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

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,

PETITIONERS,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

RESPONDENTS.

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

BRIEF OF RESPONDENT NATIONAL MINING ASSOCIATION IN SUPPORT OF PETITIONERS

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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 in 20-1530 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

National Mining Association is a non-profit corporation that has no parent corporation; no publicly held company owns 10% or more of National Mining Association's stock.

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INTRODUCTION

The Clean Power Plan involves a form of agency overreach that has, unfortunately, become increasingly more common since the Clean Power Plan's issuance: an agency seizes upon a snippet of general statutory language and enlists that language as claimed authority for settling a major policy issue for the Nation. *See, e.g.*, *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam); *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 609–18 (5th Cir. 2021). When an agency acts in this manner, the resulting rule offends the separation of powers and the right of the people to be governed by their elected representatives. Such administrative action runs afoul of the major questions doctrine and puts the underlying statute under threat of violating the nondelegation doctrine.

Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), the authority upon which the Environmental Protection Agency ("EPA") built the Clean Power Plan, contains just two relevant sentences. The first sentence requires EPA to establish a "procedure" under which States must "establish[ ] standards of performance for any existing source" of air emissions and "provide[ ] for the implementation and enforcement of such standards of performance." The second sentence merely clarifies the first to ensure that States may consider, among other factors, the remaining useful

life of an existing source in applying a "standard of performance" to it.

In adopting the Clean Power Plan, EPA claimed to find lurking within these two sentences of Section 111(d), as well as a definitional cross-reference, the authority to force the entire power sector away from fossil fuels and toward renewable energy resources. EPA did so by asserting that Section 111(d) gives it virtually unlimited discretion to determine the "best" way to reduce carbon-dioxide emissions from power plants, and EPA decided that changing the resources used to generate electricity would be best. To effect that change, EPA hypothesized how much it thought generation could be shifted, and then adopted "emission performance rates" for fossil fuel-fired units that had never before been achieved by "any existing source." Therefore, and by design, the Clean Power Plan required the power sector to transition away from coal-fired generation.

While the National Mining Association strongly agrees with State Petitioners that Section 111(d)'s text unambiguously prohibits the Clean Power Plan, and therefore this Court can uphold EPA's 2018 repeal of the Plan on that basis alone, State Pets. Br. Part II, the National Mining Association respectfully submits that this Court should resolve this case directly under the major questions doctrine. This Court should hold that EPA in 2018 correctly concluded that the Clean Power Plan was unlawful

because Congress, in adopting Section 111(d), did not clearly delegate to EPA the authority to decide for the Nation whether to replace coal-fired generation with other energy resources. Taking this approach would give guidance to lower courts, agencies, litigants, and the people on how to deal with this increasingly common form of agency overreach.

OPINION BELOW

The opinion of the D.C. Circuit below is reported at *American Lung Association v. EPA*, 985 F.3d 914 (D.C. Cir. 2021), and is reproduced in the Joint Appendix. J.A.53–255.

JURISDICTION

The D.C. Circuit entered judgment on January 19, 2021. The petition for a writ of certiorari in No. 20-1530 was filed on April 29, 2021. The petition for a writ of certiorari in No. 20-1531 was filed on April 30, 2021. The petitions for writs of certiorari in Nos. 20-1778 and 20-1780 were filed on June 18, 2021. The petitions were granted on October 29, 2021 and the cases were consolidated by the Court. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

Relevant statutory provisions from the Clean Air Act appear in the Appendix to the Petition in 20-1530. Pet.App.204a–09a.

STATEMENT OF THE CASE

A. Section 111(d) Of The Clean Air Act

In 1970, Congress enacted Section 111 of the Clean Air Act, authorizing the regulation of air pollutants emitted from stationary sources that "cause[ ], or contribute[ ] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." Pub. L. 91-604, § 111, 84 Stat. 1676, 1683–84 (1970); 42 U.S.C. § 7411. For *new* stationary sources that meet these criteria, Congress directed EPA under Section 111(b) to promulgate "standards of performance." 42 U.S.C. § 7411(b)(1)(B). For *existing* stationary sources in those same source categories, (*i.e.*, those built before the standards for new sources have been proposed), Congress directed EPA under Section 111(d) to "prescribe regulations which shall establish a procedure" for States to "establish[ ] standards of performance for any existing source" subject to Section 111(d). *Id.* § 7411(d)(1).

Section 111(d) is a cooperative federalism regime. Section 111 defines "standard of performance" as "a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines

has been adequately demonstrated." *Id.* § 7411(a)(1). However, Congress only authorized EPA to promulgate a "procedure" for the States to follow when "establish[ing]" and "apply[ing]" standards of performance for existing sources. *Id.* § 7411(d). In other words, while EPA may determine the best system of emission reduction and regulate new sources directly, Congress left it to the States to decide how to reduce emissions from existing stationary sources. Section 111(d) thus protects state authority to determine what levels of emission reduction are achievable by these stationary sources. The Clean Air Act also reserves to the States the authority to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies" when applying a standard of performance to it. *Id.* § 7411(d)(1).

Prior to the Clean Power Plan, EPA had promulgated only seven rules under Section 111(d) since the provision's enactment over 50 years ago, including only one within the last 25 years, and that one was vacated by the D.C. Circuit. *See* 42 Fed. Reg. 12,022 (Mar. 1, 1977) (fluorides from phosphate fertilizer plants); 42 Fed. Reg. 55,796 (Oct. 18, 1977) (acid mist from sulfuric acid plants); 44 Fed. Reg. 29,828 (May 22, 1979) (total reduced sulfur from kraft pulp plants); 45 Fed. Reg. 26,294 (Apr. 17, 1980) (fluorides from primary aluminum plants); 60 Fed. Reg. 65,387 (Dec. 19, 1995) (various pollutants from municipal waste combustors); 61 Fed. Reg. 9905 (Mar. 12, 1996) (landfill gases from municipal solid waste

landfills); 70 Fed. Reg. 28,606 (May 18, 2005) (mercury from coal-fired power plants); *New Jersey v. EPA*, 517 F.3d 574, 580 (D.C. Cir. 2008).

