No. 20-1530

In The
Supreme Court of the United States

STATE OF WEST VIRGINIA et al.,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The D.C. Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution, and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioners State of West Virginia et al.

INTRODUCTION AND SUMMARY OF ARGUMENT

Administrative agencies operate only under the authority granted to them by Congress. Congress makes laws and the President, acting though administrative agencies "faithfully execute[s] them." U.S. Const. art. II, § 3. And when an agency issues a rule having enormous economic and political implications, the agency must have a clear mandate from Congress to do so. This concept, known as the "major rules

[1] The parties have consented to the filing of this brief. Petitioners have provided blanket consent for the filing of *amicus* briefs and were informed of *Amicus Curiae's* intent to file on November 19, 2021. Respondents have also provided blanket consent for the filing of *amicus* brief and were informed of *Amicus Curiae's* intent to file on November 19, 2021. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *Amicus Curiae*, its members, or its counsel made a monetary contribution to its preparation or submission

doctrine," ensures: "(i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch, and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017, Kavanaugh, J., dissenting).

This case shows the important role the major rules doctrine plays in reining in administrative agencies who improperly assert authority to issue regulations with enormous political and economic impacts. Years ago, EPA disregarded the constitutional and statutory limits on its authority by issuing a major rule (entitled the Clean Power Plan or "Plan") that would transform the nation's energy sector, cost hundreds of billions of dollars to implement, and lead to tens of thousands of lost jobs. It did all of this without a clear authorization from Congress.

In promulgating the Clean Power Plan, EPA relied on Section 111(d) of the Clean Air Act ("CAA" or "Act"), 42 U.S.C. § 7411(d). Designed to reduce greenhouse gas ("GHG") emissions from existing power plants, the Plan would implement three "building blocks" for emission reduction. 80 Fed. Reg. 64,662, 64,667 (Oct. 23, 2015). First, the Plan obligated existing power plants to implement technology to improve the efficacy of coal-fired steam power plants. *Id.* Next, the Plan sought to substitute "increased generation from lower-emitting existing natural gas combined cycle units for generation from higher-emitting affected steam generating units." *Id.* Finally, the Plan

prioritized usage of electricity from zero-emitting sources over electricity from traditional fossil fuel power plants. *Id.* The latter two blocks are referred to generation shifting provisions because reductions occur only when the source of power generation has shifted from one type of power plant to another. 80 Fed. Reg. at 64,728-29.

In an unprecedented ruling,[2] the Court stayed implementation of the Plan. *West Virginia v. EPA*, 577 U.S. 1126 (2016). After a change in presidential administrations, EPA wised up, withdrew the Plan and replaced it with a more modest, but constitutionally viable rule entitled The Affordable Clean Energy ("ACE") Rule, 84 Fed. Reg. 32,520 (July 8, 2019). The ACE rule reflected EPA's then interpretation of the "plain meaning" of the Section 7411(d) of the Act. *Id.* at 32,523-24. Concluding that this plain meaning "unambiguously" limits the best system of emission reduction to measures "that can be put into operation at a building, structure, facility, or installation," the ACE rule removed those "generation shifting" provisions. *Id.* EPA also noted that the ACE rule was "based on the only permissible reading of the [Act] and [it] would reach this conclusion even without consideration of the major question doctrine." *Id.* at 32,529

The new rule, however, didn't survive. A decision by the lower court vacated the ACE rule and, in so doing, breathed new life into the Plan by greatly

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[2] Courtney Scobie, *Supreme Court Stays EPA's Clean Power Plan*, American Bar Association, Feb. 17, 2016.

expanding EPA's regulatory authority under the Clean Air Act. *Am. Lung Assoc. v. EPA*, 985 F.3d 914, 930, 995 (D.C. Cir. 2021).

Under any reasonable analysis, the Plan amounts to a major regulatory action, thereby requiring clear congressional authorization. Without such authorization, no court should uphold its implementation. Yet that is exactly what the lower court did and now this Court must step in and act.

For reasons stated by Petitioners and for reasons stated below, *Amicus Curiae* Landmark respectfully urges the Court to conclude that the lower court's decision wrongly endorses an unconstitutional rulemaking by EPA. Further, *Amicus* request that the Court adopt the major rules doctrine and find that an agency must have a clear delegation from Congress before it issues any rule (such as the Clean Power Plan) having enormous political and economic effects.

