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

IN THE

Supreme Court of the United States

WEST VIRGINIA, ET AL.,
Petitioners,
v.

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

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

BRIEF OF RESPONDENT AMERICA'S POWER IN SUPPORT OF PETITIONERS

F. WILLIAM BROWNELL
ERICA N. PETERSON
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW,
Suite 900
Washington, DC 20037
(202) 955-1500

ELBERT LIN
Counsel of Record
HUNTON ANDREWS KURTH LLP
951 East Byrd Street,
East Tower
Richmond, VA 23219
elin@HuntonAK.com
(804) 788-8200

Counsel for Respondent America's Power

December 13, 2021

Additional Captions Listed on Inside Cover

THE NORTH AMERICAN COAL CORPORATION
PETITIONER,
V.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
RESPONDENTS.

WESTMORELAND MINING HOLDINGS, LLC,
PETITIONER,
V.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.
RESPONDENTS.

STATE OF NORTH DAKOTA,
PETITIONER,
V.
ENVIRONMENTAL PROTECTION AGENCY, ET AL.
RESPONDENTS.

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 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.

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

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

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

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

Respondents in 20-1530, 20-1531, 20-1778, 20-1780 who were petitioners below and filed briefs in opposition to certiorari are Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Sacramento Municipal Utility District, American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental

Defense Fund, Environmental Law & Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, the Sierra Club, Advanced Energy Economy, American Clean Power Association (successor of the American Wind Energy Association), Solar Energy Industries Association, State of New York, State of California, State of Colorado, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, People of the State of Michigan, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, State of Wisconsin, District of Columbia, City of Boulder (CO), City of Chicago, City and County of Denver, City of Los Angeles, City of New York, City of Philadelphia, and the City of South Miami (FL).

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

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

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

In 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. 19-1185: Biogenic CO2 Coalition.

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

CORPORATE DISCLOSURE STATEMENT

Respondent America's Power is a trade association comprised of companies involved in the production of electricity from coal. It has no parent corporation, and no publicly held company owns a 10 percent or greater interest in America's Power.

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INTRODUCTION

The major questions doctrine is an important canon of statutory construction that protects the separation of powers when an agency asserts expansive authority based on statutory ambiguity. Where statutes include ambiguity, judicial deference to an agency's interpretation raises separation of powers concerns. This Court's major questions doctrine addresses these concerns in part by recognizing that Congress must speak clearly—and not through ambiguity—if it wishes to authorize an agency to exercise enormous and transformative regulatory power over a significant portion of the economy.

It is difficult to imagine a better illustration of the need for the major questions doctrine than this case. In 2015, the EPA claimed to have discovered in a scarcely used, narrowly tailored provision of the Clean Air Act (CAA) breathtaking power to reorganize the energy generation sector. The Clean Power Plan (CPP) used CAA section 111(d), 42 U.S.C. § 7411(d), to set greenhouse gas emission standards for existing power plants that were unachievable through controls at any individual source. Under the CPP, owners and operators of regulated sources would be required to reduce operations and shift generation to lower emitting generators, or would be required to shut down if that alternative generation was not available. The CPP never went into effect, however, because in early 2016, this Court stayed the rule pending litigation brought by a broad coalition of states, trade

and labor associations, and regulated entities. Then in 2019, EPA repealed the CPP, recognizing that the regulation exceeded the agency's statutory authority because section 111(d) is limited to systems of controls that can be applied at individual sources. Among other reasons, EPA invoked the major questions doctrine.

This litigation, in which America's Power intervened in support of EPA alongside Petitioners here, followed. This case is about whether EPA correctly concluded that it was required to repeal the CPP, and to replace it with a rule premised on controls that could be applied at individual sources (the "Affordable Clean Energy" rule).

There are many reasons supporting EPA's conclusion that it lacked statutory power to adopt the generation shifting measures in CPP, but this brief focuses on only one: the major questions doctrine. As Petitioners explain, the plain-text and context of section 111(d) clearly provide that the CPP exceeded EPA's statutory authority. America's Power does not repeat those arguments here. Instead, this brief supplements Petitioners' discussion of EPA's invocation of the major questions doctrine—*i.e.*, that the interpretation of section 111(d) on which the CPP was based would bring about an enormous and transformative expansion of EPA's regulatory authority without clear congressional authorization. As discussed below, the authority claimed by EPA in the CPP falls squarely in the domain of the major questions doctrine.

SUMMARY OF ARGUMENT

As a supplement to Petitioners' arguments on the major questions doctrine, this brief proceeds in three parts. First, it explains the important function played by the major questions doctrine in protecting the separation of powers in certain cases of statutory ambiguity. Second, it explains that the doctrine's purpose has informed, and should continue to inform, how this Court applies it. And third, it explains how the major questions doctrine clearly applies here and supports EPA's conclusion that the agency was required to repeal the CPP.

