtl. Prot. of the S. Cmte. on Env't & Public Works, 100th Cong. 13 (1987).

That situation changed when EPA finalized the Clean Power Plan ("CPP") rule in October 2015. 80 Fed. Reg. 64,662 (Oct. 23, 2015). The CPP implemented President Obama's directive to use Section 111(d) to "lead[] global efforts to address climate change" and thereby "do what Congress wouldn't." App. 170a (citation omitted). Designed to overhaul national electricity generation, the

CPP imposed mandates for existing coal and natural gas power plants that were—by EPA's own admission—unachievable through technology or process improvements at any individual source. 80 Fed. Reg. at 64,754.

EPA first determined that existing coal-fired plants could adopt equipment and practices to reduce emissions an average of 4.1%, lowering emission rates from 2,160 pounds per megawatt hour to 2,071. *See* U.S. Envt'l Prot. Agency, *CO2 Emission Performance Rate and Goal Computation Technical Support Document for CPP Final Rule* 12, Dkt. No. EPA-HQ-OAR-2013-0602-36850 (Aug. 2015). No adequately demonstrated equipment and practices, though, would reduce average emissions for natural gas plants. 80 Fed. Reg at 64,728. Dissatisfied with these findings, EPA fashioned a novel mandate in the form of an "adjusted CO_2 emission rate"—which it calculated by dividing the amount of emissions from the source by the amount of that source's generation *and* the amount of generation from EPA-preferred, zero-emitting sources that the disfavored plants could subsidize. *Id.* at 64,949. Thus, despite current technology putting average reductions to 2,071 pounds per megawatt hour in reach for coal-fired plants, EPA mandated an impossible-to-achieve standard of 1,305 pounds. 80 Fed. Reg. at 64,667; see also *id.* at 64,961 (setting 771 pounds limit for natural gas plants). This standard was even lower than EPA's requirements for *new* sources under Section 111(b), see 80 Fed. Reg. 64,510, 64,513 (Oct. 23, 205), which is unsurprising because it was not a traditional emission limit at all. Instead, the CPP established a credit system that required sources to subsidize "energy generated or saved with zero associated emissions" elsewhere. *Id.* at 64,949, 64,961.

The upshot is that most coal- and gas-fired plants would have been required to reduce operations and invest in alternate types of generation, or (most often) subsidize their competitors' or out-of-state companies' investments. Some plants would have been forced to close down. App. 174a. Projected implementation costs and increased utilities rates for consumers were staggering. App. 174a. And States would have been stripped of their statutory flexibility to adjust performance standards based on sources' individual characteristics, forced instead to facilitate reordering their electricity infrastructure. The CPP required States to impose EPA's sweeping subsidization mandate unless they adopted an equivalent state-level scheme or a mass-based emission allowance that EPA designed to achieve the same industry-transforming changes as the primary subsidy plan. 80 Fed. Reg. at 64,820-26.

4. Twenty-seven States and numerous other parties took issue with EPA's claim "to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," *Util. Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) ("*UARG*") (citation omitted), and challenged the CPP in the D.C. Circuit. 84 Fed. Reg. 32,520 (July 8, 2019). Petitioners in those actions urged the court to stay the CPP pending judicial review, but it refused. Order, *West Virginia* v. *EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016).

This Court was more receptive. The challengers applied to the Court for a stay pending the D.C. Circuit's (and potentially this Court's) review. Requirements for a stay include "a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari"; a "fair prospect that a majority of the Court will vote to reverse [a] judgment below"; and "a likelihood

that irreparable harm will result from the denial of a stay." *Hollingsworth* v. *Perry*, 558 U.S. 183, 190 (2010). On February 9, 2016, the Court took the unprecedented step of staying EPA's rule. *E.g.*, *West Virginia* v. *EPA*, 136 S.Ct. 1000 (2016) (No. 15A773).

5. Without waiting for a three-judge panel to decide the case, the D.C. Circuit *sua sponte* took it up *en banc* and heard oral argument in September 2016. After the January 2017 change in presidential administration, the court granted a request to hold the challenges in abeyance while EPA reconsidered the rule. App. 36a. The court ultimately dismissed the challenges before issuing a decision. App. 36a.

On July 8, 2019, following this Court's "not-so-subtle hint," App. 172a, EPA repealed and replaced the CPP. 84 Fed. Reg. at 32,522. EPA determined that the CPP "significantly exceeded" its authority under Section 111. *Id.* at 32,523. Section 111 is limited by its terms to systems of controls that can be applied successfully at individual sources, and the CPP unlawfully departed from that unambiguous constraint. *Id.* at 32,521, 32,526-27. EPA also recognized that clear-statement canons bolstered its view, and that the CPP would have run afoul of the Clean Air Act's cooperative federalism framework and significantly infringed areas of traditional state sovereignty. *Id.* at 32,529, 32,521. EPA found telling the "notable absence of a valid limiting principle" in the CPP's contrary approach, and concluded there was no basis to divine "[c]ongressional intent to endow the Agency with discretion of this breadth"—including power to regulate "fundamental sector[s] of the economy." *Id.* at 32,529.