ARGUMENT

I. The major rules doctrine precludes EPA from issuing and enforcing the Clean Power Plan.

The lower court did not properly consider the major rules doctrine when it dismissed the ACE rule and revived the Clean Power Plan. The lower court glossed

over the enormous effects of implementing the Plan and the lack of clear statutory authorization.

The major rules doctrine "constrains the Executive and helps to maintain the Constitution's separation of powers." *United States Telecom Ass'n*, 855 F.3d at 419 (D.C. Cir. 2017, Kavanaugh, J., dissenting.) Its application precludes upholding the Clean Power Plan as a valid exercise of administrative authority.

Article I, § 1 of the Constitution vests "all legislative Powers herein granted . . . in a Congress of the United States. . . ." This legislative power rests solely with Congress under our constitutional system and this concept is central to the separation of powers. "By allocating specific powers and responsibilities to a branch fitted to the task, the Framers created a National Government that is both effective and accountable." *Loving v. United States*, 517 U.S. 748, 757 (1996). So "Article I's precise rules of representation, member qualifications, bicameralism, and voting procedure make Congress the branch most capable of responsive and deliberative lawmaking." *Id.* at 757-58. Thus, "[i]ll suited to the task [of lawmaking] are the Presidency, designed for the prompt and faithful execution of the laws and its own legitimate powers, and the Judiciary, a branch with tenure and authority independent of direct electoral control." *Id.* at 758. This assignment of powers "allows the citizen to know who may be called to answer for making, or not making, those delicate and necessary decisions essential to governance." *Id.*

Separation of powers prevents accumulation of power and encroachments upon liberty. "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny." The Federalist No. 47 at 298 (James Madison) (C. Rossiter ed., 1961). As a result, "There can be no liberty where the legislative and executive powers are united in the same person, or body of magistrates," *Id.* (quoting Montesquieu, *The Spirit of the Laws*).

And "when the Judiciary exercises its Article III authority to determine whether an agency's rule is consistent with a governing statute, two competing canons of statutory interpretation come into play." *United States Telecom Ass'n*, 855 F.3d at 419. The first canon, using the well-known analysis espoused in *Chevron U.S.A. Inc. v. Natural Resources Def. Council*, 467 U.S. 837 (1984) obligates an agency to follow the clear meaning of a statute. When the meaning is ambiguous, "the agency has discretion to adopt its own preferred interpretation, so long as that interpretation is at least reasonable." *United States Telecom Ass'n*, 855 F.3d at 419 (citing *Chevron*, 467 U.S. at 842-45).

When a major agency rule involves a matter of "great economic and political significance" a "countervailing canon" constrains "the Executive and helps maintain the Constitution's separation of powers." *Id.* Thus, the major rules doctrine demands that, for an agency to issue a major rule, "Congress must *clearly* authorize the agency to do so." *Id.* For that reason, "[i]f

a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful." *Id.* The doctrine derives from two "presumptions: (i) a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch . . . and (ii) a presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* (internal citations omitted).

Unless expressly delegated with authority, agencies should not be the overlords of major policy decrees. A string of cases has established the principle that, even when Congress has delegated general rulemaking authority, courts should not presume that Congress has delegated its power to "amend major social and economic policy decisions." *Id.* at 422 (quoting William N. Eskridge Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 288 (2016)).

These cases include:

– *MCI Telecommunications Corp., v. American Telephone & Telegraph Co.*, 512 U.S. 218 (1994). The Court held that the FCC has overstepped its bounds by issuing a rule exempting certain telephone companies from rate filing requirements. *Id.* at 231-32. The Court noted, that it was "highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion." *Id.* at 231.

– *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). The Court denied the FDA's attempt to use its general authority to regulate "drugs" and "devices" as a predicate to regulate the tobacco industry. *Id.* at 159-61. The Court stated that it was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.* at 160.

– *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457 (2001). The Court found that relevant portions of the CAA did not delegate to EPA the legislative authority permitting the Administrator to consider implementation costs in setting National Ambient Air Quality Standards (NAAQS). *Id.* at 486.

– *Gonzales v. Oregon*, 546 U.S. 243 (2006). The Court considered whether the Controlled Substances Act permitted the Attorney General to de-register physicians and therefore prevent them from writing prescriptions for certain drugs. *Id.* at 248-49. Again, the Court rejected the rule, stating 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 outside 'the course of professional practice.'" *Id.* at 262 (citation omitted). The Court continued, "The idea that Congress gave the Attorney General such broad and unusual authority through an

> implicit delegation in the CSA's registration provision is not sustainable." *Id.* at 267.