B. EPA Adopts The Clean Power Plan And Then Repeals And Replaces It

Frustrated with what he believed to be Congress's inability to adopt comprehensive climate change legislation, "President Obama ordered the EPA to do what Congress wouldn't." J.A.220–22. President Obama ordered EPA "to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy." Evan Lehmann & Nathanael Massey, *Obama Warns Congress to Act on Climate Change, or He Will*, Scientific Am. (Feb. 13, 2013).[1] President Obama intended this directive to be "the single most important step America has ever taken in the fight against global climate change." Andrew Rafferty, *Obama Unveils Ambitious Plan to Combat Climate Change*, NBC NEWS (Aug. 3, 2015, 3:05 PM).[2] The

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[1] *Available at* https://www.scientificamerican.com/article/obama-warns-congress-to-act-on-climate-change-or-he-will/ (all websites last visited on December 12, 2021).

[2] *Available at* https://www.nbcnews.com/politics/barack-obama/obama-unveils-ambitious-plan-combat-climatechange-n403296.

result was the Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), "arguably one of the most consequential rules ever proposed by an administrative agency," J.A.225.

1. To achieve sufficient emissions reductions to meet President Obama's goals, EPA promulgated the Clean Power Plan, and for the first time ever adopted an interpretation of Section 111(d) that allowed the agency to restructure the power sector through so-called "generation shifting." 80 Fed. Reg. at 64,728–29. In particular, EPA adopted national "emission performance rates" for coal and gas power plants based upon three so-called "Building Blocks." *Id.* at 64,719–20, 64,752.

EPA developed two of the three building blocks "from the perspective of the source category as a whole," rather than as a model system that States might apply to individual existing sources. *Id.* at 64,744. Building Block 1, the only one consistent with the text, context, and history of Section 111(d), was based upon requiring improved combustion efficiency at individual coal-fired generating facilities, which can result in lower CO_2 emissions per unit of electric output. *Id.* at 64,745. Building Block 2, which involved generation shifting, was based upon displacing large quantities of existing coal-fired generation with generation from existing natural gas generating facilities. *Id.* at 64,745–46. Building Block 3, which also involved generation shifting, was based upon displacing both existing coal- and gas-

fired generation with large increases in generation from new renewable energy resources. *Id.* at 64,747–48.

EPA used these Building Blocks to set the "emission performance rates" for existing fossil fuel-fired power plants. The resulting rate for existing coal-fired plants was 1,305 lbs CO_2/MWh, and for existing gas-fired plants was 771 lbs CO_2/MWh. *Id.* at 64,667. These "emission performance rates" were the "chief regulatory requirement" of the Clean Power Plan. *Id.* at 64,823. But these rates were just a regulatory artifice, as no existing facility could meet them through the application of pollution controls or operational improvements that EPA determined to be available for individual existing sources. *Id.* at 64,754. Indeed, these rates were *stricter* than the emission rates EPA applied to *new* sources. *Compare id.* at 64,512–13, Tbl. 1, *with id.* at 64,667.

To comply with these regulatory artifices, the owners of power plants would need to pay to shift the power sector away from coal-fired generation to lower- or zero-emitting generation. *Id.* at 64,733. They could do this either by building their own renewable generation resources or by purchasing emission allowances or credits from renewable energy competitors through an emissions trading market that EPA expected would develop. *Id.* at 64,669, 64,720, 64,725–26, 64,728, 64,731. These measures would thus shift generation to new lower- or zero-

emitting generation. *Id.* at 64,911; *see also id.* at 64,745–47 ("generation shifts").

Numerous parties—including the National Mining Association—challenged the Clean Power Plan in court; first, in the D.C. Circuit, and then before this Court on a motion for a stay pending appeal. J.A.223. These parties' lead argument in their applications for a stay to this Court was that EPA's reliance on novel, transformational generation-shifting authority under Section 111(d) violated the major questions doctrine, as articulated in *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014) ("*UARG*"). *See* Coal Indus. Appl. For Immediate Stay at 6–8, *Murray Energy Corp. v. EPA*, No. 15A778 (U.S. Jan. 27, 2016); 29 States and State Agencies Appl. For Stay at 15–18, *West Virginia v. EPA*, No.15A773 (U.S. Jan. 26, 2016). In an "unprecedented intervention," this Court "did what [the D.C. Circuit] would not"—it stayed the Clean Power Plan pending judicial review. J.A.223–24; *West Virginia v. EPA*, 577 U.S. 1126 (2016).

2. Before the D.C. Circuit could complete its merits review, EPA repealed the Clean Power Plan, after concluding that it lacked statutory authority to adopt it. *See* 84 Fed. Reg. 32,520, 32,522–23 (July 8, 2019); J.A.224. Simultaneous with this repeal, EPA promulgated the Affordable Clean Energy ("ACE") Rule, which adopted heat rate improvement measures as the "best system of emission reduction." 84 Fed. Reg. at 32,520–21. The D.C. Circuit then

dismissed as moot all pending challenges to the Clean Power Plan. Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Sept. 17, 2019).

EPA offered two primary reasons for repealing the Clean Power Plan. First, "Congress 'spoke to the precise question' of the scope of [Clean Air Act] section 111(a)(1) and clearly precluded" consideration of "measures wholly outside a particular source," like generation shifting. 84 Fed. Reg. at 32,526–27. Second—and most relevant to the arguments in this brief—"the major question[s] doctrine" required repeal. *Id.* at 32,529. EPA discussed a number of factors relevant to its major-questions conclusion: the Clean Power Plan's "generation-shifting scheme was projected to have billions of dollars of impact on regulated parties and the economy, would have affected every electricity customer (*i.e.*, all Americans), [and] was subject to litigation involving almost every State in the Union"; the rule's generation-shifting components "are far afield from the core activity of [Clean Air Act] section 111"; there is a "notable absence of a valid limiting principle to basing a [Clean Air Act] section 111 rule on generation shifting"; and the Clean Power Plan "advanced a broad reading of [Clean Air Act] section 111(a)(1)" that "overextended federal authority into matters traditionally reserved for states[.]" *Id.* Because major rules "must be supported by a clear-statement from Congress," which was lacking here, EPA concluded that it must repeal the Clean Power Plan. *Id.*

C. The D.C. Circuit's Decision Below

Numerous parties challenged EPA's repeal of the Clean Power Plan and its replacement with the ACE Rule before the D.C. Circuit, and many other parties—including the National Mining Association—intervened to defend EPA's actions. J.A.53–215. In a 2-1 decision, a panel of the D.C. Circuit held that EPA's repeal of the Clean Power Plan and its adoption of the ACE Rule were unlawful, concluding that both actions "hinged on a fundamental misconstruction of Section 7411(d) of the Clean Air Act." J.A.71–72. Most relevant for the arguments in this brief, the panel majority rejected EPA's conclusion that the major questions doctrine compelled the repeal of the Clean Power Plan. J.A.135–55.