I. The major questions doctrine is a canon of statutory interpretation that prevents significant expansion of executive branch authority based solely on statutory ambiguity. Deference to an agency's reading of an ambiguous statute raises two potential separation of powers concerns: abdication to the executive branch of the judiciary's power to say what the law is and the unauthorized transfer of legislative authority to the executive branch. The major questions doctrine addresses those concerns in part by requiring courts to find a clear statement from Congress where an agency claims extraordinary and transformative powers. The doctrine thus operates as a vital check on the executive branch and also avoids unnecessary resort to the non-delegation doctrine by reading narrowly a statute that would otherwise implicate non-delegation concerns.

II. When determining whether the major questions doctrine applies, this Court has taken a flexible approach that reflects the important constitutional separation of powers purpose the doctrine serves. It has looked to both whether a particular rule is "major" and whether the agency has more generally asserted transformative statutory authority. Either has been sufficient to trigger the major questions doctrine. This Court has also applied the major questions doctrine at all steps of the *Chevron* analysis. No matter what step of the *Chevron* analysis an agency might invoke in defense of a rule, the Court has undertaken the same task: it has looked to the statute itself to determine whether Congress clearly grants the authority the agency has claimed. If Congress did not do so, the agency cannot use ambiguity to justify its action.

III.A.1. The CPP satisfies both tests this Court has employed to determine whether the major questions doctrine applies. In support of CPP, EPA interpreted section 111(d) to authorize standards that compel massive reductions in existing generation based on projections that alternative forms of generation will replace that existing generation. This is exactly the type of unprecedented authority that constitutes a major question. EPA's reading not only transforms section 111 from how it has long been understood but also expands EPA's authority to include remaking the energy sector. Indeed, under its newfound authority, EPA could restructure virtually any industry to achieve emission reductions.

2. The CPP also fits within the types of cases where this Court has found that the vast economic and political significance of the particular rule being reviewed triggers the major questions doctrine. Estimates from industry and EPA show that the CPP has significant economic impact. The rule is also clearly politically significant for many reasons, including that it seeks to address an issue that Congress has repeatedly considered but declined to take on.

B. Finally, EPA was correct in concluding that the major questions doctrine provided independent confirmation that the CPP exceeded the agency's authority. As Petitioners explain, the plain-text and context of section 111(d) alone make this apparent. But EPA was also right to consider the major questions doctrine. Even though the agency had found the statute unambiguous at *Chevron* step one, the agency correctly recognized that the major questions doctrine is a canon of statutory construction that can be and is applied at any step of *Chevron* to determine whether the agency's interpretation is contrary to law. It applies here and further confirms that EPA was required to repeal the CPP.

ARGUMENT

I. The major questions doctrine protects against expansions of executive branch authority through ambiguous language.

The major questions doctrine prohibits agencies from exercising vast regulatory authority based solely on statutory silence or ambiguity. It provides that when an agency seeks to exercise major regulatory authority, the agency must identify a clear statement from Congress granting such authority. Put another way, the doctrine bars judicial deference to agency interpretation of ambiguous statutory language in certain circumstances.

The doctrine thus plays a critical role in protecting the separation of powers. As explained below, deferring to agency views of statutory ambiguity raises at least two separation of powers concerns. Indeed, that is why *Chevron* has come under recent criticism by several members of this Court. The major questions doctrine avoids these concerns in cases where an agency claims extraordinary and expansive power over a significant portion of the economy.

A. Deferring to agency views of ambiguous statutory language raises separation of powers concerns.

Deference to an agency's understanding of ambiguous statutes raises two potential separation of powers concerns. *First*, yielding to an agency's views

may abdicate to the executive branch the judiciary's constitutional duty to interpret statutes. "Those who ratified the Constitution knew that legal texts would often contain ambiguities." *Perez* v. *Mortg. Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring). And "[t]he judicial power was understood to include the power to resolve these ambiguities." *Ibid.*; The Federalist No. 78, at 467 (Alexander Hamilton) (Clinton Rossiter ed., 1961) ("[t]he interpretation of the laws is the proper and peculiar province of the courts."). Deference to an agency, however, precludes judges from exercising independent judgment on the best reading of ambiguous statutory language in favor of the agency's preferred reading. *Michigan* v. *EPA*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring).

Second, deference to an agency's interpretation of an ambiguous statutory term invites an unauthorized transfer of legislative authority to the executive branch. The Constitution provides that "*[a]ll* legislative Powers herein granted shall be vested in a Congress of the United States." U.S. Const., art. I, § 1 (emphasis added). This Court has thus long insisted that Congress generally cannot delegate its legislative power, while recognizing that Congress can obtain the assistance of executive agencies by conferring on them authority to implement and enforce the laws. *Gundy* v. *United States*, 139 S. Ct. 2116, 2123 (2019) (citing *Wayman* v. *Southard*, 23 U.S. (10 Wheat.) 1, 42–43 (1825)). Yielding to an agency's understanding of ambiguous statutory language removes an independent judicial check on whether the line has

been crossed from executive branch assistance to lawmaking.