Finally, in *Utility Air Regulatory Group*, 573 U.S. 302 (2014), the Court held that EPA lacked authority to issue a regulation subjecting millions of stationary sources to regulation under the Clean Air Act because they emitted GHGs. "When an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,' . . . we typically greet its announcement with a measure of skepticism." *Id.* at 374 (citation omitted). Reiterating the point made in *Brown & Williamson*, the Court continued, "We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *Brown & Williamson*, 529 U.S. at 159, 160).

As summarized by then Judge Kavanaugh, "If an agency wants to exercise expansive regulatory authority over some major social or economic activity . . . Congress must *clearly* authorize an agency to take such a major regulatory action." *United States Telecom Ass'n*, 855 F.3d at 421.

Again, no applicable section of the Act provides a clear authorization to issue a rule of the size of the Clean Power Plan. Congress did not authorize (or direct) EPA to promulgate a rule obligating a shift from traditional power plants such as coal burning units to renewable energy sources. And the lower court erred by concluding that it did.

A. The lower court erred when it ruled that Section 111 obligates EPA to promulgate the Clean Power Plan.

The Clean Power Plan caps carbon emissions and forces shifts in power generation from traditional coal-fired plants to lower-emitting plants (such as natural gas or renewable sources). But nowhere in the applicable sections of the Act is EPA granted this specific authority. Instead, the lower court disregards the source-specific limitation promulgated in the ACE rule and interprets Section 111 as "not ambiguously bar[ring] a system of emission reduction that includes generation shifting." *Am. Lung Assoc.*, 985 F.3d at 951. The lower court then goes even further and concludes that "Congress imposed no limits on the types of measures the EPA may consider beyond three additional criteria: cost, any non-air quality health and environmental impacts, and energy requirements." *Id.* at 946 (citation omitted). EPA, therefore, has virtually unlimited authority to impose any measures upon the nation's energy sector it deems appropriate – no matter the effects such measures may have upon traditional energy sources.

Under this reasoning, EPA would not only be allowed to promulgate the Clean Power Plan, it could regulate any building emitting GHGs and impose massive costs upon the nation. While EPA hasn't gone that far, the Clean Power Plan and other attempts by EPA to regulate massive sectors of the economy should never pass judicial scrutiny.

The Plan's economic and political impacts compel application of the major rules doctrine to reverse the lower court's decision and rein in EPA's actions. As the section of the Clean Air Act that EPA and the lower court rely on includes no clear statement unambiguously authorizing EPA to consider off-site solutions for emission reduction and because such action would cause a major economic impact, EPA lacks any authority promulgate it. The Clean Power Plan thus fails the major rules doctrine and should not receive protection from any court.

Although some courts may assume that agencies possess the authority, under *Chevron*, to issue rules resolving statutory ambiguities, this is false. An agency can issue a *major rule* – i.e., one of great economic and political significance – only if it has clear congressional authorization to do so. When agencies assert some "unheralded power to regulate 'a significant portion of the American economy,'" such actions are to be met with "a measure of skepticism." *Util. Air Reg. Group v. EPA*, 573 U.S. at 324 (citation omitted) (quoting *FDA v. Brown & Williamson Tobacco Corp.* 529 U.S. 120, 159 (2000)). Indeed, "[the Court] expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.*

Consider that regulation in *Utility Air Regulatory Group*. EPA sought to tailor sections of the Act (specifically the Prevention of Significant Deterioration (PSD) program and Title V) to accommodate regulations of GHGs emissions from stationary sources. *Id.* at 311-12. EPA argued that it had the authority to

interpret the Act in manner that would allow it to regulate tens of thousands of stationary sources that emit GHGs. *Id.* at 312. It also argued that it could amend the clear numeric thresholds for PSD and Title V to exempt most of those sources because it could not manage the administrative burden of managing the onslaught of new permits that would be required should stationary sources emitting GHGs come under the auspices of PSD program and Title V. *Id.* The Court rejected both claims.

First, the Court considered it "beyond reasonable debate that requiring permits for sources based solely on their emission of greenhouse gasses . . . set forth in the statute would be 'incompatible' with 'the substance of Congress' regulatory scheme.' " *Id.* at 322 (quoting *Brown & Williamson*, 529 U.S. at 156). PSD and Title V review involved complex and time-consuming processes that could not be administratively managed if all sources emitting GHGs fell under their regulatory authority. *Id.* at 312.