Judge Walker dissented, in relevant part, to explain his concern regarding whether the Clean Power Plan ran afoul of the major questions doctrine. J.A.216–55. "The potential costs and benefits of the 2015 Rule are almost unfathomable," with "wholesale electricity's cost [expected] to rise by $214 billion" and an additional $64 billion "to replace shuttered capacity." J.A.226. On the other side of the equation, the Clean Power Plan's goal was to attempt to "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." J.A.227 (citation omitted). In short, no one could argue the

Clean Power Plan was a "minor" rule, J.A.228. Judge Walker also noted that "[h]ardly any party in this case makes a serious and sustained argument that § 111 includes a clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting." J.A.217, 224, 229, 230.

SUMMARY OF THE ARGUMENT

I. A case like this one, where an agency seeks to resolve a national policy dispute by pointing to a snippet of general language, implicates three interrelated doctrines—the major questions doctrine itself, nondelegation, and deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A.1. Under the major questions doctrine, an agency only has the authority to decide a major national policy if Congress clearly and unambiguously authorizes the agency to do so. This doctrine furthers the separation of powers via a statutory presumption that Congress would generally not want administrative agencies to resolve national policy issues.

2. The nondelegation doctrine is closely related to the major questions doctrine and prohibits Congress from delegating its lawmaking authority to administrative agencies. Like the major questions doctrine, the nondelegation doctrine ensures that

lawmaking follows the strictures of Article I of the U.S. Constitution.

3. *Chevron* deference requires courts to defer in certain, appropriate circumstances to an agency's reasonable interpretations of ambiguous statutory language in the statutes that it administers, based on the theory that Congress has implicitly delegated authority to agencies to resolve such ambiguities. *Chevron* deference intersects with the major questions doctrine when agencies improperly argue that courts should defer to agency interpretations even when those interpretations empower the agency to decide major national policies.

B. This Court should hold that the major questions doctrine is a threshold inquiry. Applying the major questions doctrine as a threshold analysis would resolve most nondelegation cases, since Congress rarely, if ever, specifically delegates major policy questions to agencies, and would keep *Chevron* within its traditional role.

C. This Court should hold that there are three independently sufficient tests that trigger the application of the major questions doctrine. First, the doctrine should apply when an agency seeks to resolve an issue of vast economic and political significance. Multiple factors are relevant to this first test, including the rule's overall impact on the economy, the number of people affected, the degree of congressional and public attention to the issue, and

the amount of money involved. Second, the doctrine should apply when the agency bases its regulatory action on a never before claimed tool that would give the agency enormous and transformative power. Third, the doctrine should apply when the agency's actions encroach upon traditional state authority or on the core expertise of another administrative agency.

II. The Clean Power Plan's shifting of electricity generation resources from fossil fuels to renewable energy resolves a major policy question that Congress did not assign to EPA to decide.

A. The Clean Power Plan triggers the major questions doctrine under each of the three independently sufficient tests drawn from this Court's jurisprudence.

1. The Clean Power Plan is a rule of vast economic and political significance. The Plan imposes a substantial overall impact on the national economy, while also eliminating a significant number of jobs attributable to the energy sector. The number of people affected by the Clean Power Plan is exceedingly high, extending to every electric customer in the country. Congress and the public have devoted considerable attention to the question that the Plan purports to resolve. Finally, the Plan implicates a significant amount of money, as it is projected to raise electricity-generation costs by hundreds of billions of dollars.

2. The Clean Power Plan is an assertion of enormous and transformative authority by the EPA. The Plan's core feature—generation shifting—requires owners of power plants either to build their own renewable generation resources or subsidize lower-emitting resources by buying credits from their competitors. Under this generation shifting methodology, EPA could take similarly transformative steps in numerous other industries, thereby rearranging the economy.

3. The Clean Power Plan trespasses on the traditional powers of the States and strays into the core zone of expertise of other federal agencies. The regulation of utilities is a power traditionally reserved to the States. The Clean Power Plan, however, usurps this traditional state role by requiring States to shift vast amounts of energy generation from fossil fuel-fired plants to new renewable resources. In doing so, the Clean Power Plan also intrudes upon the expertise of the Federal Energy Regulatory Commission ("FERC")—the agency that administers the Federal Power Act—which has authority over interstate transmission of energy.

B. Because the Clean Power Plan implicates the major questions doctrine, it could only be lawful if Congress clearly and unambiguously authorized EPA to promulgate it. However, Section 111(d) does not contain such a clear statement of transformative authority, as Section 111(d)'s prosaic terms nowhere

suggest that EPA has the power to transform the nation's energy mix.

C. The panel majority's contrary conclusions below are all incorrect. The panel majority's approach would render the major questions doctrine an effective nullity by permitting agencies to settle questions of nationwide importance based upon snippets of general statutory text.