EPA also adopted new Section 111(d) guidelines for existing coal-fired power plants. 84 Fed. Reg. at 32,532. This Affordable Clean Energy ("ACE") rule was built on

the same threshold determination that measures achievable only on a regional or grid-wide level cannot be a "system of emission reduction." App. 37a-42a.

6. A new group of States and interested parties challenged the CPP repeal and ACE rule. App. 43a-44a. Another group of States and other entities intervened in support of both actions—including Petitioners here and many of the original challengers in the CPP lawsuits. App. 172a.

On January 19, 2021, after copious briefing and roughly nine hours of remote oral argument, the D.C. Circuit issued a 2-1 decision vacating and remanding the CPP repeal and ACE rule. App. 1a-163a. Without even acknowledging the Court's stay, the majority rejected EPA's conclusion that no reasonable interpretation of Section 111(d) authorizes rules that go beyond using adequately demonstrated equipment and practices for limiting emissions at particular sources.

The majority relied heavily on the phrase "system of emission reduction," one part of Section 111(a)(1)'s definition of "standard of performance." App. 56a-58a. Even though standards of performance indisputably apply to individual sources, the majority concluded that EPA can rely on systems that apply to "the source category" as a whole, or even "emissions" in the abstract. App. 63a, 66a. Requiring States' electricity-generation fleets to shift to zero-emitting alternatives was thus among the statutorily permitted options.

Indeed, the majority's analysis allows even more expansive power than the CPP claimed. The majority insisted that EPA "tied its own hands" by restricting the systems it considered for the CPP to, for example, those "target[ing] supply-side activities" or that reduce

emissions directly instead of offsetting their effects. App. 91a n.9. It emphasized that "Congress imposed no limits" in Section 111 other than directives to consider costs, nonair health and environmental impacts, and energy requirements. App. 56a.

The majority did not, however, find clear and unmistakable delegation of this industry-changing power. It concluded instead that Section 111 does not implicate what it characterized as the "so-called 'major questions doctrine.'" App. 83a. Congress clearly delegated power over "what" and "whom" EPA may regulate (greenhouse gas pollution and power plants), and the majority deemed Section 111 to give sufficient clarity to "how," as well. App. 89a. It similarly rejected federalism concerns because "[i]nterstate air pollution is not an area of traditional state regulation," and EPA is otherwise authorized to mandate pollution-reduction measures with broad consequences for States' electricity-generation fleets. App. 102a-109a.

The majority also rejected some parties' challenges to the ACE rule, including an argument that EPA cannot regulate coal-fired power plants under Section 111 because that source category is already regulated under Section 112. App. 124a-146a.

7. By contrast, Judge Walker would have held that EPA "was required to repeal [CPP] and wrong to replace it" under Section 111. App. 165a (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part). He explained that Congress disabled EPA from regulating pollutants "emitted from a source category which is regulated under [Section 112]"—like coal-fired power plants. App. 181a (quoting 42 U.S.C. § 7411(d)).

Judge Walker was also highly skeptical that Congress delegated the enormous power the CPP and the majority claimed. App. 165a-181a. He looked first to Congress's failed attempt to enact comprehensive climate-change legislation in 2009 and President Obama's order for EPA to act instead. App. 168a. Then he catalogued the CPP's breathtaking consequences: It was self-consciously conceived as a "groundbreaking" rule for reshaping the power sector, aimed to reduce carbon emissions "equal to the annual emissions from more than 166 million cars," and would have exacted "almost unfathomable costs" to do so. App. 173a-174a (citation omitted).

There was therefore nothing "minor" about "one of the most consequential rules ever proposed by an administrative agency." App. 173a. How to address climate change and "who should pay" for solutions are matters "of vast economic and political significance." App. 177a (quoting *UARG*, 573 U.S. at 324). Judge Walker noted the Court has not (yet) fully resolved "the nature of major questions and limits of delegation," but he emphasized that the doctrine's basic premise is sure: "Either a statute clearly endorses a major rule, or there can be no major rule." App. 178a, 180a. And no party below made "a serious and sustained argument that § 111 includes a clear statement unambiguously authorizing" the CPP's approach. App. 165a.

Finally, Judge Walker explained that even if Congress "*allowed* generation shifting" under Section 111(d), it would have been an unconstitutional delegation because Congress did not "clearly *require* it." App. 178a. Congress must decide "what major rules make good sense" and cannot shirk that duty by passing off critical questions to "the impenetrable halls of an administrative agency." App. 179a-180a.

8. On February 22, 2021, the D.C. Circuit granted EPA's motion for a partial stay of issuance of the mandate with respect to the CPP vacatur, and issued a partial mandate concerning vacatur of ACE and certain implementing regulations only. Order, *Am. Lung Ass'n* v. *EPA*, No. 19-1140 (D.C. Cir. Feb. 22, 2021). This Petition followed.

