

IN THE
Supreme Court of the United States

WEST VIRGINIA, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

THE NORTH AMERICAN COAL CORPORATION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

(For Continuation of Caption See Inside Cover)

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

**BRIEF OF *AMICUS CURIAE* RICHARD L. REVESZ
IN SUPPORT OF FEDERAL, NON-GOVERNMENTAL
ORGANIZATION AND TRADE ASSOCIATION, POWER
COMPANY, AND STATE AND MUNICIPAL RESPONDENTS**

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ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

NORTH DAKOTA,

Petitioner,

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INTEREST OF *AMICUS CURIAE*

Amicus Richard L. Revesz,¹ the AnBryce Professor of Law and Dean Emeritus at New York University School of Law, has published more than 100 books, articles, and chapters on environmental and administrative law, and was recently listed as the nation's most cited environmental and administrative law scholar.² In particular, Professor Revesz has written extensively on the regulatory state, the Clean Air Act, and the major questions doctrine. Through his scholarship, Professor Revesz has described the considerable regulatory precedent for the Clean Power Plan and highlighted the extensive use of flexible compliance mechanisms, including generation shifting, in prior Clean Air Act regulation.³ Professor Revesz has also documented Congress's concerns for climate change in enacting the Clean Air Act in 1970.⁴

1. No party or counsel for a party authored this brief in whole or in part. No party, counsel for a party, or person other than amicus or counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief.

2. Brian Leiter, *20 Most-Cited Administrative and/or Environmental Law Faculty in the U.S., 2016–2020*, The Law Professor Blogs Network (Nov. 8, 2021), <https://leiterlawschool.typepad.com/leiter/2021/11/20-most-cited-administrative-andor-environmental-law-faculty-in-the-us-2016-2020.html>.

3. See, e.g., Richard L. Revesz et al., *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan*, 46 *Env't L. Rep.* 10,190 (2016).

4. Richard L. Revesz, *Bostock and the End of the Climate Change Double Standard*, 46 *Colum. J. Env't L.* 1 (2020).

Additionally, Professor Revesz’s scholarship has analyzed the major questions doctrine and explained how the Trump administration’s attempts to expand the doctrine would produce unworkable standards and perverse incentives.⁵ Petitioners⁶ and their amici in this litigation echo many of the Trump administration’s arguments, asking this Court to consider factors such as a rule’s public salience and the magnitude of its costs in deciding whether the major questions doctrine is applicable. This brief draws on Professor Revesz’s scholarship to rebut those arguments.

SUMMARY OF ARGUMENT

The Clean Power Plan was repealed three years ago—having never been implemented—and none of the parties seek to revive it. Nonetheless, petitioners request that this Court invoke the major questions doctrine to declare the already-defunct rule unlawful. They contend that if the Clean Power Plan had been implemented according to its original schedule, it would have crippled the coal industry and vastly expanded EPA’s authority. As respondents explain, these claims are nonjusticiable, as they require the Court to adjudicate the lawfulness of a rule that no longer exists, will never be enforced, and has been bypassed by market trends. Fed. Resp’t Br. 15–23; NGO & Trade Ass’n Br. 23–32. In addition, petitioners’ claims rely on misrepresentation of the Clean Power Plan’s

5. Natasha Brunstein & Richard L. Revesz, *Mangling the Major Questions Doctrine*, 74 Admin. L. Rev. (forthcoming 2022), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3927233.

6. This brief uses the term “petitioners” to include respondents in support of petitioners.

record and precedents, as well as illogical and unworkable new standards for identifying a major question.

As evidence of a major question, petitioners focus on three factors that supposedly make the Clean Power Plan unique: the rule's economic impacts, the degree of legislative attention its subject matter has received, and its public salience. None of these factors offers a persuasive basis to invoke the doctrine. For instance, while petitioners allege that the Clean Power Plan would have decimated the coal industry, the Trump administration concluded in the Affordable Clean Energy Rule ("ACE"), which petitioners defend, that the Plan would have made "no difference" in the energy sector and that repealing it would thus have no economic impact, positive or negative. J.A. 1672–73. Moreover, even if this Court somehow considered EPA's outdated (and, in retrospect, inflated) cost projections from 2015, those estimates are in line with the projected impacts of other regulations from administrations of both parties.

Petitioners' focus on legislative attention and public salience is similarly misguided. While petitioners highlight failed legislative attempts to limit greenhouse gas pollution economy-wide, this Court has rejected "speculation about why a later Congress declined to adopt new legislation" as a tool of statutory interpretation, explaining that inaction could indicate recognition of authority previously granted. *Bostock v. Clayton County, Georgia*, 140 S. Ct. 1731, 1747 (2020). Petitioners' emphasis on "the controversial subject of climate change," W. Va. Br. 26 (internal quotation marks omitted), also fails to provide a workable trigger for the major questions doctrine, as many issues are controversial in today's political climate yet remain the

subject of frequent rulemaking that this Court has often upheld. Petitioners' argument would produce an absurd result under which public controversy surrounding an issue could deprive an agency of an authority it held when the issue was less controversial.

As further evidence of a major question, petitioners erroneously claim that EPA has always "require[d] performance standards that are achievable by individual sources," and that the Clean Power Plan's reliance on generation shifting represented a transformative use of the agency's authority under Section 111(d). Nat'l Mining Ass'n Br. 39–41. Yet in the George W. Bush administration's Clean Air Mercury Rule, a cap-and-trade program for coal-fired power plants, EPA set emission limits based in part on shifting generation away from high-polluting facilities. That rule, which many of the petitioners in this case supported, also had considerable precedent.

Petitioners and amici further suggest that *any* significant rulemaking under Section 111(d) raises a major question, because the provision is "an all-but-forgotten backwater" of the Clean Air Act, Westmoreland Br. 1, that "was never used" prior to the Clean Power Plan, Mich. Leg. Br. 2. But these claims also fall flat, as both legislative history and regulatory precedent establish Section 111(d) as a key provision for controlling air pollution from stationary sources.