This Court's *Chevron* doctrine is premised on the notion that agencies may be entrusted to sort out statutory ambiguities because such ambiguities merely reflect Congress's enlistment of executive branch assistance. This Court explained in *Chevron* that it understood statutory ambiguities as policy "gap[s] left, implicitly or explicitly, by Congress" for the agency to fill. *Chevron, U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 (1984). Critically, however, a court must first review the statute to determine whether such a gap exists and the contours of that gap. That prevents an agency from being the arbiter of *both* the scope of its authority and how it exercises that authority, as it would violate the separation of powers for an agency to define the scope of its own delegated authority. *Michigan*, 576 U.S. at 761–62 (Thomas, J., concurring).

Put simply, the Court's precedents hold that "an agency can fill in statutory gaps" where courts find that "'statutory circumstances' indicate that Congress meant to grant it such powers." *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting) (quoting *United States* v. *Mead Corp.*, 533 U.S. 218, 229 (2001)). Once the judiciary has resolved any question regarding the scope of a congressional delegation, an agency may implement Congress's directive based on the relevant factors within the scope of that delegation. *Motor Vehicle Mfrs. Ass'n of the U.S., Inc.* v. *State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42–43 (1983). If

implementing that congressional directive includes giving meaning to terms in the statute that are susceptible of multiple interpretations (*i.e.*, that are ambiguous), the agency's implementation of that congressional directive may include adopting an interpretation that is "reasonable" (*i.e.*, not "arbitrary and capricious" or "an abuse of discretion") and within the scope of the delegation determined by the judiciary. *Chevron*, 467 U.S. at 844.

But as several members of this Court have noted, *Chevron* raises serious separation of powers questions even as so limited. Among them is the concern that *Chevron*'s core premises are both wrong and unconstitutional. Some have questioned whether ambiguity is fairly considered a delegation by Congress of gap-filling policy-making powers to executive agencies. See*, e.g.*, *Cuozzo Speed Techs., LLC* v. *Lee*, 579 U.S. 261, 286 (2016) (Thomas, J., concurring) ("*Chevron*'s fiction that ambiguity in a statutory term is best construed as an implicit delegation of power") And some have questioned whether Congress can even delegate such power, see, *e.g.*, *Dep't of Transp.* v. *Ass'n of Am. RRs.*, 575 U.S. 43, 70 (2015) (Thomas, J., concurring in the judgment) ("[T]he discretion inherent in executive power does *not* comprehend the discretion to formulate generally applicable rules of private conduct."); *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring) (explaining that even if Congress intended to delegate legislative authority through ambiguity "[t]he Supreme Court has long recognized that under the Constitution 'congress

cannot delegate legislative power to the president'"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150 (2016) (reviewing Robert A. Katzmann, Judging Statutes (2014)) ("*Chevron* itself is an atextual invention by courts. In many ways, *Chevron* is nothing more than a judicially orchestrated shift of power from Congress to the Executive Branch.").

Moreover, even accepting the constitutionality of *Chevron* in principle, its presumptions do not always bear out in practice. Again, the theory of *Chevron* is that a statutory ambiguity "reflects Congress's implicit delegation of authority for the agency to make policy and issue rules within the reasonable range of the statutory ambiguity." *U.S. Telecom Ass'n* v. *FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc). This assumes that the intent to delegate and the breadth of the intended delegation can be discerned from the statute. But in reality, that is not always true. And where congressional intent is not clear, deference by a court to an agency's resolution of statutory ambiguity gives an agency exactly what it should never have: the power to define the scope of its own authority.

B. The major questions doctrine avoids separation of powers concerns in certain instances of statutory ambiguity.

In the face of concerns about *Chevron* and its treatment of statutory ambiguity, the major questions doctrine is a canon of statutory construction that

prohibits a "major" exercise of agency authority based solely on statutory silence or ambiguity. This interpretive doctrine is based on the presumption that Congress will "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014) (*UARG*) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)). After all, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration." Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986).

The major questions doctrine "operates as a vital check on expansive and aggressive assertions of executive authority" and "preserve[s] the separation of powers." *United States Telecom Ass'n*, 855 F.3d at 417 (Kavanaugh, J., dissenting from the denial of rehearing en banc). To begin with, by demanding clarity the doctrine eliminates any doubt about whether Congress intended to delegate certain authority at all. Furthermore, in refusing to accept ambiguity, the major questions doctrine ensures that the judiciary must fulfill its duty to "say what the law is." *Marbury* v. *Madison*, 1 Cranch 137, 177 (1803).

The major questions doctrine also avoids unnecessary invalidation of a statute under the non-delegation doctrine. In its current form, the non-delegation doctrine requires Congress to lay down principles sufficient to guide the agency's exercise of

authority. *Gundy*, 139 S. Ct. at 2123. And where, after applying traditional canons of statutory construction, the bounds of the congressional delegation are unclear, the non-delegation doctrine may be implicated. *Ibid*. The major questions doctrine avoids non-delegation problems by resolving statutory ambiguity to exclude "major questions" not clearly addressed by Congress. *Id.* at 2142 (Gorsuch, J., dissenting) ("we apply the major questions doctrine in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency."); see also Abbe R. Gluck & Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 1003 (2013) (the major questions doctrine "supports a presumption of *non*delegation in the face of statutory ambiguity over major policy questions.").