REASONS FOR GRANTING THE PETITION

I. This Case Involves Compelling And Timely Questions Of Federal Law That The Court Should Resolve.

The Court has reviewed aspects of EPA's authority to address greenhouse gas emissions under the Clean Air Act twice before. *UARG*, 573 U.S. 302; *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). This case should be the third. In an "unprecedented intervention" into the previous iteration of this case concerning *these same issues*, the Court stayed the CPP even before the lower court had its say. App. 171a-172a. This extraordinary order signaled that the CPP's legal framework hinges on important issues of federal law that EPA then—and the court below now—got so wrong this Court was likely to grant review. Five years later EPA, the States, and the American people still lack resolution on these weighty issues. This case poses exceptionally important questions only the Court can resolve, and because further delay would carry serious and far-reaching costs, it should do so now.

A. This case presents unusually important questions about EPA's power to unilaterally remake significant sectors of the economy.

The CPP was "one of the most consequential rules ever proposed by an administrative agency." App. 173a. Even more expansively, the decision below gives EPA more policymaking power than ever before placed in an agency's hands. In rejecting Petitioners' (and EPA's below) position that Section 111(d) focuses on what individual stationary sources can accomplish using demonstrated technology, the majority concluded that one portion of one definition is the only restraint on EPA rulemaking. App. 56a. That novel and atextual reading sweeps broader than the agency itself tried to go five years ago in the CPP—giving EPA power to reorder the utility power sector and mandate sweeping changes to any industry. Indeed, the majority insisted that EPA "tied its own hands" in the CPP by setting limits on the scope of its powers that Congress never required. App. 91a n.9. And it rejected concerns that its reading affords no limiting principle: As long as EPA's purpose is pollution-reduction and it considers costs and nonair environmental and energy effects, even measures that fundamentally reshape the economy are all on the regulatory table. App. 56a. Questions surrounding new and almost limitless agency powers like these are as important as they come.

1. The consequences of the decision below are massive—for the electricity sector and the rest of the economy alike.

In the utility power context, the ruling threatens the existence of over 200 gigawatts of coal plants and over 500 gigawatts of natural gas plants, or roughly two-thirds of the nation's total electricity-generation capacity. U.S. Energy Information Administration, *Electric Power Annual 2019* tbl. 4.3 (Feb. 2021). Eliminating these power plants would, in turn, likely lead to shutting down coal mines and natural gas development that provide high-

paying jobs and significant revenues for States and local governments.

It is also highly unlikely the decision's ripple effects will be limited to power plants. There is every reason to expect EPA will exercise its judicially expanded powers aggressively: President Biden committed the country to reducing greenhouse gas emissions 50-52% from 2005 levels by 2030—just 8.5 years from now. See United States of America, *Nationally Determined Contribution* 1-2 (Apr. 22, 2021), *available at* https://www4.unfccc.int/sites/ndcstaging/PublishedDocuments/United%20States%20of%20America%20First/United%20States%20NDC%20April%2021%202021%20Final.pdf. This target is far greater than any the Obama Administration proposed, *id.*, and even the immense changes the CPP envisioned for the coal and natural gas sectors would not be enough to get there.

The decision below, however, creates near-boundless leeway to make up the difference: EPA need only heed the majority's reprimand and unlock its self-imposed handcuffs. Although this case is certainly about power, all sectors of the economy with buildings that emit greenhouse gases—that is, nearly all of them—are now in Section 111(d)'s sights.

Existing stationary sources account for two-thirds of the carbon emissions subject to President Biden's promised target. See U.S. Envt'l Prot. Agency, *Draft Inventory of U.S. Greenhouse Gas Emissions & Sinks: 1990-2019*, ES-7 (Feb. 2021). Over 2,000 large buildings such as "schools, churches, hospitals, hotels, and police stations" use fossil fuel combustion for heat. 73 Fed. Reg. 44,354, 44375 (July 30, 2008). Nearly every manufacturing plant in the United States would be covered as well. See Jeff Deason et al., *Electrification of Buildings and*

Industry in the United States 14 (Mar. 2018). So too the millions of homes and small businesses that use fossil fuels for heating air and water. Nat'l Renewable Energy Lab., *Electrification & Decarbonization* 7 (July 2017). Combined, these sectors emit over 1.4 billion tons of carbon dioxide emissions each year—almost as much as the utility power sector's 1.6 billion tons. See *Draft Inventory*, at 1-18 (0.8 billion tons industrial settings, 0.34 billion tons residential settings, and 0.25 billion tons commercial settings).

Future decarbonization targets also extend beyond the industries—and individual Americans—that use fossil fuels for energy. EPA has identified "key categories" for potential Section 111(d) regulation like "fugitive" emissions from oil and gas development, as well as certain aspects of iron, steel, cement, and petrochemical production. *Draft Inventory*, at 1-18 to 1-20.

Further, *how* EPA can now regulate makes the huge number of potentially regulated entities more troubling. The majority interpreted "system of emission reduction" to encompass any means—Section 111 contains "no limits" as long as EPA thinks about "costs, nonair health and environmental impacts, and energy requirements." App. 56a (citation omitted). Thus the agency's next rule might not stop with "supply-side activities." App. 91a n.9 (quoting 80 Fed. Reg. at 64,776, 64,778-79). There is now no obstacle to calculating emission guidelines that presume reducing electricity availability for customers in States that depend on coal and natural gas—just as the CPP's guidelines depended on generation-shifting and subsidization on the supply side. App. 56a.