In sum, petitioners exaggerate the impacts of the Clean Power Plan and misrepresent the Clean Air Act's structure and regulatory history. In doing so, they seek to extend the major questions doctrine in unwarranted and unworkable ways.

ARGUMENT

I. The Factors that Petitioners Deem Indicative of a Major Question Are Unworkable and Fail to Distinguish the Clean Power Plan from Many Other Regulations

Petitioners and their amici present various criteria that purportedly justify applying the major questions doctrine here. These include regulatory costs; congressional attention; and public salience as represented by such factors as the volume of public comments, related litigation, and presidential statements. But such factors hardly distinguish this case, and would stretch a doctrine meant to apply only “[i]n extraordinary cases” beyond both recognition and workability. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In many circumstances, these factors would also create perverse incentives for both regulators and regulated entities. Because they fail to offer “limited and precise standards that are clear, manageable, and politically neutral,” *Rucho v. Common Cause*, 139 S. Ct. 2484, 2500 (2019), petitioners’ justifications for applying the major questions doctrine are unpersuasive.

A. The Clean Power Plan’s Costs, Which Petitioners Wildly Overstate, Are Not a Workable Criterion for Application of the Major Questions Doctrine

As a basis for invoking the major questions doctrine, petitioners emphasize the projected regulatory costs of the never-implemented Clean Power Plan. According to petitioners, implementing the rule “would have cost

hundreds of billions of dollars,” W. Va. Br. 20, including “a near-collapse in coal production, displacement of thousands of jobs across multiple industries, and hundreds of billions in forgone economic growth,” Westmoreland Br. 30. But these cost-related claims fail for at least four reasons: (1) the relevant cost estimate for purposes of this case is zero—the economic impact that the Trump administration attributed to the Clean Power Plan when it repealed the rule; (2) the outdated industry estimates petitioners cite were hugely inflated even when made; (3) EPA’s own, far more credible, cost estimates from the time of the Clean Power Plan’s issuance were in line with those of other judicially upheld rules; and (4) reliance on regulatory costs as a major questions trigger would create perverse incentives for agencies and promote arbitrary decisionmaking.

1. The Relevant Cost Figure for This Case Is the Estimate Prepared by EPA at the Time of the Affordable Clean Energy Rule’s Issuance, Which Found No Economic Impact from the Clean Power Plan

Even if regulatory costs could reasonably be considered when determining whether to apply the major questions doctrine, the relevant cost figure here would be one that reflects information available at the time EPA replaced the Clean Power Plan with ACE, which is the action now under review. And when it finalized the latter rule, EPA found that the Clean Power Plan would have had *no costs at all*, due to market shifts that had put the nation on a path to meet the rule’s goals even without any regulation. J.A. 1672–73 (“[T]here is likely to be no difference between a world where the [Clean Power

Plan] is implemented and one where it is not.”). Though petitioners did not challenge that EPA finding, they conveniently ignore it now, along with this Court’s clear command that the legality of a deregulatory action—here, ACE—be evaluated based on its own contemporaneous record. *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020). Instead, petitioners ask the Court to attribute costs that are not supported in the record to a rule that is not in place.

2. The Industry Cost Estimates that Petitioners Cite Are Neither Credible nor Relevant, and EPA’s Own Cost Estimates from the Time of the Clean Power Plan’s Issuance Are in Line with Those of Other Upheld Rules

In lieu of EPA’s 2019 estimate, petitioners rely on select industry-funded estimates from around the time of the Clean Power Plan’s issuance in 2015, which were unreasonably high even when made and, as a result, rejected by the agency.⁷ If cost projections based on pre-ACE conditions were relevant here—and, again, they are not—the appropriate projections to consider would be those prepared by EPA itself in 2015, using a peer-reviewed model of the electricity sector that the agency has relied on for decades. Grab & Lienke, *supra* note

7. See EPA, Clean Power Plan Response to Comments, EPA-HQ-OAR-2013-0602-37106, Ch. 8 Economic & Employment Impacts Part 1: Sections 8.0 Through 8.6, 99–103 (2015); see also Denise A. Grab & Jack Lienke, *The Falling Cost of Clean Power Plan Compliance* 14–17 (2017), https://policyintegrity.org/files/publications/Falling_Cost_of_CPP_Compliance.pdf (detailing flaws in analysis that petitioners rely upon).

7, at 3–5. Those estimates—which, unlike the industry estimates, used transparent assumptions and were subject to public comment—found that the Clean Power Plan’s compliance costs in 2030 would range from \$5.1 to \$8.4 billion, J.A. 1534, and EPA acknowledged those high-end estimates did not account for “low cost abatement opportunities” including interstate cooperation, EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3-10 to -11 (2015).

Contrary to petitioners’ claims, those costs would not have “tower[ed] over” those of other significant regulatory actions, W. Va. Br. 20. In recent years, numerous agencies under administrations of both political parties have issued multi-billion-dollar regulations without raising major questions concerns from courts. In 2020, for example, the Department of Defense issued a rule to “enhance the protection of unclassified information,” which it estimated to cost \$6.5 billion annually and over \$92 billion overall. 85 Fed. Reg. 61,505, 61,505, 61,507 (Sept. 29, 2020). Also in 2020, the Internal Revenue Service, Treasury Department, and Department of Health and Human Services promulgated a joint regulation requiring disclosure of health insurance information that, by the agencies’ estimates, could cost over \$10 billion in a single year. 85 Fed. Reg. 72,158, 72,280 tbl.8 (Nov. 12, 2020). And in 2008, the Department of Homeland Security issued regulations to restrict the import of terrorist weapons, which it projected to cost up to \$56 billion over ten years (i.e., \$5.6 billion annually). 73 Fed. Reg. 71,730, 71,768 (Nov. 25, 2008).