ARGUMENT

I. Congress Must Speak Clearly If It Wants To Assign To An Agency The Authority To Resolve A Major Policy Issue.

A. The Major Questions Doctrine, Nondelegation, And *Chevron* Deference

1. The Major Questions Doctrine

In "a series of important cases" over the last few decades, this Court has recognized that "major agency rules" require "*clear* congressional authorization" to be lawful. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc); *see, e.g.*, *MCI Telecomm. Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218 (1994); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000); *Gonzales v. Oregon*, 546 U.S. 243 (2006); *UARG*, 573 U.S. at 302; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489; *accord Whitman v. Am. Trucking*

Ass'ns, 531 U.S. 457, 468–69 (2001); *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (Stevens, J., controlling opinion). These cases stand for the proposition that for "an agency to issue a major rule, Congress must *clearly* authorize the agency to do so." *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *accord Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. "If a statute only *ambiguously* supplies authority for the major rule, the rule is unlawful" without any further inquiry. *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *see, e.g.*, *Brown & Williamson*, 529 U.S. at 132–33, 161. Thus, an agency may only "exercise regulatory authority over a major policy question" if Congress has either: "(i) expressly and specifically decide[d] the major policy question itself and delegate[d] to the agency the authority to regulate and enforce; or (ii) expressly and specifically delegate[d] to the agency the authority both to decide the major policy question and to regulate and enforce." *Paul v. United States*, 140 S. Ct. 342, 342 (2019) (Kavanaugh, J., respecting the denial of certiorari) (collecting cases).

Two "overlapping and reinforcing presumptions" provide the legal foundation and justification for the major questions doctrine. *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

The first is "a separation of powers-based presumption against the delegation of major lawmaking authority from Congress to the Executive Branch[.]" *Id.* (citing *Indus. Union*, 448 U.S. at 645–46 (Stevens, J., controlling op.)); *accord Indus. Union*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment). "Under the Constitution's separation of powers, Congress makes the laws, and the Executive implements and enforces the laws"; "[t]he Executive Branch does not possess a general, free-standing authority to issue binding legal rules." *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc). "The major rules doctrine helps preserve the separation of powers and operates as a vital check on expansive and aggressive assertions of executive authority." *Id.* at 417; *accord* Cass R. Sunstein, *The American Nondelegation Doctrine*, 86 Geo. Wash. L. Rev. 1181, 1201–02 (2018).

The second is the "presumption that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *accord King v. Burwell*, 576 U.S. 473, 485–86 (2015); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986). Under the "democratic values" embodied in our Constitution, "a major policy change should be made by the most democratically accountable process—Article I, Section 7 legislation[.]" *U.S. Telecom Ass'n*, 855 F.3d

at 422 (Kavanaugh, J., dissenting from the denial of rehearing en banc) (quoting William N. Eskridge, Jr., *Interpreting Law: A Primer on How to Read Statutes and the Constitution* 289 (2016)). This constitutional process requires "Congress [to] deliberate[ ] about" any "change in [ ] major policies," forcing it to remain accountable to the people for the policy choices it makes for the entire Nation. *Id.* (quoting Eskridge, *supra*, at 289); *accord Gonzales*, 546 U.S. at 267–68.

This Court has applied the major questions doctrine at different stages of the statutory analysis. Sometimes this Court appears to invoke the doctrine at *Chevron* step one, where it counsels "hesitat[ion] before concluding that Congress has intended" the "implicit delegation" of a major question to an agency via statutory "ambiguity." *Brown & Williamson*, 529 U.S. at 159–60; *Christensen v. Harris Cty.*, 529 U.S. 576, 589 n.* (2000) (Scalia, J., concurring in part and concurring in the judgment). Other times this Court considers this doctrine at *Chevron* step two, concluding that an agency's "interpretation" of a statute is "unreasonable"—and therefore undeserving of deference—where that interpretation would allow the agency to answer a major question. *UARG*, 573 U.S. at 321, 323–24; *see also MCI*, 512 U.S. at 229–31. And still other times, this Court invokes the doctrine to hold that Congress never intended to delegate resolving a major question to the agency. *King*, 576 U.S. at 485–86; *Gonzales*, 546 U.S. at 267.

2. The Nondelegation Doctrine

The nondelegation doctrine is "closely related" to the major questions doctrine. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., respecting the denial of certiorari); *see Gundy v. United States*, 139 S. Ct. 2116, 2141–42 (2019) (Gorsuch, J., dissenting); Jonathan H. Adler & Christopher J. Walker, *Delegation and Time*, 105 Iowa L. Rev. 1931, 1946–49 (2020); Sunstein, *supra*, at 1198–1200. Given that "the people ha[ve] vested the power to prescribe rules limiting their liberties in Congress alone," Congress may not "alter that arrangement" by delegating its "responsibility of adopting legislation" to any other body. *Gundy*, 139 S. Ct. at 2133 (Gorsuch, J., dissenting); *accord Clinton v. City of New York*, 524 U.S. 417, 464–65 (1998) (Scalia, J., concurring in part and dissenting in part). "[O]nly the people's elected representatives"—not the executive—"may adopt new federal laws restricting liberty." *Gundy*, 139 S. Ct. at 2131 (Gorsuch, J., dissenting).

Like the major questions doctrine, the nondelegation doctrine ensures that lawmaking proceeds through the Article I lawmaking process. *Id.* at 2133–35; John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 Sup. Ct. Rev. 223, 271 (2000) (calling this the doctrine's "central aim"). "[T]he framers went to great lengths to make lawmaking difficult," given that "the new federal government's most dangerous power was the power to enact laws restricting people's liberty."

Gundy, 139 S. Ct. at 2134 (Gorsuch, J., dissenting). Further, the Constitution requires "that legislating be done . . . in a public process," making "the lines of accountability" between Congress and the people "clear." *Id.* "If Congress could pass off its legislative power to the executive branch" via delegation, however, "legislation would risk becoming nothing more than the will of the current President"—and "would not be few in number." *Id.* at 2134–35. "Accountability would suffer too," since Congress could take credit for addressing a social problem by delegating the finding of a solution to the executive, only to then blame the executive if the "measures he chooses to pursue" are unpopular—with the executive placing the blame on Congress in return. *Id.* at 2135.