Similarly, although the majority concluded the interconnected nature of the nation's power grids limited the CPP's intrusive effects, App. 99a, it found nothing in

the statute restricting measures to those within a source's particular industry. If EPA can regulate from the perspective of "emissions" as a whole, App. 66a, not only is "planting trees" a possible "system of emission reduction," App. 91a n.9, but nothing would stop EPA from requiring regulated parties to subsidize carbon offsets in *any* industry with a system it deems "best."

The majority's approach would therefore mean EPA could commandeer almost any greenhouse-gas emitting building, factory, or house through almost any mechanism. If this is not transformative power, it is only because (so far) EPA has stayed its own hand. The decision below pushes it to regulate to Section 111's "true" breadth.

2. The incredible reach of the majority's decision also makes this the right case to resolve whether and how Congress can ever delegate issues of this magnitude. The Court is clear that agencies may make "decision[s] of vast economic and political significance" only when clearly authorized by Congress. App. 177a-178a (citing *UARG*, 573 U.S. at 324). But there is considerable uncertainty in the lower courts about when a decision reaches that threshold.

The division in the panel below illustrates the confusion. The majority began with skepticism that the major rules doctrine applies at all. App. 83a (describing "so-called 'major questions doctrine'"). It then embraced a piecemeal analysis, considering whether "each critical element" of the CPP has been "recognized by Congress and judicial precedent." App. 84a. And although the majority acknowledged the CPP's economy-shifting power, it found no need for a clear statement because the statute requires EPA to consider some potentially limiting factors. App. 94a-96a.

Judge Walker emphasized the CPP's practical effects, which made it "arguably one of the most consequential rules ever proposed by an administrative agency." App. 173a-174a. He cautioned that approaching the analysis too abstractly risks erasing the rule: If courts "frame a question broadly enough, Congress will have always answered it." App. 178a. As a result, he viewed EPA's purported power holistically, taking seriously its costs and economic and political significance. App. 173a.

This intra-panel disagreement reflects the D.C. Circuit's uneven approach to major-questions cases more generally. In 2014, for example, the court acknowledged that broadband regulation involved "decisions of great 'economic and political significance,'" quoting one of the seminal major questions cases. *Verizon* v. *FCC*, 740 F.3d 623, 639-40 (D.C. Cir. 2014) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000)). Yet it did not require a clear statement pursuant to that case's direction because, it reasoned, it was enough for Congress to provide "limiting principle[s]" on the agency's power. *Id.* Three years later when faced with a near-identical question, however, the court took no position on "the precise contours" or even the "existence" of the major questions doctrine, yet held the statute contained a sufficiently "clear" statement after all. *United States Telecom Ass'n* v. *FCC*, 855 F.3d 381, 384 (D.C. Cir. 2017) (per curiam).

There are good grounds to disagree how the doctrine applies. Judge Walker noted that the Court's guidance has been "neither sweeping nor precise," and expressed confidence that the Court "will further illuminate the nature of major questions and the limits of delegation." App. 178a, 180a. This language echoes Fourth Circuit Judge Wynn's lament that the doctrine is too "difficult" to

apply in part because "no judicially accepted standard appears to have emerged for determining when a question is sufficiently 'major.'" *Int'l Refugee Assistance Project* v. *Trump*, 883 F.3d 233, 328 n.3 (4th Cir. 2018), *judgment vacated*, 138 S.Ct. 2710 (2018) (Wynn, J., concurring; citation omitted). The Fifth Circuit, too, recognized confusion over "the precise status of a 'major questions'" doctrine, yet ultimately invalidated a rule based on separation-of-powers concerns from implicitly delegating issues of unusual importance. *Chamber of Com. of USA* v. *U.S. Dep't of Labor*, 885 F.3d 360, 387-88 (5th Cir. 2018). The Ninth Circuit also recognized an exception to deference principles where "an agency's interpretation involves an issue of deep economic and political significance"—but in a case involving an executive order, where by definition non-delegation concerns are not in play. *City & Cty. of San Francisco* v. *Trump*, 897 F.3d 1223, 1242 (9th Cir. 2018) (citation omitted).

This case is thus far from the only context where it matters whether the major-questions doctrine exists, what principles animate it, and how clearly Congress must speak to satisfy it. The Court should resolve these important questions, too.

B. The important federal issues in this case need resolution now.

EPA unveiled significant Section 111(d) regulation under the last two presidential administrations. It plans to do the same under President Biden's leadership. See Resps.' Mot. for Partial Stay of Issuance of the Mandate, *Am. Lung Ass'n* v. *EPA*, No. 19-1140 (D.C. Cir. Feb. 12, 2021) ("Resp'ts' Mot."). Yet without the Court's review, EPA and all affected parties will be in an even worse position this third time around: The D.C. Circuit sent EPA

on a "multiyear voyage of discovery" to craft systems of emission reduction "without regard for the thresholds prescribed by Congress." *UARG*, 573 U.S. at 328. If EPA's vessel runs aground—or *when* it does, considering the court below sanctioned power more expansive than in the rule this Court stayed—another several years and countless resources will be lost with it. Granting review is critical to avoid this waste, as well as other serious consequences that could not be undone if the next years of market decisions are shaped by the specter of EPA's unlawful mandate.