The estimated costs of the Clean Power Plan were also unexceptional for EPA pollution-control rules. The

agency's 1979 new source performance standards for coal-burning power plants, which the U.S. Court of Appeals for the D.C. Circuit upheld, were projected to cost utilities "tens of billions of dollars" by 1995, resulting in higher energy costs and consumer prices. *Sierra Club v. Costle*, 657 F.2d 298, 314 (D.C. Cir. 1981). And the 2012 fuel-efficiency and greenhouse gas emission standards for motor vehicles, which were not challenged in court, were projected to cost industry \$150 billion, at an annualized rate of at least \$6.5 billion. 77 Fed. Reg. 62,624, 62,663 tbl.I-19 (Oct. 15, 2012).

Petitioners' other attempts to differentiate the Clean Power Plan's economic impacts similarly fail. For instance, while petitioners claim that the rule could have "impacted almost everyone in the Nation," Nat'l Mining Ass'n Br. 35, this is common for regulations affecting consumer staples like electricity, motor vehicles, or home appliances, as well as those involving airline safety, central banking, and other ubiquitous aspects of modern American life. The petitioners also highlight the Clean Power Plan's supposedly "major impacts on employment," *id.* at 34, but even under EPA's outdated 2015 estimates, the rule's employment impacts would have been in the five digits, J.A. 1507–08—a drop in the bucket of the millions of individuals who gain and lose or leave jobs every month. See *Job Openings, Hires, and Total Separations by Industry, Seasonally Adjusted*, Bureau of Labor Statistics, <https://www.bls.gov/news.release/jolts.a.htm> (last updated Jan. 4, 2022).

Finally, while petitioners emphasize EPA's since-disclaimed projection that the Clean Power Plan would have resulted in the "closure of sources," Westmoreland Br.

19, source retirements have been a common consequence of environmental regulation for decades. *See, e.g., Ass'n of Pac. Fisheries v. EPA.*, 615 F.2d 794, 808 (9th Cir. 1980) (recognizing that EPA regulation “result[s] in plant closures” and highlighting other judicially upheld examples); *Nat'l Ass'n of Metal Finishers v. EPA.*, 719 F.2d 624, 663 (3d Cir. 1983), *rev'd on other grounds sub nom. Chem. Mfrs. Ass'n v. Nat. Res. Def. Council, Inc.*, 470 U.S. 116 (1985) (upholding EPA standard “resulting in the closing of 737 electroplating operations and the loss of 12,584 jobs”). Closures are, furthermore, consistent with the “technology-forcing character” of the Clean Air Act, which this Court has long recognized. *Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 91 (1975).

3. Focusing on Regulatory Costs Would Create Arbitrary Results and Perverse Incentives

Even if petitioners' claims regarding the Clean Power Plan's costs were accurate, using regulatory costs as a criterion for application of the major questions doctrine would lead to at least three undesirable and potentially absurd results.

First, decontextualizing a rule's costs would jeopardize expensive but non-transformative rules in larger industries while likely preserving relatively inexpensive but transformative rules in smaller industries. In this case, for instance, the Clean Power Plan's outdated cost projections (as made by EPA in 2015) constitute just 1–2% of the electricity industry's approximately \$400 billion in annual revenues. *See Revenue from Sales of Electricity to Ultimate Customers*, U.S. Energy Info. Admin., <https://>

www.eia.gov/electricity/annual/html/epa_02_03.html (last visited Jan. 5, 2022). Such a relatively minor impact is highly unlikely to cause the massive dislocation that the Court decried, but upheld on its own reading, in *King v. Burwell*, where eliminating the tax credit at issue would have decreased healthcare enrollment by 70% and caused unsubsidized premiums to increase by 47%. 576 U.S. 473, 494 (2015). Focusing on decontextualized regulatory costs would disregard such nuance and complicate regulation of larger industries.

Second, focusing on regulatory costs would incentivize agencies to issue less beneficial regulations—breaking with decades of practice and violating common sense. Since the Reagan administration, agencies have been encouraged to pursue, when permissible, the regulatory approach that “maximizes the net benefits”—that is, the regulation’s benefits minus its costs. Exec. Order No. 12,291 § 2(c), 46 Fed. Reg. 13,193, 13,193 (Feb. 17, 1981); *accord* Exec. Order 12,866 § 1(a), 58 Fed. Reg. 51,735, 51,735 (Oct. 4, 1993). The Clean Power Plan, for instance, was projected to result in \$32–54 billion in annual benefits by 2030, easily surpassing its cost. J.A. 1509. But under petitioners’ single-minded focus on industry compliance costs, agencies would select less-costly regulatory approaches even when those approaches sacrificed substantial net benefits.

Third, focusing on regulatory costs would create a perverse incentive for agencies to split up larger rules into component parts. While this approach would minimize the costs of any single rule, it could well lead to higher costs in the aggregate. Congressional silence should not be interpreted to delegate authority to an agency to advance a regulatory program only if the agency does so in pieces.

In summary, the Trump administration’s conclusion in the challenged rule that the Clean Power Plan would have made “no difference” renders any focus on regulatory cost inapposite. J.A. 1672–73. And even if that were not the case, petitioners’ suggestion that costly rules trigger the major questions doctrine is problematic.

B. Petitioners’ Focus on Legislative Failures Under the Major Questions Doctrine Disregards This Court’s Clear Precedent and Does Not Meaningfully Differentiate the Clean Power Plan

Petitioners also suggest that the Clean Power Plan triggers the major questions doctrine because “[c]limate change has been on Congress’s agenda for decades.” Westmoreland Br. 31. Citing legislative failures to enact economy-wide greenhouse-gas programs, they characterize the rule as an impermissible effort by the executive to act where “Congress had failed.” Nat. Mining Ass’n Br. 36. This argument is similarly unpersuasive.