Three "important guiding principles" aid in deciding "whether Congress has unconstitutionally divested itself of its legislative responsibilities." *Id.* at 2135–36. First, Congress itself must "make[ ] the policy decisions when regulating private conduct" via statute, although Congress "may authorize another branch to 'fill up the details'" of a statutory regime. *Id.* at 2136 (citation omitted); *accord* Breyer, *supra*, at 370–71 (approving of Congress's "leaving interstitial matters" to agencies). Second, Congress may "prescribe[ ]" a "rule governing private conduct" and "make the application of that rule depend on executive fact-finding." *Gundy*, 139 S. Ct. 2136–37 (Gorsuch, J., dissenting); *accord* Aditya Bamzai, *Delegation and Interpretive Discretion:* Gundy*,* Kisor*, and the Formation and Future of Administrative Law*,

133 Harv. L. Rev. 164, 182–83 (2019). That is, the Constitution permits Congress to exercise its lawmaking powers "expressly or *conditionally*" on executive action, without running afoul of the nondelegation doctrine. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). This remains true even if "the power extended to the executive" in this circumstance "may prove highly consequential." *Id.* Third, Congress may assign another branch "certain non-legislative responsibilities" without causing nondelegation concerns. *Id.* at 2137; *accord Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting). Although "the Constitution vests all federal legislative power in Congress alone, Congress's legislative authority sometimes overlaps with [the] authority" vested in another branch by the Constitution. *Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting). So, if Congress by statute delegates certain matters to another branch that are already "'within the scope'" of that branch's "'power,'" that raises no nondelegation concern. *Id.* (citation omitted).

Much of this Court's nondelegation-doctrine case law, properly understood, accords with these three "traditional tests." *Id.* at 2139. While this Court has, at times, described the nondelegation doctrine as requiring only that Congress provide an "intelligible principle" when delegating legislative authority, the "intelligible principle 'test'" simply restates the traditional nondelegation principles discussed above. *Id.* at 2138–41. So, a statute "provides an intelligible

principle," sufficient to satisfy the nondelegation doctrine based upon the answers to the following questions: "Does the statute assign to the executive only the responsibility to make factual findings? Does it set forth the facts that the executive must consider and the criteria against which to measure them? And most importantly, did Congress, and not the Executive Branch, make the policy judgments?" *Id.* at 2141.

The nondelegation doctrine is most consequential when dealing with "major national policy decisions." *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., respecting the denial of certiorari). The Constitution vests Congress with the duty to set major policy for the Nation. *Gundy*, 139 S. Ct. at 2134–36 (Gorsuch, J., dissenting); *accord* Manning, *supra*, at 271 & n.223. To carry out this Article I process, Congress must "accommodate competing policy concerns" and reach compromise legislative solutions, given Article I's difficult requirements. Manning, *supra*, at 271 & n.223 (citation omitted); *accord Gundy*, 139 S. Ct. at 2134–36 (Gorsuch, J., dissenting) ("difficult and deliberative processes"). Thus, by design, Congress may only enact major national policies after engaging in "due deliberation," striking a compromise, and securing "approval of a supermajority of the people's representatives." *Gundy*, 139 S. Ct. at 2134 (Gorsuch, J., dissenting) (citation omitted); *accord Indus. Union*, 448 U.S. at 685 (Rehnquist, J., concurring in the judgment); *Gonzales*, 546 U.S. at 267 ("earnest and profound debate") (citation omitted). If Congress

could delegate "major national policy decisions" to agencies, then Congress could empower the agencies to impose *the executive's* policy views, depriving the people of Article I consensus and compromise. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., respecting the denial of certiorari); *see Gundy*, 139 S. Ct. at 2134–35 (Gorsuch, J., dissenting); Manning, *supra*, at 271 & n.223; William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 Vand. L. Rev. 593, 631 (1992).

These Article I concerns do not arise to the same degree when Congress delegates lesser, statutory-gap-filling decisions to agencies. *See Gundy*, 139 S. Ct. at 2136, 2141–42 (Gorsuch, J., dissenting); Breyer, *supra*, at 370–71. An agency resolving "interstitial matters" is generally of less consequence to the people. *See* Breyer, *supra*, at 370–71; *accord Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting). Thus, if Congress sets out "consider[ations]" and "criteria" to guide the agency's discretion, delegation of those less-important matters does not generally offend Article I. *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting); *accord* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016); Breyer, *supra*, at 370–71.

3. *Chevron* Deference

The final relevant doctrine here is *Chevron* deference, which, in appropriate circumstances,

requires courts to defer to an agency's reasonable interpretations of ambiguous statutory language that the agency is charged with administering. *Brown & Williamson*, 529 U.S. at 159; *Chevron*, 467 U.S. at 844–45. *Chevron* deference "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." *Brown & Williamson*, 529 U.S. at 132, 159; *see also King*, 576 U.S. at 486. Thus, "when an agency-administered statute is ambiguous with respect to what it prescribes," this Court understands Congress to have "empowered the agency to resolve the ambiguity"—such that this Court must defer to the agency's "reasonabl[e]" interpretations. *UARG*, 573 U.S. at 315; *see* Breyer, *supra*, at 373.

Chevron deference intersects with the major questions doctrine when an agency improperly relies on *Chevron* to resolve a major policy question for the Nation. When properly confined to its traditional role of allowing the agency to fill in the details of a regulatory regime, the *Chevron* deference doctrine proceeds in two steps. Under the first step, the court "ask[s] whether the statute" that the agency administers "is ambiguous." *King*, 576 U.S. at 485. If the statute is *not* ambiguous—meaning that "Congress has directly spoken to the precise question at issue"—then the *Chevron* "inquiry is at an end; the court must give effect to the unambiguously expressed intent of Congress." *Brown & Williamson*, 529 U.S. at 132 (citations omitted). If the statute is ambiguous, then, under the second step, the court

must ask "whether the agency's interpretation is reasonable." *King*, 576 U.S. at 485. If it is, then the court must defer to that agency interpretation even if it is not "the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Chevron*, 467 U.S. at 843 & n.11.

This approach creates serious constitutional difficulties, however, when an agency improperly claims *Chevron* deference in relying on general statutory language to resolve a major national policy question. *See U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc); Kavanaugh, *supra*, at 2151–52.