Second – and equally important – EPA's interpretation of its authority under the Act would "bring about an enormous and transformative expansion in EPA's regulatory authority. . . ." *Id.* at 324. If upheld, the rule would have authorized EPA to "require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources . . . " *Id.* This authority, according to the Court, "falls comfortably within the class of authorizations that we have been reluctant to read into ambiguous statutory text." *Id.*

Finally, recognizing the authority in the Tailoring Rule would "deal a severe blow to the Constitution's separation of powers." *Id.* at 327. As aptly stated, "Under our system of government, Congress makes laws and the President, acting at times through agencies like EPA, 'faithfully execute[s]' them." *Id.* (citation omitted) (quoting U.S. Const. art. II, § 3).

These arguments apply to the Clean Power Plan. Nowhere in the applicable section of the Clean Air Act does Congress authorize EPA to issue a regulation that leads to electricity generation shifting from traditional, fossil fuel sources to renewable sources. And, as stated before, implementation of the Plan will "bring about an enormous and transformative expansion in EPA's regulatory authority" as it would greatly expand EPA's mandates under the Act. *Id.* at 324. Upholding the Clean Power Plan therefore undermines the carefully crafted balance of federal powers enshrined in the Constitution and protected by application of the major rules doctrine.

B. The Clean Power Plan is a major rule requiring clear congressional authorization.

The Clean Power Plan, dubbed by President Obama as a "Landmark Action to Protect Public Health, Reduce Energy Bills for Households and Businesses, Create American Jobs, and Bring Clean Power to Communities across the Country," cannot be classified as anything but a major rule. White House Fact Sheet,

President Obama to Announce Historic Carbon Pollution Standards for Power Plants, Aug. 3, 2015. The Plan purportedly would reduce premature deaths from power plant emissions by 90% and create tens of thousands of new jobs (while eliminating others). *Id.* Implementation, according to EPA, would reduce domestic energy's carbon emissions by 30% – "equal to the annual emissions from more than 150 million cars." EPA Fact Sheet: *Clean Power Plan by the Numbers*. EPA itself concluded that the Plan would eliminate over 33,000 jobs relating to traditional energy generation by 2030, including about 20,000 coal-related jobs. EPA, *Regulatory Impact for the Final Clean Power Plan*, Oct. 23, 2015.

Industry experts predict that implantation of the Plan will cause wholesale electricity costs to rise by $214 billion. National Mining Association, *Clean Power Plan Will Add $214 Billion to Wholesale Electricity Prices*, Nov. 17, 2015. Replacing capacity lost through implementation of the Plan will cost another $64 billion. National Mining Association, *EPA's Clean Power Plan: An Economic Impact Analysis*. Experts estimate that many states will see increases of wholesale electricity exceeding 25%. *Id.* at 3-4. Ohio and West Virginia, for example, could see energy cost increases of 31.2% and 29.8% respectively. *Id.* at 3.

Implementation of the Plan also involves serious political ramifications. Judge Walker notes in his dissent in the case below that the Plan will contribute to achieving "victory" over climate change on a scale of "vast political significance." *Am. Lung Assoc.*, 985 F.3d

at 1001 (Walker, J., dissenting). Such a victory, according to the Plan's advocates "will lower ocean levels; preserve glaciers; reduce asthma; make hearts healthier; slow tropical diseases; abate hurricanes; temper wildfires; reduce droughts; stop many floods; rescue whole ecosystems; and save from extinction up to 'half the species on earth.'" *Id.*

II. EPA cannot use Section 111 of the Clean Air Act to regulate coal burning power plants when they are regulated under Section 112.

EPA cannot regulate electricity generating units (EGUs) under Section 111 of the Clean Air Act because EGUs are already regulate under a different section. The version of Section 111(d), 42 U.S.C. § 7411(d) passed by the House of Representatives and appearing in the United States Code provides that the Administrator must prescribe regulations from any existing source:

> (i) for which air quality criteria have not been issued or which is not included on a list published under Section 108(a) [42 U.S.C. § 7408(a)] or emitted from a source category which is regulated under Section 112 [42 U.S.C. § 7412] but
>
> (ii) to which a standard of performance under this section would apply if such existing source were a new source . . .

According to this clear and unambiguous language, Section 111(d) applies only to sources that have "not been issued or which is not . . . regulated under Section 112 [42 U.S.C. § 7412. . . ." Thus, regulation of sources under Section 112 bars regulation of those sources under Section 111(d).