This Court most recently dismissed the relevance of post-enactment legislative developments as a tool of statutory interpretation in *Bostock v. Clayton County, Georgia*. 140 S. Ct. 1731 (2020). There, this Court held that failed congressional efforts to expressly protect sexual orientation offered “no authoritative evidence” as to whether that protection already existed. *Id.* at 1747. The Court recognized attempts to discern statutory meaning from subsequent proposed legislation as a “particularly dangerous basis on which to rest an interpretation of an existing law,” as such attempts could indicate that legislators “didn’t think a revision [was] needed”

because they “understood the impact [of the law’s] broad language.” *Id.* (internal quotation marks omitted). *See also Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring) (“Arguments based on subsequent legislative history . . . should not be taken seriously.”).

And the argument for ignoring subsequent inaction is even stronger in this case than it was in *Bostock*. *See Revesz, supra*, at 61. Unlike in *Bostock*, in which the failed legislation would have expressly codified the interpretation being challenged, here petitioners rely on legislation that substantially differs from the Clean Power Plan. Petitioners point to the Waxman-Markey bill, H.R. 2454, 111th Cong. § 703 (2009), and other unenacted climate bills concerning economy-wide carbon emissions trading, renewable energy tax credits, and other matters that are far broader than and distinct from EPA’s authority to reduce greenhouse gas emissions from existing coal-fired power plants. *See W. Va. Br. 24–25; Westmoreland Br. 31–32; Nat’l Mining Ass’n Br. 35–36.*

In fact, when Congress considered legislation related to the authority exerted in the Clean Power Plan, those bills aimed to curtail that authority and failed. For instance, Congress considered but failed to enact legislation that would have prohibited EPA from regulating greenhouse gas emissions, H.R. 910, 112th Cong. (2011), S. Amdt. 183 to S. 493, 112th Cong. (2011); regulating greenhouse gas emissions from power plants unless they meet specified requirements, H.R. 3826, 113th Cong. (2014); and finalizing the Clean Power Plan as proposed, H.R. 5300, 113th Cong. § 2(b)(2) (2014). Congress also failed to enact legislation that would have nullified the Clean Power Plan, as it could not overcome a presidential veto. S.J. Res. 24, 114th Cong.

(2015). Thus, if subsequent legislative failures are at all relevant, they undermine petitioners' arguments.

Because Congress considers varied legislation on many important issues, petitioners' focus on congressional attention to a broad topic (here, climate and energy) is unworkable, *see, e.g.*, W. Va. Br. 24; Nat'l Mining Ass'n Br. 35. Over the past twenty years, Congress has enacted roughly 5% of the over 125,000 bills introduced. *Bills by Final Status*, GovTrack, <https://www.govtrack.us/congress/bills/statistics> (last visited Jan. 4, 2022). Enabling all of these bills to serve as a basis to invoke the major questions doctrine would extend the doctrine into nearly every area of public policy and create perverse incentives. First, it would make legislators who support a regulatory program reluctant to introduce related legislation for fear of jeopardizing the program's legality. Second, it would make legislators who oppose a regulatory program inclined to introduce legislation, regardless of its chances at passage, so as to increase the likelihood that the program would be struck down in court.

Petitioners' effort to analogize to the legislative backdrop in *Brown & Williamson* also fails. *See* Westmoreland Br. 31. In that case, the defendant agency made "consistent and repeated statements that it lacked authority . . . to regulate tobacco," and, in light of these representations, Congress passed "tobacco-specific statutes [that] effectively ratified the FDA's long-held position." 529 U.S. at 144. Here, in contrast, EPA had not disclaimed its authority to use the regulatory mechanisms deployed in the Clean Power Plan prior to ACE,⁸ nor

8. As detailed later in this brief, EPA had in fact previously relied on generation-shifting approaches. *Infra* Sec. II.

did Congress enact legislation to ratify any such a claim. Petitioners instead point to a series of tangential legislative failures, but such an over-inclusive invocation of legislative history defies this Court's precedent and would create an unmanageable standard.

C. Public Salience Is a Problematic Consideration Under the Major Questions Doctrine, as Evidenced by Petitioners' Various Unworkable Indicators

Some petitioners argue that the Clean Power Plan must have been a major rule because of its public salience, presenting evidence such as the number of public comments, intensity of litigation, presidential statements, and public discourse concerning the rule. But none of these criteria present a workable indicator to identify a major question.

1. The Volume of Public Comments Cannot Be Indicative of a Major Question

Although petitioners highlight the number of comments received on the Clean Power Plan, *W. Va. Br. 25*, this Court has never relied on that factor before. It even noted in *Brown & Williamson* that the FDA rule at issue had broken the agency's comment record, 529 U.S. at 126–27, yet did not rely on this fact in its analysis.

Such disregard is well-founded. For one, large numbers of comments are not atypical in complex rulemakings—a finding confirmed by the Senate Committee on Homeland Security and Government Affairs, under then-Chairman Rob Portman (R-Ohio). Staff of Permanent Subcomm. on

Investigations, 116th Cong., *Abuses of the Federal Notice-and-Comment Rulemaking Process* 5 (Comm. Print. 2019) (“Senate Report”). In 2017, for example, the Federal Communications Commission received nearly 24 million comments on the proposed repeal of its net neutrality rule. *Id.* Without acknowledging the discrepancy, the Trump administration argued that the Clean Power Plan’s 4.3 million comments were evidence of “political significance” yet defended its net-neutrality repeal despite its far higher number of comments. *See* Brunstein & Revesz, *supra*, at 20.

Moreover, the number of regulatory comments cannot be a good measure of agency authority due to the prevalence of mass comments, fraudulent or mal-attributed comments, and computer-generated comments. Senate Report, *supra*, at 5–6. The Senate Report found that of the almost 24 million comments submitted on the net-neutrality rule, “nearly eight million comments came from email addresses associated with fakemailgenerator.com and more than 500,000 came from Russian email addresses.” *Id.* at 19. The Senate Report further documented the high volume of comments submitted under the names of famous individuals including Donald Trump, Barack Obama, LeBron James, and Elvis Presley. *Id.* at 20. Furthermore, “[o]n nine different occasions, more than 75,000 comments were dumped into the [net neutrality] docket at the very same second,” indicating that the comments were likely computer-generated. Steve Balla et al., *Mass, Computer-Generated, and Fraudulent Comments* 3 (June 1, 2021) (report to the Admin. Conf. of the U.S.).