B. The Major Questions Doctrine Should Be A Threshold Inquiry To Any *Chevron* Or Nondelegation Analysis.

This Court should hold that the major questions doctrine operates as a threshold inquiry before any further statutory or nondelegation doctrine analysis. *See U.S. Telecom Ass'n*, 855 F.3d at 418–22 (Kavanaugh, J., dissenting from the denial of rehearing en banc). When a court considers whether an agency has the authority to promulgate a challenged rule, the court should first determine whether that rule purports to answer a "major policy question." *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., respecting the denial of certiorari). If the rule does attempt to do so, the court must decide whether Congress "expressly and specifically delegate[d] th[e]

authority" to answer such a "major policy question" to the agency. *Id.* And if Congress did not clearly and unambiguously delegate such authority to the agency, the rule is unlawful on that basis alone. *Id.* If, however, the court concludes that Congress took the highly unusual step of clearly delegating the resolution of that major policy issue to the agency, the court would then need to analyze whether such a rare delegation is constitutionally permissible under the nondelegation doctrine.

Considering the major questions doctrine as a threshold matter, before *Chevron* or the nondelegation doctrine, best reflects the intertwined logic of these doctrines. The inquiries required by the major questions doctrine—whether a rule implicates a major question and, if so, whether the statutory delegation is unambiguous, *see id.*—are logically prior both to *Chevron*'s two-step framework and to any nondelegation-doctrine analysis. If an agency's rule purports to resolve a major national policy, then that rule is unlawful absent a clear statement from Congress that it wants the agency to resolve that issue. *Id.*; *accord King*, 576 U.S. at 485–86; *Gonzales*, 546 U.S. at 267. The major questions doctrine also logically precedes the nondelegation analysis, including as a matter of constitutional avoidance. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009); *accord* Manning, *supra*, at 223–24. After all, if the court holds that the statute does not authorize the rule under the major questions doctrine, no

nondelegation or *Chevron* inquiry would be needed or appropriate.

This understanding of the major questions doctrine would allow *Chevron* to remain within its historical role, where agencies rely upon delegated authority to resolve statutory ambiguities about the details of a regulatory regime that Congress created. *See U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc); Kavanaugh, *supra*, at 2151–52.

As for the nondelegation doctrine, applying the major questions doctrine first would often render that doctrine unnecessary, given that Congress rarely—if ever—explicitly delegates major policy questions to agencies. *See, e.g.*, *King*, 576 U.S. at 485–86; *Gonzales*, 546 U.S. at 267. The people rightly expect Congress to "make the policy judgments" for the Nation, consistent with its vested legislative power under the Constitution, *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting), rather than to "leave those decisions to agencies," *U.S. Telecom Ass'n*, 855 F.3d at 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc). And, as an empirical matter, Congress does not generally explicitly delegate to agencies the responsibility to resolve such questions. *See* 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, 1003–06 (2013); *accord Christensen*, 529 U.S. at

589 n.* (Scalia, J., concurring in part and concurring in the judgment); Breyer, *supra*, at 369–70. So, in almost all challenges to a major administrative rule on nondelegation grounds, a court could resolve the case without invalidating the statute by concluding that, under the major questions doctrine, Congress had not unambiguously directed the agency to answer that major question in the first place.

C. This Court Should Hold That Three Independently Sufficient Tests Identify That A Rule Triggers The Major Questions Doctrine.

Three tests, drawn from this Court's case law, should be independently sufficient to demonstrate that an agency has attempted to answer a major question, requiring clear and unambiguous statutory authority under the major questions doctrine.

Under the first test, the rule at issue implicates the major questions doctrine if that rule involves a decision of "vast economic and political significance." *UARG*, 573 U.S. at 324 (citations omitted); *see, e.g.*, *King*, 576 U.S. at 486; *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. Several factors help determine whether the major questions doctrine applies under this first test: "the overall impact on the economy," *U.S. Telecom Ass'n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *accord Brown & Williamson*, 529 U.S. at 159–60; "the number of people affected," *U.S. Telecom Ass'n*, 855

F.3d at 422–23 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *accord UARG*, 573 U.S. at 324; "the degree of congressional and public attention to the issue," *U.S. Telecom Ass'n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *Gonzales*, 546 U.S. at 267 ("earnest and profound debate across the country") (citation omitted); *accord* Breyer, *supra*, at 371 ("illuminate or stabilize a broad area of the law"); and "the amount of money involved," *U.S. Telecom Ass'n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from the denial of rehearing en banc); *accord Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

Under the second test, a rule triggers the major questions doctrine when it is based upon a tool that would give the relevant agency "enormous and transformative" authority, including in future rules that the agency may adopt. *UARG*, 573 U.S. at 324; *see, e.g.*, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489 ("breathtaking amount of authority"; "unprecedented [ ] [s]ince th[e] provision's enactment"); *Gonzales*, 546 U.S. at 267 ("broad and unusual authority through an implicit delegation"); *accord Whitman*, 531 U.S. at 468 ("alter[ing] the fundamental details of a regulatory scheme"). Major questions under this test often involve agencies divining "unheralded power," often from a "long-extant statute." *UARG*, 573 U.S. at 324; *accord District of Columbia v. Dep't of Labor*, 819 F.3d 444, 446, 454 (D.C. Cir. 2016) (Kavanaugh, J.) (the agency "advanced a novel reading of [a statute] that would significantly enlarge" its scope).

Finally, under the third test, a rule triggers the major questions doctrine if it involves the agency trespassing on the traditional authority of the States, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489, or of other agencies, *see, e.g.*, *King*, 576 U.S. at 486; *Gonzales*, 546 U.S. at 266–67. These are circumstances in which "[i]t is especially unlikely that Congress would have delegated th[e] decision to the" agency, *King*, 576 U.S. at 486, as Congress does not "significantly alter the balance between federal and state power" through mere delegations to agencies, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489, or countenance agencies "expand[ing] their power beyond" their "special expertise," Breyer, *supra*, at 370–71; *accord King*, 576 U.S. at 486; *Gonzales*, 546 U.S. at 267.

II. Whether The United States Should "Shift" Away From Coal-Fired Generation Is A Major Policy Question That Congress Did Not Clearly Assign To EPA To Resolve.