II. This Court's application of the major questions doctrine has reflected, and should continue to reflect, its significant purpose.

A. The major questions doctrine is triggered whether an agency's assertion of authority is "major" in the particular application or more generally transformative.

When deciding to apply the major questions doctrine, this Court has looked both to whether a particular rule or action is "major" and to whether the

asserted authority is generally transformative. See, *e.g.*, *Ala. Ass'n of Realtors* v. *Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *UARG*, 573 U.S. at 324. In examining a specific rule or action, this Court has considered measurable metrics, such as the number of people affected by the rule and the economic impact of the rule, as well as public attention to the issue. And when considering the nature of the asserted authority more generally, this Court has considered how long-extant statutes have previously been used and interpreted, as well as the potential reach of the claimed power.

In *MCI Telecomms. Corp. v. Am. Telephone & Telegraph Co.*, for example, this Court looked to the transformative nature of the agency's reading of the statute. 512 U.S. 218, 231 (1994). There, this Court rejected the FCC's rule that completely exempted certain telephone companies from rate-filing requirements based on the FCC's statutory authority to modify such requirements. In doing so, this Court reasoned that "[i]t is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *Ibid.* The agency's position, the Court explained, was no less than "a fundamental revision of the statute." *Ibid.*

In *Brown & Williamson*, this Court likewise looked mainly to the far-reaching implications of the asserted authority in rejecting the FDA's claim to jurisdiction to regulate the tobacco industry. 529 U.S. at 159. This Court explained that Congress would be expected to

have spoken clearly if it wished to authorize such broad authority to "regulate an industry constituting a significant portion of the American economy" with a "unique place in American history and society." *Ibid.* It also noted that under the FDA's view of the law, the agency "would have the authority to ban cigarettes and smokeless tobacco entirely." *Ibid.*

This Court followed a similar approach in finding that the Controlled Substances Act (CSA) did not grant the Attorney General authority to prohibit physicians from prescribing controlled substances for assisted suicide based on the major questions doctrine. *Gonzales* v. *Oregon*, 546 U.S. 243, 262 (2006). In that case, the Court concluded that "the Attorney General claims extraordinary authority," explaining that it "would be anomalous for Congress to have so painstakingly described the Attorney General's limited authority to deregister a single physician or schedule a single drug, but to have given him, just by implication, authority to declare an entire class of activity . . . a criminal violation of the CSA." *Ibid.*

In contrast, this Court looked in *UARG* to both the measurable impact of the specific EPA rule, as well as the transformative power claimed by the agency. EPA claimed under the CAA "[t]he power to require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide" based on their greenhouse gas emissions. *UARG*, 573 U.S. at 324. Such expansive authority, the Court said, "falls comfortably within the class of authorizations that [this Court has] been

reluctant to read into ambiguous statutory text." *Ibid.* But it was not just the measurable impact of the particular regulation that warranted major questions treatment. EPA's reading of the CAA, this Court also said, brought "about an enormous and transformative expansion in EPA's regulatory authority" and would have given the agency "unheralded power." *Ibid.*

Finally, in the most recent application of the major questions doctrine to the Centers for Disease Control's eviction moratorium, this Court once again relied on both immediate impacts and sweeping potential applications in finding the major questions doctrine applicable. In *Alabama Association of Realtors*, this Court found the doctrine triggered by the CDC's claim to authority under the Public Health Service Act to enact a moratorium on evictions during the COVID-19 pandemic. The Court looked first to the moratorium's vast economic impact, noting that "[a]t least 80% of the country, including between 6 and 17 million tenants" would be affected by the moratorium, which would impose "nearly $50 billion" in costs. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. But "the issues at stake [were] not merely financial." *Ibid.* The CDC's reading would also grant it "a breathtaking amount of authority" with seemingly no limit. *Ibid.* Indeed, the CDC's reading of the statute would allow it to "mandate free grocery delivery to the homes of the sick or vulnerable" or "[r]equire manufacturers to provide free computers to enable people to work from home." *Ibid.* Such a breathtaking expansion of CDC's authority required clear congressional authorization. *Ibid.*

The takeaway from these cases is that this Court has been flexible in its consideration of both legal and practical factors in determining what triggers the major questions doctrine. In several cases, the doctrine has been found to apply solely because an agency has claimed legally transformative authority. In *MCI Telecomms. Corp.*, the Court applied the major questions doctrine because FCC's interpretation would bring about a "fundamental revision of the statute." 512 U.S. at 231. In *Brown & Williamson*, the Court focused only on the "breadth of the authority" FDA asserted and what FDA might do with it. 529 U.S. at 159–60. And in *Gonzales*, this Court found the major questions doctrine applied based on the "extraordinary authority" the Attorney General claimed, without assessing any measurable impact of the rule. 546 U.S. at 262.