Focusing on the number of public comments received would also create perverse incentives for opponents of

a regulation to execute mass-comment campaigns in hopes of influencing a judicial outcome. Under petitioners' proposed trigger, organizations would be rewarded for generating as many comments as possible—regardless of their substance or even whether they came from real people.

2. The Scale of Litigation Is Similarly Unworkable and Would Produce Perverse Incentives

Some petitioners also cite the litigation associated with the Clean Power Plan as evidence of a major question, W. Va. Br. 25, with one party counting the number of total words briefed, hours argued, and lines captioned, Nat'l Mining Ass'n Br. 37–38. But this factor is equally problematic and unprecedented.

For one, litigation over the Clean Power Plan is hardly an outlier. Many important regulations are challenged and defended by large groups of state attorneys general, advocacy organizations, and industry groups. *See, e.g.*, Brunstein & Revesz, *supra*, at 27–28. For example, the Department of Homeland Security's 2019 regulation defining “public charge” was challenged in nine lawsuits by 21 states and numerous groups representing the regulated community. *See* Public Charge Litigation, Ctr. for Pub. Representation, <https://medicaid.publicrep.org/feature/public-charge-litigation/> (last updated Mar. 9, 2021). Yet this Court allowed that rule to stand, with a concurrence emphasizing its extensive litigation. *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 599 (2020) (Gorsuch, J., concurring).

Similarly, in *Utility Air Regulatory Group v. EPA*, even though thirteen states were petitioners, fifteen states were respondents, and several environmental and industry groups intervened, this Court did not consider these facts in its legal analysis. *See* 573 U.S. 302, 304–06, 324 (2014) (“*UARG*”). This was also the case in *EPA v. EME Homer City*, where 23 states and numerous environmental organizations and industry groups were involved in the dispute. 572 U.S. 489, 493–94 (2013). Extending the major questions doctrine to include this criterion would perversely incentivize widespread litigation.

3. Presidential Statements Highlighting the Importance of Regulations Are Common, and Fail to Distinguish the Clean Power Plan

Petitioners next suggest that the Clean Power Plan presents a major question because President Obama touted the rule’s importance. *See, e.g.*, *Westmoreland Br.* 30–31. Yet again, the Court has never relied on this factor. Furthermore, plenty of rules that presidents boast about do not create regulatory transformations. Presidents have political reasons for trumpeting particular executive actions—such as to demonstrate the benefits achieved through their leadership, ensure their legacy, and bolster efforts for reelection—and when they do so, they typically highlight the action’s importance. Using presidential statements of this sort to determine an agency’s authority would “inject [this Court] into . . . heated partisan issues” and turn it into an arbiter on how everyday politics is conducted. *Rucho*, 139 S. Ct. at 2499 (internal quotation marks omitted).

Indeed, presidents on both sides of the aisle routinely emphasize the importance of their administration’s achievements. For instance, President Trump described the Department of Homeland Security’s Migrant Protection Protocols as “historic policy changes to shut down asylum fraud . . . [,] end[] a humanitarian crisis and save[] countless lives.” Remarks on Border Wall Construction and Immigration Reform Near Alamo, Texas, 2021 Daily Comp. Pres. Doc. 14 (Jan. 12, 2021). Nonetheless, this Court recently reinstated that policy, indicating that a subsequent rollback was likely arbitrary and capricious. *Biden v. Texas*, 210 L. Ed. 2d 1014, 1014 (Aug. 24, 2021).

Whether the president declares a rule important has little bearing on whether it has in fact prompted a regulatory transformation. For instance, despite President Obama’s claims about the Clean Power Plan, as described above EPA modeling conducted in 2019—for the ACE rule petitioners now defend—found that the regulation would have made no impact.

4. Public Opinion and Discourse Is Difficult to Measure, and Also Fails to Distinguish the Clean Power Plan

Some petitioners also claim that the Clean Power Plan presented a major question because climate change is “at the very center of this Nation’s public discourse.” W. Va. Br. 25–26 (internal quotation marks and citation omitted). But once again, the petitioners fail to present any workable metric to identify a question subject to profound debate, and basing a key doctrine on such an amorphous factor is “more likely to confuse than to clarify,” *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) (Scalia, J., concurring).

Debate around the Clean Power Plan is not as extensive as petitioners suggest. According to a 2017 survey from Yale University, “majorities of Americans in all 50 states and 435 congressional districts support setting strict carbon dioxide emission limits on coal-fired power plants.” *Poll: Majority in All States, Congressional Districts Support Clean Power Plan*, Yale School of the Environment (Feb. 28, 2017), <https://environment.yale.edu/news/article/poll-majority-support-for-clean-power-plan-in-all-states-congressional-districts>. Many issues today—such as immigration, abortion, internet privacy, tax policy, and LGBTQ rights—are subject to similar or more extensive public debate, yet administrations of both parties regulate in these areas. In fact, this Court recently allowed one of the most salient immigration rules—the “public charge rule”—to take effect. *New York*, 140 S. Ct. 599.

Under petitioners’ standard, however, agencies would not only be restricted from regulating on many topics, but agency authority would wax and wane over time with public attention. For instance, while environmental regulation is now highly partisan, that was not always the case, as evidenced by the overwhelming congressional support for the Clean Air Act and its amendments. Richard Schmalensee & Robert N. Stavins, *Policy Evolution Under the Clean Air Act* 2–3, Resources for the Future (Working Paper No. 18-27, 2018), <https://media.rff.org/documents/RFF20WP-18-2720dc.pdf>. The implication of petitioners’ argument is therefore that EPA now lacks authority that it once had. But this conclusion cannot be squared with statutory language and congressional intent, and would place the courts in the uncomfortable (and untenable) position of determining what quantum

of public attention is sufficient to divest an agency of a previously held power.