1. Rulemaking of the CPP and ACE rules' magnitude takes time, as do the accompanying legal challenges from the many parties on all sides of the issue. EPA proposed the CPP in June 2014 and finalized it sixteen months later in October 2015. By January 2017 when a new president directed EPA to change course, the D.C. Circuit had not yet issued a decision in the CPP challenges. The regulatory cycle for the CPP repeal was not much faster: EPA proposed the new rule in October 2017 and finalized it in July 2019. The D.C. Circuit rejected that rule in the decision below over a year-and-a-half later, one day before President Biden's inauguration began the cycle yet again.

Looking ahead to another round of rulemaking and litigation, EPA will begin in the doubly unenviable position of being bound by the majority's interpretation while not knowing whether it accurately reflects the limits Congress set. This is the Court's first opportunity to decide these issues on the merits, and there is no guarantee when the next will arise if the Court sits this round out. Depending on timing, the anticipated third rule in as many administrations might evade review just like the first. It may thus be 2025 (or later) before the Court could next provide much-needed clarity. Yet taking up the

issue now would put a definitive resolution in reach no later than June 2022—allowing EPA to propose a rule on a similar timeframe as the CPP rulemaking, but this time with certainty in its legal footing.

2. The costs of waiting, however, are too high. Dozens and dozens of governmental and private parties put enormous resources into the last two notice-and-comment processes and following years of litigation. EPA also committed significant energy into promulgating and defending its rules. A third cycle will be similarly time- and cost-intensive. More years of resources taken from the critical areas of energy security and climate-change policy could thus be erased if the Court declines to clarify EPA's legal framework from the outset.

Given the stakes it is important to get these questions right. But it is also imperative simply to get an answer. Whatever else can be said for the past rules, nine hours of oral argument and over "a quarter of a million words" in briefing show that perhaps the only point on which all sides agree is that these issues are vital. App. 172a.

The majority emphasized the importance of finding solutions to climate change, App. 19a—which makes it essential to know now, not another four or more years in, which options EPA can use. If the Court ultimately holds that the D.C. Circuit misread the Clean Air Act, better to shift public debate as soon as possible to the entity that *can* and *should* act: Congress. There are many pathways to address climate change, often diametrically opposed, and the choices have significant and multifaceted consequences. Economy-changing issues like these require bicameral legislative solutions, not an agency going it alone.

And if Section 111 does not grant EPA the wholesale power the majority envisioned, then States like Petitioners and myriad regulated parties will suffer unjustified and weighty consequences along the way. EPA does not intend merely to shore up the CPP, but is poised to undertake new rulemaking under the D.C. Circuit's flawed directive. Resp'ts' Mot. 4. Presumably it will take to heart the court's rebuke against extra-statutory limits and flex the unbridled power the majority assured it Congress delegated in Section 111. President Biden put his 2030 emission-limit commitment on the world stage, after all, and given the nationwide changes needed to meet that aggressive target, the majority's approach to Section 111 makes it an especially powerful tool.

States like Petitioners have much to lose under the majority's view. The policies we pursue to address climate change and how costs are allocated are serious issues, and the States' contributions will vary significantly. Some States, for example, are blessed with abundant fossil fuel resources, while others have extensive industrial operations like steel mills and cement plants. States like these will almost certainly bear a disproportionate share of the massive costs that restructuring mandates would require. They should not face those consequences based on the decisions of an unelected and unaccountable agency.

Critically, the decision below also casts a wide shadow apart from any specific regulations EPA will promulgate under it. In terms of setting stable, reliable energy policy, it is bad enough that States and regulated industries have been bounced back-and-forth between the past two administrations' priorities. But the fact that the majority's decision is the *only* statement on EPA's

authority makes the short-term situation worse—with an interpretation biased toward executive unilateralism, the States are left under a sword of Damocles.

Infrastructure cannot change on a dime; States and market participants must plan and make resource commitments years in advance. *Pac. Gas & Elec. Co.* v. *State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201-02 (1983). This means that without review the States (and other stakeholders) would have little choice but to work with an agency empowered to exercise unprecedented authority. The States and others will likely be boxed into concessions and priorities against their constituents' interests, and the effects of those decisions will have ripple effects throughout the power sector and beyond. After the Court held a prior EPA rule unlawful in *Michigan* v. *EPA*, 135 S.Ct 2699 (2015), for example, the agency downplayed the decision's significance because the majority of regulated entities were "already in compliance or well on their way to compliance" with the challenged rule. U.S Envt'l Prot. Agency, *In Perspective: The Supreme Court's Mercury and Air Toxics Rule Decision* (June 30, 2015), https://blog.epa.gov/2015/06/30/in-perspective-the-supreme-courts-mercury-and-air-toxics-rule-decision/. If market forces could be shaped so forcefully by an erroneous view of EPA's power while litigation remained pending, delaying review will likely lead to even more significant and irreparable changes.