A. The Clean Power Plan Triggers The Major Questions Doctrine Under All Three Independently Sufficient Tests.

1. Vast Economic And Political Significance

The Clean Power Plan purports to answer a major question of "vast economic and political significance," *UARG*, 573 U.S. at 324 (citations omitted), because of the Plan's overall effect on the economy, the number

of people that it impacts, the degree of congressional and public attention that the issue and rule have received, and the amount of money involved. *U.S. Telecom Ass'n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

Overall impact on the economy. The Clean Power Plan would have had a substantial "overall impact on the economy." *Id.* at 423. The energy economy is part of our Nation's "uniquely critical" infrastructure, given that it serves "an 'enabling function' across all critical infrastructure sectors," thereby "fuel[ing] the economy of the 21st century." U.S. Cybersecurity & Infrastructure Sec. Agency, *Energy Sector*.[3] Or, as the majority below explained, "[e]lectrical power has become virtually as indispensable to modern life as air itself." J.A.79. Accordingly, a robust and well-functioning energy sector is essential to our Nation's wellbeing, including its economic wellbeing.

Coal plays an important role in aiding and driving the energy sector. Unlike many other forms of energy production, coal is not a "resource limited" product in the near- or long-term, meaning that the United States has stable coal reserves available for decades to come. Nat'l Research Council, *Coal: Energy for the Future* 3–4 (Nat'l Acads. Press 1995); *see* U.S. Energy Info. Admin., *Coal Explained: How Much Coal is Left* (Oct. 19, 2021) ("Based on U.S. coal production in 2020, of about 0.535 billion short tons, the recoverable

[3] *Available at* https://www.cisa.gov/energy-sector.

coal reserves would last about 470 years, and recoverable reserves at producing mines would last about 25 years.").[4] Further, coal is a resilient energy source, is readily dispatchable, and has the capacity to be stored onsite in quantities sufficient for months of fuel. Jeff St. John, *PJM: Fuel Security Issues Won't Disrupt the Grid, Unless Coal & Nuclear Closures Skyrocket*, GreenTechMedia.com (Nov. 1, 2018).[5] Coal thus plays a critical role in maintaining the energy grid's reliability in the face of various threats—from natural threats like the bitter cold, *id.*, to more modern threats like cyberattacks, *see* Robert Walton, *NERC Identifies 4 Regions Facing Potential Summer Energy Shortages*, UtilityDive.com (May 18, 2021)[6]—making coal essential to the grid's continued operation.

The Clean Power Plan, by its core design, would have a "massive negative impact on the U.S. coal mining industry." Seth Schwartz, *Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry* at 48 (Energy Ventures Analysis,

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[4] *Available at* https://www.eia.gov/energyexplained/coal/how-much-coal-is-left.php.

[5] *Available at* https://www.greentechmedia.com/articles/read/pjm-fuel-security-wont-disrupt-grid-unless-coal-nuclear-closures.

[6] *Available at* https://www.utilitydive.com/news/nerc-cybersecurity-concerns-summer-energy-shortages-texas-california/600324/.

Inc. Oct. 2015).[7] By eliminating any real growth potential for the U.S. coal industry, the Clean Power Plan would "by any financial measure—market capitalization, share price, bond rating, access to capital markets— . . . impair[ ] the ability of coal companies" to remain "going concerns." *Id.* at 57.

The Clean Power Plan's shifting away from coal-fired generation would also have major impacts on employment. The energy sector, and the coal industry in particular, are major contributors to employment and economic growth. The coal industry directly employs over 185,000 individuals. Nat'l Ass'n of State Energy Officials, et al., *Wages, Benefits, and Change: A Supplemental Report to the Annual U.S. Energy and Employment Report* 47 (2020).[8] And every one of those jobs in coal mining "creat[es] [ ] 3.3 jobs" elsewhere. Nat'l Mining Assoc., *Coal: Reliable & Affordable Power* 1 (Mar. 2021).[9] The Clean Power Plan by its core design reduces demand for the Nation's supply of coal, as discussed above, which would have a direct, negative impact on employment in the coal industry.

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[7] *Available at* http://www.nma.org/pdf/EVA-Report-Final.pdf.

[8] *Available at* https://www.usenergyjobs.org/s/Wage-Report.pdf.

[9] *Available at* https://nma.org/wp-content/uploads/2018/02/coal_reliable_power_2021.pdf.

Number of people affected. The Clean Power Plan would have impacted almost everyone in the Nation, thus the "number of people affected" is exceedingly large. *U.S. Telecom Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting from the denial of rehearing en banc). As explained above, the Plan also would have undermined the security and reliability of the Nation's energy sector and reduced energy sector employment. *Supra* pp. 32–34. Thus, as EPA correctly explained when repealing the Clean Power Plan, the Plan's "generation-shifting scheme . . . would have affected *every electricity customer (i.e., all Americans)*," making it "a major rule." 84 Fed. Reg. at 32,529 (emphasis added).

Degree of congressional and public attention to the issue. The Clean Power Plan received a high "degree of congressional and public attention." *U.S. Telecom Ass'n*, 855 F.3d at 423 (Kavanaugh, J., dissenting from the denial of rehearing en banc).

Since at least 2009, Congress has introduced—but failed to pass—legislation that would have "force[d] the electric-power industry to shift from fossil fuels to renewable resources," J.A.220, and "dozens of other climate-related bills" have been "introduced since then," all to no avail. J.A.220–21 (citing American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009); Integrated Energy Systems Act, S. 2702, 116th Cong. (2019); Clean Industrial Technology Act, S. 2300, 116th Cong. (2019); Advancing Grid Storage Act, H.R. 7313, 115th Cong.

(2018); Climate Risk Disclosure Act, S. 3481, 115th Cong. (2018); American Energy and Conservation Act, S. 3110, 114th Cong. (2016); Climate Solutions Commission Act, H.R. 6240, 114th Cong. (2016); Super Pollutants Act, S. 2911, 113th Cong. (2014); American Renewable Energy and Efficiency Act, H.R. 5301, 113th Cong. (2014); End Polluter Welfare Act, S. 3080, 112th Cong. (2012); Save Our Climate Act, H.R. 3242, 112th Cong. (2011); Carbon Dioxide Capture Technology Prize Act, S. 757, 112th Cong. (2011); Clean Energy Standard Act, S. 20, 111th Cong. (2010)). Congress did not pass any of these measures because "Senators from small states blocked legislation they viewed as adverse to their voters." J.A.220–21.