Such a standard would also incentivize efforts to deepen political polarization and run opposition campaigns. As evidenced by this very case, challengers could use their public-relations campaigns as purported evidence of broad opposition. *See* Brunstein & Revesz, *supra*, at 28–29 (describing public-facing campaign against the Clean Power Plan aimed at influencing litigation).

* * *

The factors that petitioners propose do not ascertain whether an agency has achieved “a fundamental revision of the statute,” *MCI Telecommunications Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 231 (1994), but instead would confuse the major questions analysis and place this Court in the uncomfortable role of arbitrating political disputes. In fact, the very factors that petitioners emphasize fail to distinguish the Clean Power Plan from many other rules promulgated under both parties, including ones that this Court upheld.

II. EPA’s Past Reliance on Flexible Compliance Mechanisms, Including Generation Shifting, Under Administrations of Both Parties, Belies Petitioners’ Claims That the Clean Power Plan’s Novelty Triggers the Major Questions Doctrine

Petitioners and their amici claim that “EPA did not use Section 111(d) before the [Clean Power Plan] to require measures *other* than on-the-scene technologies,” *W. Va. Br. 22*, including “decreased utilization of individual

sources or ‘shifting’ production away from individual sources,” Westmoreland Br. 9. These assertions rewrite regulatory history.

For one, since the Trump administration concluded in ACE that market forces alone would have shifted energy production and the Clean Power Plan would have made “no difference” itself, J.A. 1672–73, petitioners’ claims about the Clean Power Plan’s effects are inconsistent with the record. Moreover, even if the agency’s since-disclaimed 2015 projections remained relevant, under both Section 111(d) and related Clean Air Act provisions, EPA has often—under administrations of both political parties—set the stringency of standards on the basis of generation shifting and other controls that extend beyond the fenceline of an individual facility. Thus, contrary to petitioners’ claims, the Clean Power Plan did not assert a “transformative expansion” of the Clean Air Act, Westmoreland Br. 26 (quoting *UARG*, 573 U.S. at 324).

A. EPA Has Previously Set the Stringency of Section 111(d) Standards Based on the Use of Generation Shifting and Emissions Trading

Under the George W. Bush administration, EPA promulgated the Clean Air Mercury Rule (“2005 Mercury Rule”) under Section 111(d). 70 Fed. Reg. 28,606 (May 18, 2005). That rule, which set statewide targets for mercury emissions from coal-fired generating units, not only allowed for intersource and interstate trading of emission allowances, but identified such trading as part of the “best system of emissions reduction” for the source category. *Id.* at 28,617. By its very nature, an emissions trading system reaches beyond the fencelines of individual

plants, allowing a group of regulated sources to apportion a collective reduction burden among themselves based on their relative costs of abatement.

Petitioners attempt to distinguish the 2005 Mercury Rule from the Clean Power Plan by arguing that the former’s stringency was “derived from inside-the-fenceline control technology available at the time” and did not necessitate use of allowance trading or generation shifting. W. Va. Br. 22 (internal citation omitted). But the 2005 Mercury Rule reveals otherwise. In promulgating that rule, EPA never suggested that every affected source would or could, at reasonable cost, comply with that rule solely through technological controls. Instead, it explained that units for which it was “not cost effective to install controls” would “use other approaches for compliance including buying allowances, switching fuels, *or making dispatch changes* [i.e., generation shifting].” 70 Fed. Reg. at 28,619 (emphasis added). In other words, EPA based the stringency of its “best system of emission reduction” under Section 111(d) on the premise that higher-polluting facilities would reduce generation. And numerous petitioners in this case, who now allege that the use of generation shifting is unlawful, in fact defended the 2005 Mercury Rule in litigation, including its trading program. Joint Brief of State Respondent-Intervenors, Industry Respondent-Intervenors, and State Amicus at 26, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008) (No. 05-1097).

Though the 2005 Mercury Rule was ultimately vacated by the D.C. Circuit, the reversal was on grounds wholly unrelated to generation shifting or the stringency of the rule’s emission budgets. *New Jersey*, 517 F.3d 574. Moreover, alongside the 2005 Mercury Rule, EPA

amended the Section 111 implementing regulations to provide that a state's "[e]mission standards [may] be based on an allowance system." 70 Fed. Reg. at 28,649. That language remains in place. 40 C.F.R. § 60.24(b)(1). Accordingly, petitioners' argument that the Clean Power Plan represented a novel interpretation of Section 111(d) falls flat.

B. EPA Has Previously Set the Stringency of Standards Under Other Clean Air Act Provisions Based on Generation Shifting and Emissions Trading

EPA has also relied on generation shifting and other beyond-the-fenceline compliance measures when setting emission limits under other Clean Air Act provisions, resulting in stricter standards than would be achievable through technological improvements alone. Some of those provisions, like Section 111(d), do not expressly address such measures, contradicting petitioners' claim that Congress always "says so directly" when it "wants an industry or source to hit an emission target" through "outside-the-fenceline measures." W. Va. Br. 42. Furthermore, several of the provisions under which EPA has previously regulated in this fashion are related to Section 111(d) or employ similar language.

Specifically, EPA has set standards based on generation shifting and other beyond-the-source approaches under the following Clean Air Act provisions:

Good Neighbor Provision, Section 110(a): Under the Good Neighbor Provision, which limits interstate pollution from stationary sources, 42 U.S.C. § 7410(a)

(2)(D)(i)(I), EPA has consistently relied on generation shifting and other beyond-the-fenceline measures in setting pollution standards. In five rulemakings, EPA established statewide emission budgets for the power sector and crafted trading mechanisms for states to meet their budgets: the Clinton administration’s 1998 NO_x SIP Call, 63 Fed. Reg. 57,356, 57,358–59 (Oct. 27, 1998); the George W. Bush administration’s Clean Air Interstate Rule, 70 Fed. Reg. 25,162, 25,162, 25,229 (May 12, 2005); the Obama administration’s 2011 Cross-State Air Pollution Rule (“Transport Rule”), 76 Fed. Reg. 48,208, 48,210–11 (Aug. 8, 2011) and 2016 Cross-State Air Pollution Rule Update, 81 Fed. Reg. 74,504, 74,508–09 (Oct. 26, 2016);⁹ and the Biden administration’s 2021 Update, 86 Fed. Reg. 23,054 (Apr. 30, 2021). These precedents are particularly relevant because Section 111(d) directs EPA to follow “a procedure similar to that provided by section 110” when working with states to set standards for existing sources. 42 U.S.C. § 7411(d)(1).