At bottom, this case will determine the overall balance of power—legislative versus executive, and federal verses state—for one of the most significant public policy issues of our day. Questions "particularly high in the scale of our national interest" are "a uniquely compelling justification for prompt judicial resolution of [a] controversy."

McCulloch v. *Sociedad Nacional*, 372 U.S. 10, 17 (1963). It has already been six years since EPA announced its vast and newly discovered powers under Section 111(d). The Court should grant the Petition to ensure it does not take a full decade—or longer—before all affected parties know whether that "discovery" was real.

3. Finally, the nature of the decision below gives even more reason to take up these important matters of delegation, agency rulemaking, and state sovereignty now.

First, the question presented has been thoroughly developed over five years of litigation. The D.C. Circuit heard the first set of challenges to the CPP in 2016, and many of the same entities were parties to the consolidated cases below challenging its repeal. Indeed, over 50 parties and *amici curiae* participated below, and briefing "exceeded a quarter of a million words." App. 172a. Questions involving this type of rulemaking do not percolate through multiple circuits; nevertheless, there is little question these issues have been fully developed and reflect the benefit of thoughtful participation from stakeholders on all sides.

Second, the case presents pure issues of law. EPA repealed the CPP because of a simple premise: Section 111 does not allow EPA to choose a system of emission reduction based on offsite compliance measures that individual stationary sources may not be able to achieve. App. 37a. This meant the D.C. Circuit answered statutory and constitutional questions only. It did not view the question of what Section 111 allows through the lens of agency discretion, see App. 51a, and its analysis did not turn on the specific record before EPA when it repealed the CPP—nor, for that matter, the record when EPA *adopted* it four years prior. As a result, granting review

will allow the Court to rule on important legal issues that are not fact-bound and that will necessarily control how EPA exercises its statutory authority in all future Section 111 proceedings. The States, the many other interested parties and regulated entities, and EPA itself need answers to these threshold questions. This is the right time and the right case to give them.

II. The Decision Below Is Wrong.

The Court should also grant the Petition because the D.C. Circuit got the important and time-sensitive issues in this case wrong. In dissent, Judge Walker characterized the Court's 2016 stay as a "not-so-subtle hint," App. 172a: EPA should have known then it was building its regulatory house on sand. Yet when asked whether EPA was right to repeal that same rule, the majority did not even mention the stay, and instead turned EPA's house into a fortress. The Court should grant review to hold that EPA was right, the second time, to build elsewhere.

A. Congress did not clearly authorize EPA to exercise the expansive powers the court below affirmed.

The majority gave short shrift to the clear-statement canons. It referred to the Court's "so-called" major rules doctrine with a lineage of only a "few" cases. App. 83a. It concluded the federalism canon "lends *no* support" to the claim that EPA cannot functionally require States to remake their electricity-generation fleets under the guise of pollution regulation. App. 103a (emphasis added). And—not surprisingly given this cavalier approach—it did not attempt to show that Congress spoke with requisite clarity in Section 111. While Judge Walker emphasized that none of the many parties challenging the

CPP repeal offered "a serious and sustained argument" that the statute includes clear, unambiguous delegation, App. 165a, the majority found it sufficient that Section 111 does not unambiguously *forbid* its reading. Because the clear statement canons require more, the majority's decision must fall if even one applies. Both do here.

If an agency can ever wield economy-transforming power to decide major questions and significantly alter the balance of power between the States and federal government, Congress must delegate that authority with unmissable clarity. This is because two constitutional presumptions militate against *implicit* delegations of such weighty matters: First, courts presume that "Congress intends to make major policy decisions itself" and does not lightly assign "major lawmaking authority . . . to the Executive Branch." *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from denial of rehearing en banc). And likewise, courts presume Congress does not intend to make "a dramatic departure" from the Constitution's state-federal balance "[a]bsent a clear statement of that purpose." *Bond* v. *United States*, 572 U.S. 844, 866 (2014).

In the "major rules" context, the first presumption translates to the canon that Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *UARG*, 573 U.S. at 324 (citation omitted). Several types of decisions carry the "economic and political" heft of a major rule. Most on point, in another case involving regulation of carbon dioxide emissions the Court demanded "clear[]" congressional authorization before affirming EPA's "claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Id.* Exercising established authority in novel

and unexpectedly far-reaching ways is another example: Although the Attorney General routinely denies or revokes individual doctors' authorizations to distribute controlled substances, 21 U.S.C. §§ 823(f), 824(a)(4), "declar[ing] an entire class of activity outside the course of professional practice" for *all* doctors was a "major" rule. *Gonzales* v. *Oregon*, 546 U.S. 243, 262, 267 (2006) (citation omitted). So too for a rule expanding eligibility for health insurance tax credits that "involv[ed] billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people." *King* v. *Burwell*, 576 U.S. 473, 485 (2015).