As for the cases where this Court found both substantial measurable impact and a transformative assertion of regulatory authority, none suggests that both were necessary. In *UARG*, this Court recognized the significant economic impact of EPA's rule and then noted "[m]oreover" the "extravagant" and transformative nature of the power EPA claimed. 573 U.S. at 324. Similarly, in *Alabama Association of Realtors*, this Court concluded that the substantial economic impact of the CDC's eviction moratorium made it "exactly the kind" of rule subject to the major questions doctrine. 141 S. Ct. at 2489. It then additionally noted that the CDC's understanding of the statute was "[i]ndeed . . . breathtaking." *Ibid.* If

anything, the Court appeared to be moved more by the "unprecedented" and "sweeping" nature of CDC's "claim of expansive authority," as it proceeded to spin out hypotheticals illustrating the limitless reach of the CDC's theory. *Ibid.*

This flexibility makes sense given the important constitutional purpose of the major questions doctrine. It ensures that an extravagant assertion of authority does not escape closer scrutiny. For example, a rule that does not itself have broadly measurable impacts may nevertheless be premised on a theory of the statute that would permit a variety of *other* wide-reaching and significant rules. The separation of powers concerns with such a theory of the statute, even if one particular application of it has only minimal impact, are no less serious.

B. The major questions doctrine requires a court to assess whether a statute clearly grants an agency the claimed authority.

The major questions doctrine is a canon of statutory construction that has been, and should be, applied to statutory text irrespective of under which step of *Chevron* the interpretation is presented. Depending on the posture of the case, the major questions doctrine has been applied as a canon of statutory construction both to assist judicial resolution of the scope of an agency's authority in the first instance, as well as to reject agency assertions of deference to its interpretation under *Chevron* step two. In all events, the court's task is the same once it

is determined that the major questions doctrine applies: to assess whether the statute clearly grants the agency the claimed authority.

For example, the major questions doctrine has been used by courts to determine whether an agency has any business regulating under a statute at all—what has sometimes been called *Chevron* step zero. See *King* v. *Burwell*, 576 U.S. 473, 485 (2015); *Brown & Williamson*, 529 U.S. at 159. In those cases, this Court explained that even if one were to accept the premise often attributed to *Chevron*—that a statute's ambiguity is an implicit delegation—in cases involving major questions "'there may be reason to hesitate before concluding that Congress has intended such an implicit delegation.'" *King*, 576 U.S. at 485 (quoting *Brown & Williamson*, 529 U.S. at 159). Because of the expansive nature of the authority claimed, the Court refused to accept that the mere presence of ambiguity necessitated application of *Chevron* two-step. Instead, the major questions doctrine required a threshold inquiry into whether the statute clearly provided the regulatory authority claimed by the agency. Kavanaugh, *supra* at 2152.

Other cases have come to the Court in a very different posture. Unlike *King* and *Brown & Williamson*, in some cases there is no question that Congress charged the agency with implementing the statute to address the subject matter of concern. The issue instead is the scope of that delegation, and whether the agency may justify its claim of expanded regulatory authority as a reasonable interpretation of

the statute entitled to deference under *Chevron* step two.

Yet in those cases, the Court has applied the major questions inquiry in the same way as in *King* and *Brown & Williamson*. It has asked whether the statutory text clearly grants the authority claimed by the agency. If not, the Court has deemed the agency's reading contrary to law and therefore unreasonable and entitled to no deference under *Chevron*. For instance, in applying the major questions doctrine to the eviction moratorium, this Court reasoned that "[e]ven if the text were ambiguous," the CDC's reading was simply not permitted. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. This Court followed a similar approach in *UARG*. Addressing the agency's plea for deference under *Chevron* step two, this Court rejected EPA's reading of the statute as "patently unreasonable" as a matter of law and held that it "does not merit deference." 573 U.S. at 321.

In sum, the major questions inquiry is identical irrespective of the *Chevron* framework. However a case reaches a court, the interpretive task is the same once it is determined that the major questions doctrine applies. Whether presented at *Chevron* step zero, one, or two, the major question doctrine is simply a canon of statutory construction that asks whether the statute clearly grants an agency the claimed authority. That is how this Court has treated the doctrine, and it is also consistent with the doctrine's preservation of the separation of powers by making the question of authority one that a court must

answer. As Judge Walker summed up below, "[e]ither a statute clearly endorses a major rule, or there can be no major rule." J.A. 230 (Walker, J., concurring in part).

III. The major questions doctrine confirms that EPA had no discretion but to repeal the CPP.

A. The CPP is exactly the kind of agency claim of authority for which the major questions doctrine exists.

The CPP satisfies both tests that this Court has employed to determine whether the major questions doctrine applies. It is premised on a transformative expansion of a long-extant statute. And it is also a rule with wide-reaching economic and political consequence.

1. The Clean Power Plan represents an unheralded expansion of EPA's authority under CAA section 111(d).

EPA's interpretation of section 111(d) in support of the CPP is exactly the type of unprecedented authority that constitutes a major question. The CPP is premised on turning section 111(d) from a "control system" program into a provision that allows EPA to require source owners across the country to reduce production or to shut-down. This transformative reading of section 111(d)—which would permit EPA to compel reductions in existing source production that

can only be reclaimed by restructuring an entire industry—is precisely the sort of significant and unprecedented expansion of regulatory authority that must be clearly authorized by Congress.