In establishing emission budgets under its Section 110(a) rules, EPA has explicitly accounted for generation shifting. For example, in the Transport Rule, which this Court upheld as a “workable[] and equitable interpretation of the Good Neighbor Provision,” *EME Homer City*, 572 U.S. at 524, the agency concluded that requiring “direct control[s]” at individual sources “would result in fewer emission reductions and higher costs compared to [a trading-based approach],” 76 Fed. Reg. at 48,272–73. EPA accordingly set budgets with which it expected regulated plants to comply by “increas[ing] dispatch

9. The D.C. Circuit remanded the 2016 Update on unrelated grounds. *Wisconsin v. EPA*, 938 F.3d 303, 336 (D.C. Cir. 2019).

from lower-sulfur-emitting units as well as from natural gas-fired generators.” *Id.* at 48,279; *accord id.* at 48,280 (anticipating “generation shifting from higher emitting units to lower emitting units” as a compliance strategy). In other words, EPA premised its standard on the expectation of generation shifting from coal to natural gas.

EPA has followed a similar approach in more recent Section 110(a) regulations. In its latest update, which was proposed under the Trump administration, the agency continued to rely on a trading program in setting emission standards, expecting sources to comply in part by “[s]hifting generation to lower [nitrous oxide]-emitting or zero-emitting [electricity generating units].” 85 Fed. Reg. 68,964, 68,992 (Oct. 30, 2020). EPA finalized that standard in early 2021. 86 Fed. Reg. 23,054 (Apr. 30, 2021).

Mobile Source Provisions, Sections 202 and 211: For forty years, EPA has consistently set emission standards under Section 202, which governs new motor vehicles and motor-vehicle engines, based on averaging, banking, and trading. *See, e.g.*, 48 Fed. Reg. 33,456 (July 21, 1983). This approach “is an integral part of the standard setting itself . . . allowing EPA to set a standard that is numerically more stringent” than it would through technological controls on individual automobiles or fleets. 77 Fed. Reg. 62,624, 62,788 (Oct. 15, 2012); *accord* 72 Fed. Reg. 8428, 8431 (Feb. 26, 2007) (explaining that use of averaging, banking, and trading “allows us to set a numerically more stringent . . . standard than would otherwise be achievable”). Additionally, EPA has acknowledged that mobile-source standards are effectively predicated on the notion that manufacturers will comply, at least in part, by shifting sector-wide production to lower-emitting

automobiles such as through “increased electrification of the fleet.” 77 Fed. Reg. 62,624, 62,631 (Oct. 15, 2012).

Section 202 is particularly instructive for EPA’s regulation under Section 111(d) because it also calls for certain standards to “reflect the greatest degree of emission reduction achievable through the application of technology.” 42 U.S.C. § 7521(a)(3)(A)(i). The fact that “[a]veraging, [b]anking, and [t]rading . . . of emissions credits”—and, consequently, production shifting—“have been an important part of many EPA mobile source programs” for decades, over numerous presidential administrations of both parties, 76 Fed. Reg. 57,106, 57,238 (Sept. 15, 2011), undercuts the argument that the word “application,” which also appears in Section 111, requires emission reductions “*performable by* the existing source on its own,” N. Am. Coal Br. 15. The D.C. Circuit upheld the fleet-wide approach as a permissible interpretation of Section 202, finding that the provision is “[l]acking any . . . prohibition of averaging.” *Nat. Res. Def. Council v. Thomas*, 805 F.2d 410, 425 (D.C. Cir. 1986).

EPA has also designed standards for motor-vehicle fuels under Section 211, 42 U.S.C. § 7545, to be met sector-wide. For example, in 1982, during the Reagan administration, EPA promulgated a standard for the lead content of gasoline that some refineries could satisfy only by obtaining lead credits from others. 47 Fed. Reg. 49,322, 49,324 (Oct. 29, 1982). The D.C. Circuit upheld that approach. *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535–36 (D.C. Cir. 1983).

New Source Performance Standards, Section 111(b): EPA has also based emission standards under

Section 111(b) on flexible averaging, banking, and trading mechanisms that shift production. Under new source performance standards promulgated during the George W. Bush administration for certain stationary internal combustion engines, manufacturers can generate “emission credits” tied to “production volumes,” 71 Fed. Reg. 39,154, 39,185 (July 11, 2006), meaning that the standards can be achieved not just by decreasing the emissions rate of any given engine type, but also by adjusting the production balance between engines that emit above and below the standards. EPA deemed the averaging, banking, and trading mechanisms that enable this production shifting “essential elements in [its] determination that the final standards reflect best [demonstrated technology]” because they “allow[] the manufacturer to adjust its compliance for engine families for which coming into compliance with the standards will be particularly difficult or costly, without special delays or exceptions having to be written into the final rule.” *Id.* at 39,159. In other words, the availability of production shifting as a compliance mechanism was essential to EPA’s determination of the standards’ stringency. EPA subsequently included similar averaging, banking, and trading provisions in new source performance standards for stationary spark ignition internal combustion engines. 73 Fed. Reg. 3568, 3595 (Jan. 18, 2008).

Thus, petitioners’ claims that EPA has never used a “system-wide approach” for 111(b) standards are unfounded. *N. Am. Coal Br.* 46. And because Sections 111(d) and 111(b) rely on the same definition of a “standard of performance” achievable through the “best system of emission reduction,” 42 U.S.C. § 7411(a)(1), EPA’s use of such an approach under Section 111(b) for more than

fifteen years—over four presidential administrations—is particularly telling.