EPA asserted that the exclusion in Section 111(d) "does not bar the regulation [under CAA Section 111(d) of non-HAP [Hazardous Air Pollutants] from a source category, regardless of whether that source category is subject to standards for HAP under CAA Section 112." 80 Fed. Reg. at 64,711. EPA also believes that, while the version of Section 111 passed by the Senate is "clear and unambiguous," the version passed by the House "is ambiguous." *Id.* at 64,712. This purported ambiguity (according to EPA) allows it to exercise its discretion and interpret the House version in a way that permits it to regulate Electric Generating Units (EGUs) under Section 111(d). EPA appropriates a legislative role by reconciling the two versions in a way that permits regulation. See *id.* 64,715 ("The Section 112 Exclusion in Section 111(d) does not foreclose the regulation of non-HAP from a source category regardless of whether that source category is also regulated under CAA Section 112.").

Simply put, EPA is barred from regulating EGUs under Section 111(d) because it already regulates these entities under Section 112. In February 2012, EPA established "[National Emission Standards for Hazardous Air Pollutants] NESHAP that will require coal- and oil-fired EGUs to meet hazardous air

pollutant (HAP) reflecting the application of the maximum achievable technology. [(MATs rule.)]" 77 Fed. Reg. 9,304 (Feb. 16, 2012).

Regulating EGUs under Section 112 triggers the clear prohibition in Section 111(d). This should end the matter. Congress specifically carved out an exemption in Section 111(d) for sources already regulated under Section 112. The legislative history of Section 111(d) precludes regulation of sources already subject to regulation under Section 112(d). In short, the Senate itself receded to the House version of 111(d) even though both versions appear in the Statutes at Large. S. 1630, 101st Cong., § 108 (Oct. 27, 1990), reprinted in 1 Leg. History at 885 (1998) (Chaffee-Caucus Statements of Senate Managers). Also, EPA itself has acknowledged the Senate's version as a "drafting error." 70 Fed. Reg. at 15,994, 16,031 (Mar. 29, 2005).

Moreover, the statute must provide an "intelligible principle to which the person or body authorized to [act] is directed to conform." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 472 (2001) (citation omitted). "Courts do not ask the hard-to-manage question whether the legislature has exceeded the permissible level of discretion . . . " Cass R. Sunstein, *Nondelegation Canons*, 67 U. Chi. L. Rev. 315, 338 (2000). Instead, courts examine "the far more manageable question whether the agency has been given the discretion to decide something that (under the appropriate canon) only legislatures may decide. *Id.*

Section 111(d) provides no intelligible principle through which EPA may disregard the clear prohibition and regulate sources already subject to regulation under Section 112. In short, there is no legislative delegation from Congress. The language is clear and "absent an extraordinarily convincing justification," EPA cannot "ratify an interpretation that abrogates the enacted statutory text. . . ." *Appalachian Power Co. v. EPA*, 249 F.3d 1032, 1041 (D.C. Cir. 2001).

EPA engaged in a legislative act when it promulgated the Clean Power Plan by trying to reconcile what it believed to be two controlling versions of Section 111(d). The lower court abetted this error by giving "full effect" to both versions and erroneously concluding EPA could issue the Clean Power Plan. *Am. Lung Assoc.*, 985 F.3d at 980. Moreover, the lower court disregarded the major rules doctrine – a "canon that constrains the Executive and helps maintain the Constitution's separation of powers." *United States Telecom Ass'n*, 855 F.3d at 419 (D.C. Cir. 2017, Kavanaugh, J., dissenting).

CONCLUSION

EPA's attempts to regulate massive sectors of the nation's energy production without clear authorization leads to a sobering question – who should decide issues of this level of magnitude? Unnamed bureaucrats at the EPA who are operating (at best) on the absolute fringes of statutory authority? Or, accountable, elected

representatives in Congress? The Constitution provides the answer as "All legislative Powers herein granted shall be vested in a Congress of the United States . . . " U.S. Const. art. I, § 1. And "the Executive my issue rules only pursuant to and consistent with a grant of authority from Congress (or a grant of authority directly from the Constitution.)" *U.S. Telecom Ass'n v. FCC*, 855 F.3d at 419 (Kavanaugh, J., dissenting, citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952)).

For these reasons, Landmark respectfully urges the Court to overturn the lower court's decision and rule that the lower court erred by concluding EPA has the authority under the Clean Air Act to promulgate the Clean Power Plan.

Respectfully submitted,

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