Environmental statutes, including the CAA, have employed a variety of approaches to pollution control. One common pollution-reduction approach used by Congress in environmental statutes is to direct EPA to establish emission or effluent limitations based on the pollution reductions that can be achieved by incorporating pollution control systems into new sources or retrofitting them into existing sources. See, *e.g.*, CAA sections 111, 112, 169(3), 42 U.S.C. §§ 7411, 7412, 7479(3); CWA sections 301(b), 306, 33 U.S.C. §§ 1311(b), 1316. These control system programs focus regulatory attention on measures that reduce an individual source's *emissions* at all levels of operation, and not on reducing or eliminating source *operation*. See, *e.g.,* J.A. 330 ("[O]ur traditional interpretation and implementation of CAA section 111 has allowed regulated entities to produce as much of a particular good as they desire provided that they do so through an appropriately clean . . . process.").

A second approach used by Congress has been to direct EPA to establish limitations on the concentration of pollution in air or water, at a level that is protective of public health or welfare. See*, e.g.,* CAA section 109, 42 U.S.C. § 7409; CWA section 303, 33 U.S.C. § 1313. Implementation of these ambient concentration-based programs could require curtailment of production or even shut down of a

specific source if needed to prevent exceedances of the health or welfare-based concentration limit. See*, e.g.*, *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 257 (1976).

Under a third approach, Congress has established programs for entire industrial categories *that directly regulate source operation*. See, *e.g.*, CAA Titles IV-A and VI, 42 U.S.C. §§ 7651-7651*o* and §§ 7671-7671q. Under the CAA's Acid Rain "cap-and-trade" program, for example, Congress allocated sulfur dioxide (SO_2) "allowances" to individual sources. A source can meet its allowance allocation by controlling emissions, by limiting production, or by shutting down. Another example is the Stratospheric Ozone Protection program of CAA Title VI, which explicitly phases out specific types of production, subject to phase-down schedules and safety valves to manage associated economic and societal dislocation. Congress's efforts to craft climate change legislation based on this third approach—essentially industrial and economic restructuring to reduce carbon emissions—have failed to produce any political consensus.[1]

As Petitioners have demonstrated, section 111 says nothing about reductions in production and source shut-down. Instead, for more than 40 years, section 111 has been considered the paradigm for individual source control-system programs. S. Rep. No. 95-370, at 50 (1977), *reprinted in* 1977

[1] See, *e.g.*, Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009) (rejecting greenhouse gas cap-and-trade program).

U.S.C.C.A.N. 4326, 4375. Until the CPP, the section 111 program focused on lowering emissions reductions by control systems, not by reductions in the operation of a facility. Once EPA identified the "best system of emission reduction" (BSER) for new sources and the BSER for existing sources in an industrial source category, EPA sets emission standards for those sources based on those control systems.[2]

As recently as 2015, EPA set CAA section 111 carbon dioxide (CO_2) standards for new coal-fired generating facilities based on this well-established understanding of section 111. In that new source performance standard (NSPS) rule, EPA evaluated control systems that could be incorporated into the design of new coal-fired facilities and concluded that carbon capture control systems were adequately demonstrated. The NSPS was based on incorporation of those controls into facility design. 80 Fed. Reg. 64,510 (Oct. 23, 2015).

But EPA abandoned this traditional understanding of section 111 when it came to existing coal-fired generating facilities. Unlike for new facilities, EPA concluded that carbon capture systems were *not* demonstrated for existing coal-fired generation and therefore could not be BSER for those

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[2] Each of the approximately one hundred new source performance standards that EPA has set in more than 60 source categories has been based on a control system that can be applied to reduce emissions regardless of level of operation at the regulated source itself. See generally 40 C.F.R. pt. 60, subpts. Cb-OOOO.

sources. That left heat rate (*i.e.*, efficiency) improvements as the only CO_2 reduction system upon which to base an existing source standard. But because efficiency improvements would not produce the level of emission reductions needed to achieve the Administration's climate change goals, J.A. 577, J.A. 658, and because Congress had not enacted the cap-and-trade climate change legislation recommended by the Administration, *id.* at 439–43 (congressional action on climate change limited to research, monitoring, and data collection), EPA concluded that it had no choice but to undertake an "'aggressive transformation'" of the mix of electric generation under section 111 using standards that would require fossil generating units to reduce production or shut down. *Id.* at 225 (quoting White House Fact Sheet); see also *id.* at 683 ("Given EGU's large contribution to U.S. GHG emissions, any attempt to address . . . climate change must necessarily include significant emission reductions from this sector."). In the CPP, EPA required each existing coal-fired unit to meet a numerical performance standard expressed in pounds of CO_2 per megawatt hour generated (CO_2 lbs/MWhr). This performance standard was set at a level roughly 30 to 40 percent below the CO_2 lbs/MWhr performance rate associated with coal-fired generation.[3]

Because there was no demonstrated CO_2 control system capable of reducing CO_2 emissions from these