* * *

As these precedents illustrate, the Clean Power Plan applied established mechanisms that EPA has used for decades under administrations of both parties. Moreover, even where EPA has not expressly tied the stringency of emission standards to generation shifting, shifts in the generation mix are an inevitable consequence of any regulations requiring significant emission reductions from the power sector. *See* Power Companies Br. 37–38. These longstanding practices contradict the claim that EPA exerted an “unheralded power” in promulgating the Clean Power Plan. Westmoreland Br. 2 (quoting *UARG*, 573 U.S. at 324).

III. Section 111(d) Is Not an Afterthought, as Petitioners Claim in Their Major Questions Analysis, But a Key Component of the Clean Air Act’s Comprehensive Approach to Regulating Pollution

In arguing that the major questions doctrine should apply, petitioners and their amici dismiss Section 111(d) as a “marginal” and “ancillary” provision “[t]ucked away in a dusty corner” of the statute. N. Am. Coal Br. 1. But both the legislative and regulatory history of Section 111(d) rebut petitioners’ characterization of the provision as an “all-but-forgotten backwater,” Westmoreland Br. 1.

In particular, petitioners and their amici point to congressional statements that Section 111(d) should serve as a “gap-filler” as an indicator of the provision’s

insignificance. *E.g.*, Cato Inst. Br. 2–3. Congress did not presume, however, that the gaps filled by Section 111(d) would be unimportant. On the contrary, it designed the provision to address “significant danger[s] to public health and welfare” that were not covered by other statutory programs. *See* S. Rep. No. 91-1196, at 20 (1970).¹⁰ The lead drafters of the 1970 legislation affirmed the essential nature of Section 111(d), emphasizing that its inclusion in the statute reflected a desire to give EPA flexibility to limit pollutants that do not neatly fit into other regulated categories through a mechanism similar to that provided by Section 110. Brief of Leon G. Billings and Thomas C. Jorling as Amici Curiae in Support of Respondents at 22–23, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. dismissed Sept. 17, 2019).

EPA’s prior interpretations and use of Section 111(d) further demonstrate its important role. *See* Non-Gov’t Org. & Trade Assoc. Br. 9. In 1975, reasonably contemporaneous with the passage of the statute, EPA issued a regulation on appropriate procedures and requirements for stationary sources regulated under Section 111(d). 40 Fed. Reg. 53,340 (Nov. 17, 1975). The agency explained that the Clean Air Act addressed “three general categories of pollutants emitted from stationary sources”: criteria, which are regulated under Sections 108–110; hazardous, which are regulated under Section 112; and “pollutants that are (or may be) harmful to public health or welfare but are not or cannot be controlled

10. Before reconciliation with the House, the requirements under Section 111(d) were in Section 114. The core substantive requirements of Section 114 did not change after it was moved to Section 111(d).

under sections 108–110 or 112.” *Id.* This third category of pollutants was to be regulated through Section 111(d), which required “control of existing sources of such pollutants whenever standards of performance (for those pollutants) are established under Section 111(b) for new sources of the same type.” *Id.* EPA further described Section 111(d) as part of a series of “drastic measures” that would allow for “aggressive action” against air pollution. *Id.* at 53,342–43.

Consistent with this vision, the Obama, George W. Bush, Clinton, and Carter administrations relied on Section 111(d) to control harmful air pollutants. *See, e.g.*, 61 Fed. Reg. 9905 (Mar. 12, 1996); 45 Fed. Reg. 26,294 (Apr. 17, 1980); 44 Fed. Reg. 29,828 (May 22, 1979); 42 Fed. Reg. 55,796 (Oct. 18, 1977). Of particular note, EPA used Section 111(d) to target methane, a potent greenhouse gas, 61 Fed. Reg. at 9912–14—belying petitioners’ claims that Section 111(d) has been used only for “localized pollutants” rather than “ubiquitous pollutants like carbon,” W. Va. Br. 6.

And while petitioners’ amici claim that “global warming was not even a concern discussed by Congress” in 1970, CEI Br. 3, Congress in fact received extensive testimony when crafting the Clean Air Act about emerging research on the potential for air pollution to “threaten irreversible atmospheric and climatic changes.” *See* 116 Cong. Rec. 32,901 (1970). Indeed, “awareness of and concern about climate change appear extensively in the legislative history accompanying the [Clean Air Act’s] enactment, including in statements by congressional leaders and other members [and] testimony by high-ranking administration officials and prominent scientific

experts.” Revesz, *supra*, at 34. Congress responded by granting EPA authority to protect against harms to the “climate.” See 42 U.S.C. § 7602(h). Thus, it is simply not the case that lawmakers “could hardly have intended” for EPA to regulate greenhouse gases under Section 111, CEI Br. 3.

In fact, Congress recently and forcefully reiterated its intent for Section 111(d) to cover greenhouse gases, when lawmakers passed—and the President signed into law—a Congressional Review Act resolution restoring EPA’s 2015 regulation of methane emissions from the oil and gas sector. See Pub. L. No. 117-23, 135 Stat. 295 (2021). Lawmakers expressed their concern that a repeal of the Section 111(b) rule for new sources would have the “enormously consequential” impact of “effectively block[ing]” EPA from addressing more extensive methane pollution from existing sources under Section 111(d). H.R. Rep. No. 117-64, at 7–8 (2021). Congress has thus recognized that Section 111(d) can serve as the basis for “enormously consequential” regulation of greenhouse gases.

In short, petitioners are incorrect in their major questions analysis to describe Section 111(d) as an unimportant section of the Clean Air Act. Congress intended Section 111(d) to play an essential role in its comprehensive framework of air-pollution control, and EPA has, for decades, used the provision accordingly.

CONCLUSION

For the foregoing reasons, and those discussed in respondents' briefs, this Court should either dismiss the petitions or affirm the judgment of the U.S. Court of Appeals for the D.C. Circuit.

Respectfully submitted,

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