The second presumption requires similarly compelling evidence of delegation. In the federalism context, Congress must "enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S.Ct. 1837, 1849-50 (2020) (citation omitted). In other words, a statute may not be read to delegate power in areas of traditional state sovereignty unless Congress made that intent "unmistakably clear in the language of the statute." *Will* v. *Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (citation omitted).

The power EPA claimed for itself in the CPP—much more the wildly expansive authority the majority blessed it with below—triggers both of these canons.

First, if the decision below does not involve a "major question," it is difficult to imagine what would. Although Congress undoubtedly gave EPA power to "make our air cleaner" by requiring "at least some carbon reduction," App. 178a, the majority distorted that grant into a license for industry-transforming mandates using essentially *any* means. The majority downplayed the magnitude of the CPP's subsidization mandate. See 80 Fed. Reg. at 64,949.

The CPP was deliberately designed to be "groundbreaking" and economy changing. App. 173a. It started from the premise that "lives [were] at stake" and was intended to mark "the moment when the rise of the oceans began to slow and our planet began to heal"—not minor issues by any measure. App. 175a, 177a (citation omitted). Nor is who should pay for EPA's vision: The costs of implementing the CPP were projected at hundreds of billions of dollars and could have led to immense spikes in consumer electricity rates. App. 174a. The major rule in *Burwell*, by contrast, involved "only" billions. 576 U.S. at 486.

The majority was also wrong that decisions about how much and what kinds of energy can be generated—along with all the attendant economic, infrastructure, and reliability concerns—are of a piece with EPA's ordinary "scientific and technological" judgments. App. 91a. It likewise failed to grapple with the extraordinary implications if EPA accepts its call to go beyond the CPP: "Major" power is the ability to dictate how any industrial or commercial sector operates, or to decide whether heating systems for millions of homes and thousands of hospitals and factories must be retrofitted. Claiming "broad and unusual authority" beyond the agency's expertise should have triggered a searching look for clear authorizing language, *Gonzales*, 546 U.S. at 267—and all the more where before the CPP neither EPA nor anyone else thought that "long-extant" Section 111(d) permitted anything like it. *UARG*, 573 U.S. at 324.

Second, the majority's reading of Section 111 has striking implications for state sovereignty. Energy generation and utilities regulation are among "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). These "traditional responsibilit[ies]" include "determining questions of need, reliability, cost and other related state concerns"—assessing the State's energy-generation capacity needs as well as what types of facilities to license. *Pac. Gas*, 461 U.S. at 205, 212; see also *Hughes* v. *Talen Energy Mktg., LLC*, 136 S.Ct. 1288, 1299 (2016) (describing States' wide discretion when modifying existing or exploring new energy systems).

The majority brushed past the CPP's intrusion into this sphere on the theory that States were "free to choose the compliance measures" they preferred, as long as they satisfied EPA's emission guideline. App. 107a. Yet this ephemeral protection ignores how the CPP would have operated: Though not technically requiring generation shifting, EPA set emission standards that would have "been unachievable or too costly to meet" otherwise. App. 171a; see also 80 Fed. Reg. at 64,822. The CPP was thus a functional mandate for coal and natural gas States to remake their utility fleets according to one top-down, federal design. And the decision below is an invitation for EPA to make its next standards stricter still, leaving even fewer options for States with the bad luck to depend on sources of energy the agency disfavors.

B. Section 111's text and context foreclose the majority's approach.

The fact that Congress did not clearly authorize the majority's near-boundless view of agency power should have ended the analysis. But in any event, no fair construction of Section 111 supports the sweeping holding below, either. The majority's "no limits" view rests on an

unreasonable reading of the phrase "system of emission reduction"—both by itself and in context with the rest of Section 111.

Reading Section 111(d)'s precise terms in context makes its meaning plain: EPA must establish a process through which States set "standards of performance *for* any [covered] *existing source*." 42 U.S.C. § 7411(d)(1) (emphases added). A "standard of *performance*," in turn, must "reflect[] the degree of emission limitation *achievable* through the application of the best system of emission reduction." *Id.* § 7411(a)(1) (emphases added). The "system" EPA selects is thus one aspect of one definition; the key terms surrounding it make clear that it refers to measures a particular source can successfully adopt to reduce its own emissions. A "stationary source," for instance, is defined in physical terms and at the individual—not industry-wide—level. *Id.* § 7411(a)(3). And a standard of "performance" presumes action; a system that requires curtailing or stopping operations altogether requires the opposite.

The majority erred by letting "system" do the heavy lifting without accounting for how that word operates within the definition of "standard of performance" and the broader statute. Understanding that performance standards are source-specific targets makes it difficult to reconcile the majority's view that a system of emission reduction—an essential aspect of developing those standards—could be so far divorced from anything a particular source could achieve.