[3] EPA set the CPP performance rate at 1,305 lbs/MWhr, which is roughly 38% below the typical CO_2 performance rate for a coal-fired unit of 2,100 lbs/MWhr. J.A. 300, J.A. 1362.

sources by 30 to 40 percent, EPA created a "system" of "emission reduction credits" (ERCs) that represented operation of "clean" generation, *i.e.*, renewable energy (RE) generation with zero CO_2 emissions. ERCs would be required for each megawatt hour of continued operation at existing units.[4] Through this credit "system," new "clean" generation would come to replace existing fossil generation in at least two ways. *Id.* at 579–80 ("[M]ost of the CO_2 controls need to come in the form of . . . replacement of higher emitting generation with lower- or zero-emitting generation."); *id.* at 584 (BSER requires "replacement of defined quantities of fossil generation by RE generation."); *id.* at 676 ("[T]he volume of coal-fired generation will decrease."). The cost of credits would increase the cost of, and reduce the demand for, existing generation. And if credits could not be obtained, the only way to comply would be to simply curtail production or shut down existing units. *Id.* at 697 (Reduced operations would still require "that the owner/operator . . . acquire[] . . . ERCs to use in computing . . . compliance" for all remaining operations.).

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[4] Because compliance with the uniform performance rate cannot be achieved through available controls, the ERC "system" uses a legal fiction to demonstrate "compliance" through trading of ERCs and averaging. For example, assuming for ease of calculation that (i) an existing unit emits 2,000 pounds of CO_2 each megawatt hour it generates, and (ii) a CPP standard for that unit was 1,000 lbs/MWhr, the owner of the unit would have to hold one renewable energy credit ($\frac{2000 \text{ lbs/MWhr} + 0 \text{ lbs/MWhr}}{2} = 1000 \text{ lbs/MWhr}$) to meet the CPP standard.

EPA projected that by using section 111 to regulate production under an approach similar to CAA Title IV, *id.* at 607 (CPP "resembles . . . the emissions trading program enacted [by Congress] in Title IV of the 1990 CAA Amendments."); *id.* at 292 ("BSER mirrors Congress's approach to regulating . . . as exemplified by Title IV of the CAA."); *id.* at 611 (Emissions "trading [is] an integral part of the BSER analysis."), it could achieve emission reductions that would satisfy the Administration's CO_2 climate change goals. *Id.* at 290 ("This final rule is a significant step forward in implementing the President's Climate Action Plan."); *id.* at 345 (The CPP "constitutes a major commitment . . . and international leadership . . . on the part of the U.S."); *id.* at 446–48.

But by transforming CAA section 111 from a control systems program into a program under which EPA is authorized to compel substantial reductions in production at or the shutdown of existing facilities within an industrial category, EPA has walked straight into the teeth of the major questions doctrine. This approach is not only transformative from the way section 111 has long been understood, but it is also extraordinarily expansive. Indeed, that was the goal: to claim through section 111 the authority to remake the energy sector. And that is precisely the sort of extravagant claim to authority that this Court has found to trigger the major questions doctrine. *MCI Telecomms. Corp.*, 512 U.S. at 231 ("a fundamental revision of the statute" from rate-regulation for all carriers to rate-regulation only where the agency deems necessary); see also *UARG*, 573 U.S. at 324

("unheralded power to regulate" greenhouse gas emissions from millions of small sources that had never been regulated before).

And that is not even the half of it. EPA's broad reading of "system" in section 111 to include *any* set of steps or measures that would require owners and operators to reduce CO_2 emissions through forced reductions in production would give EPA "a breathtaking amount of authority," *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489, in areas well beyond its expertise. Under its newfound authority, EPA could limit production in virtually any industry based on the claim that production could be shifted to lower emitting facilities that may or may not even exist at the time EPA promulgates the rule. As with the CPP, EPA could cap emissions for any industrial sector based on projections that lower emitting facilities would be able to meet future product demand, or perhaps even projections regarding measures directed at consumers to reduce demand for products from disfavored sources. See, *e.g.,* JA at 144, note 10 ("[D]emand-side energy efficiency . . . [is] a policy tool" available under section 111(d).). Having capped emissions for an industrial sector, EPA could (as it did under CPP) create a trading program to subsidize preferred production. In other words, by constraining production in any industrial sector with facilities that emit CO_2, EPA could force consumers of that industry's products to switch to EPA's preferred modes of production. There is virtually no limit to how this playbook could be run: it could apply to electric utilities today and the paper products, refining, or

transportation sectors tomorrow. Such sweeping power to act as the central planner for entire industrial sectors falls comfortably within the cases where this Court has found clear congressional authorization required. *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (applying major questions doctrine where the government identified no limit beyond that the agency "deem a measure 'necessary'").

2. The Clean Power Plan also triggers the major questions doctrine because of its significant economic and political impact.

The CPP also fits within the types of cases where this Court has found that the "vast 'economic and political significance'" of a particular rule trigger the major questions doctrine. *UARG*, 573 U.S. at 324.