The majority's analysis also fails on its own terms. The majority determined that "best system of emission reduction" encompasses any "means" or "measures" to reduce emissions when viewed from a nationwide or grid-wide lens, instead of equipment or practices a particular

source can adopt to reduce its own emissions. App. 54a-58a. This interpretation turned on a definition of "system" as a "complex unity formed of many often diverse parts subject to a common plan or serving a complex purpose." App. 56a-57a (quoting *System*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 2322 (2d ed. 1968)). Yet the CPP was no "unity" of "parts," but a singular mandate requiring reduced output, subsidization, or both. App. 56a. Tying "system" to what a particular source can achieve, by contrast, better reflects this dictionary definition: Technology and practices individual sources can implement *do* constitute a set of physical and operational parts aimed at a particular end.

The cracks get wider when reading "best system of emission reduction" in its statutory context. *E.g.*, *UARG*, 573 U.S. at 321 (statutory construction accounts for a term's "specific context" and "the broader context of the statute as a whole" (citation omitted)). For example, EPA must select an "adequately demonstrated" system. 42 U.S.C. § 7411(a)(1). This term has readily apparent meaning for equipment and practices—the difference between research and development and successful implementation. Not so for the many "measures" EPA could adopt under the lower court's interpretation: There is no need to "demonstrate" that emissions will go down if an emission-emitting source reduces operations or closes down. Similarly, requiring one source to subsidize another is a policy choice about preferred energy generation. It is unclear what research and development would "demonstrate" for a mandate like that.

Further, CPP's focus on the "degree of emission limitation achievable" in the aggregate would have left States lacking EPA's preferred energy resources little or

no leeway to craft individual standards for each source in their fleets—much less to take into account source-specific factors like "remaining useful life" while doing so. 42 U.S.C. § 7411(d)(1). In many cases, it would have been impossible for a particular existing source in those States to "achieve" the stringent standard EPA set. *Cf. Essex Chem. Corp.*, 486 F.2d at 434 (explaining that achievability means more than "purely theoretical or experimental"). The idea of a standard of performance *that source* could meet would thus have become meaningless under the CPP, and even more now under the majority's any "means" or "measures" test.

C. The majority's interpretation of Section 111 violates the separation of powers.

Finally, if the majority is right that Congress placed functionally "no limits" on EPA's authority, App. 56a, then Section 111 would raise serious non-delegation concerns.

It is a "principle universally recognized as vital to the integrity and maintenance" of our constitutional system that Congress "cannot delegate legislative power." *Marshall Field & Co.* v. *Clark*, 143 U.S. 649, 692 (1982); see also *Gundy* v. *United States*, 139 S.Ct. 2116, 2133 (2019) (Gorsuch, J., dissenting). Yet because "Congress simply cannot do its job absent an ability to delegate power under broad general directives," the Constitution permits agency delegation so long as Congress provides "specific restrictions" that "meaningfully constrain[]" the agency's scope of authority. *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989); *Touby* v. *United States*, 500 U.S. 160, 166-67 (1991).

This doctrine means Congress cannot "confer[] authority to regulate the entire economy on the basis of" an overly vague standard, just as it cannot provide the

agency "literally no guidance." *Whitman* v. *Am. Trucking Ass'ns*, 531 U.S. 457, 474 (2001) (citation omitted). Instead, the people's representatives must make "fundamental policy decisions"—that is, "the hard choices," as opposed to "filling in of the blanks." *Indus. Union Dep't, AFL-CIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980) (Rehnquist, J., concurring in the judgment). As Judge Walker put it, it is Congress's job to decide "what major rules make good sense." App. 179a.

More specifically, the Court demands "substantial" congressional guidance when it comes to setting "air standards that affect the entire national economy." *Whitman*, 531 US at 475; see also *Michigan*, 135 S.Ct. at 2713 (Thomas, J., concurring) (noting "potentially unconstitutional delegation[]" if EPA possessed unfettered discretion over "which policy goals [it] wishes to pursue"). True, EPA may fill in the gaps with some "judgments of degree." *Whitman*, 531 U.S. at 475. But Congress cannot ask EPA to decide *for itself* "the criteria against which to measure" its decisions. *Gundy*, 139 S.Ct. at 2141 (Gorsuch, J., dissenting).

Properly understood, Section 111 passes muster: It requires EPA to make technical and scientific judgments about source-level systems of emission reductions. The majority, however, read Section 111 to "allow[]" but not "require" EPA to go much further—mandating wholesale restructuring of the energy sector. App. 178a. After all, the CPP was not merely a standard premised on the degree of reductions generation-shifting could yield; by requiring States to set rate-based standards to subsidize alternate generation or a mass-based standard tailored to accomplish the same "kinds of generation shifts," it made generation-shifting itself the goal. 80 Fed. Reg. 64,949 at (40 C.F.R. § 60.5790(c)(1)); *id.* at 64,823.

The decision below would thus allow EPA to decide what policy goals to pursue when structuring the electricity grid—as well as which other sectors to decarbonize, how much, and how fast. That type of power looks suspiciously like Congress shirked the fundamental questions and failed to "meaningfully constrain[]" EPA, while at the same time empowering EPA to assume Congress's rightful role. *Touby*, 500 U.S. at 167. Even if Congress had enacted such a statute, this "sweeping delegation of legislative power" almost certainly could not stand. *Indus. Union*, 448 U.S. at 646 (Stevens, J., controlling op.).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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