The economic impact of the CPP is alone enough to qualify as significant. Industry analysts estimated the CPP would cause wholesale electricity costs to rise by $214 billion and cost another $64 billion in terms of replacing shuttered capacity.[5] Even EPA's own analysis identified billions of dollars in compliance costs, as well as the elimination of thousands of jobs.[6]

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[5] NMA, *EPA's Clean Power Plan An Economic Impact Analysis* 2 (undated), http://nma.org/attachments/article/2368/11.13.15%20NMA_EPAs%20Clean%20Power%20Plan%20%20An%20Economic%20Impact%20Analysis.pdf.

[6] See, *e.g.*, EPA, EPA-452/R-15-003, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3-22, 6-25 (Aug.

In terms of total costs, the Department of Energy projected that a federal mandate to restructure the Nation's energy grid, like CPP, would impose hundreds of billions of dollars in lost GDP from 2015 to 2040.[7] The rule is also indisputably significant from the standpoint of estimated benefits, which EPA anticipated would reach between $26 billion and $45 billion.[8] By any of these metrics, the estimated potential economic impact of the CPP is comparable to other cases where this Court has found a major question. See *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 (finding significant economic impact based on nearly $50 billion in estimated costs); *UARG*, 573 U.S. at 324 (economic significance based on requiring permits for the operation of millions of small sources nationwide).

Contrary to the D.C. Circuit's conclusion below, J.A. 148–50, it is immaterial that the CPP's mandated generation shifting might impose fewer costs than other controls that EPA potentially could have employed, such as carbon capture and storage. The question is not whether EPA selected the least costly

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2015, replaced Oct. 23, 2015), https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_fin al-clean-power-plan-existing-units_2015-08.pdf .

[7] See U.S. Energy Information Administration, Analysis of the Impacts of the Clean Power Plan 63-64 (Fig. 39) (May 2015), https://w ww.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerp lant.pdf.

[8] EPA, Fact Sheet, Overview of the Clean Power Plan, Cutting Carbon Pollution From Power Plants 3 (undated), https://archive.ep a.gov/epa/sites/production/files/2015-08/documents/fs-cpp-overview.pdf.

approach, but whether the approach that it did choose is itself economically significant.

As for its political impact, that too qualifies the CPP as significant. By almost any metric, the CPP is an issue subject to "'earnest and profound debate' across the country." *Gonzales*, 546 U.S. at 267 (citation omitted). Indeed, the CPP generated 4.3 million comments during the rulemaking process. Perhaps more important, the CPP was an effort to take executive action where legislative action had previously failed. See *Brown & Williamson*, 529 U.S. at 143–51 (taking into account Congress's consideration of proposals that would have granted an agency power it later asserted unilaterally); see also *U.S. Telecom. Ass'n*, 855 F.3d at 417 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (finding the FCC's net neutrality rule unlawful because Congress failed to clearly authorize it despite having debated net neutrality for many years). It is by now well known that Congress has not enacted general climate change legislation. In fact, it has repeatedly rejected a number of generation-shifting approaches, including a carbon tax, S. Con. Res. 8, S. Amdt. 646, 113th Cong. (2013); fees on greenhouse gas emissions, Climate Prot. Act of 2013, S. 332, 113th Cong. (2013); and a greenhouse gas cap-and-trade program. Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009).

B. EPA is correct that the major questions doctrine can and does confirm its analysis of the statute at *Chevron* step one.

EPA explained that

> [w]hile [it] believes that [its action repealing the CPP] is based on the only permissible reading of the statute and would reach that conclusion even without consideration of the major questions doctrine, the EPA believes that that doctrine should apply here and that its application confirms the unambiguously expressed intent of CAA section 111.

J.A. 1770. In other words, EPA concluded both that the plain text unambiguously precludes the CPP at *Chevron* step one and that the major questions doctrine also bars the CPP.

As explained above, that is precisely how the major questions doctrine does and should work. Where the doctrine applies, it requires a court to assess whether the statute clearly grants the agency the claimed authority. The major questions doctrine is a canon of statutory construction that simply (and independently) asks whether the statute clearly grants an agency the claimed authority. If not, the agency action is unlawful, regardless of where in the *Chevron* analysis the doctrine is applied.

Here, section 111(d) does not clearly authorize EPA to exercise the extraordinary power it has claimed—namely, to set greenhouse gas emission

standards for existing power plants that are unachievable through controls at any individual source, but rather require owners and operators of regulated sources to reduce their operations or to shut them down. That reading is not supported by the plain text. And it is confirmed by the major questions doctrine. EPA was right that it was required to repeal the CPP.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

HUNTON ANDREWS KURTH LLP
ELBERT LIN
Counsel Of Record
951 East Byrd Street, East Tower
Richmond, Virginia 23219
elin@HuntonAK.com
(804) 788-8200

F. WILLIAM BROWNELL
ERICA N. PETERSON
HUNTON ANDREWS KURTH LLP
2200 Pennsylvania Avenue, NW, Suite 900
Washington, D.C. 20037
(202) 955-1500

Counsel for Respondent America's Power

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