EPA promulgated the Clean Power Plan in response to President Obama's view that Congress had failed to address climate change sufficiently. "President Obama ordered EPA to do what Congress wouldn't." J.A.222. Specifically, the President directed EPA "to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy." Lehmann & Massey, *supra*. The President's directive culminated in EPA's Clean Power Plan.

The promulgation of the Clean Power Plan received substantial public attention. Over 40 States and dozens of other groups litigated its lawfulness in

federal court—either challenging or defending the Plan. J.A.223. And when the D.C. Circuit refused to stay implementation pending that court's review, this Court intervened and ordered a stay, in a decision that drew still more broad, nationwide attention. *See., e.g.*, Adam Liptak & Coral Davenport, The New York Times, *Supreme Court Deals Blow to Obama's Efforts to Regulate Coal Emissions* (Feb. 9, 2016);[10] Jonathan Adler, The Washington Post, *Opinion: Supreme Court Puts the Brakes on the EPA's Clean Power Plan* (Feb. 9, 2016);[11] Lawrence Hurley & Valerie Volcovici, Reuters, *U.S. Supreme Court Blocks Obama's Clean Carbon Emissions Plan* (Feb. 9, 2016).[12]

The public attention for EPA's repeal of the Clean Power Plan and its replacement, the ACE Rule, was as intense. After this repeal and replacement, "politically diverse states and politically adverse special interest groups" participated in more litigation over the lawfulness of EPA's actions, with a number of litigants comparable to the number involved in the initial round of litigation. J.A.224. In

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[10] *Available at* https://www.nytimes.com/2016/02/10/us/politics/supreme-court-blocks-obama-epa-coal-emissions-regulations.html.

[11] *Available at* https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/02/09/supreme-court-puts-the-brakes-on-the-epas-clean-power-plan/.

[12] *Available at* https://www.reuters.com/article/us-usa-court-carbon-idUSKCN0VI2A0.

just this latest round of legal challenges, "the briefing's word count exceeded a quarter of a million words," "oral argument lasted roughly nine hours," and the "case's caption alone runs beyond a dozen pages." *Id.*

Money involved. The Clean Power Plan involves a significant "amount of money [ ] for regulated and affected parties." *U.S. Telecom Ass'n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from the denial of rehearing en banc). In repealing the Clean Power Plan, EPA explained that the Plan's "generation-shifting scheme was projected to have billions of dollars of impact on regulated parties and the economy," which supported EPA's own conclusion that the Plan qualified as "a major rule." 84 Fed. Reg. at 32,529. EPA's conclusions were correct, as the Plan's generation-shifting methodology has "almost unfathomable" potential direct costs, with "wholesale electricity's cost [alone expected] to rise by $214 billion" and an additional $64 billion "to replace shuttered capacity." J.A.226; *see also* U.S. Energy Info. Admin., *Analysis of the Impacts of the Clean Power Plan* 63–64 (May 2015).[13] Further, the National Mining Association's own evaluation of the potential impact of the Plan's generation shifting confirms its dramatic impact on both the coal industry and the country. *See* Schwartz, *supra*, at 1–2.

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[13] *Available at* https://www.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerplant.pdf.

2. Assertion Of Enormous And Transformative Authority Never Before Claimed

The Clean Power Plan's central feature—generation shifting—is an "unheralded power" that EPA had divined from a "long-extant statute," arrogating "enormous and transformative" authority to itself "without clear congressional authorization." *UARG*, 573 U.S. at 324.

Generation shifting involves "an owner or operator of a regulated source . . . 'shift[ing]' power-producing operations to a different facility, such as a nuclear power plant, through bilateral contracts for capacity or by reducing utilization." 84 Fed. Reg. at 32,527. In practical terms, generation shifting requires owners of power plants to "subsidiz[e] lower-emitting sources" like wind farms by buying those sources' excess capacity, curtailing or shuttering their own operations, or purchasing some form of credit toward compliance from those other types of generating resources. *Id.* at 32,527, 32,534.

Once armed with the generation-shifting tool, EPA's central-planning authority under Section 111(d) would be breathtaking. Nor could (or would) this "enormous and transformative" authority, *UARG*, 573 U.S. at 324, be confined to the power sector. EPA could generation-shift virtually any industry by using materially indistinguishable logic. Just looking at the sources regulated under the

immediately prior EPA rule pursuant to Section 111(d), 61 Fed. Reg. 9905 (Mar. 12, 1996), EPA could next decide that recycling plants are preferrable to municipal landfills, in terms of their impact on air emissions, and require a shift from the former to the latter.

The Clean Power Plan's assertion of generation-shifting authority, if upheld by this Court, would be unprecedented. In the 42 years between the adoption of Section 111(d) in 1970 and the proposal of the Clean Power Plan, EPA consistently read Section 111(d) to require performance standards that are achievable by individual sources based on applying a "best system of emission reduction" to those individual sources. *See* 42 Fed. Reg. 12,022 (Mar. 1, 1977) (fluorides from phosphate fertilizer plants); 42 Fed. Reg. 55,796 (Oct. 18, 1977) (acid mist from sulfuric acid plants); 44 Fed. Reg. 29,828 (May 22, 1979) (total reduced sulfur from kraft pulp plants); 45 Fed. Reg. 26,294 (Apr. 17, 1980) (fluorides from primary aluminum plants); 60 Fed. Reg. 65,387 (Dec. 19, 1995) (various pollutants from municipal waste combustors); 61 Fed. Reg. 9905 (Mar. 12, 1996) (landfill gases from municipal solid waste landfills).

Supporters of the Clean Power Plan have cited the Clean Air Mercury Rule, 70 Fed. Reg. 28,606 (May 18, 2005), to claim that the Plan does not rest on a novel assertion of EPA's authority, *see e.g.*, JA.126–27, but that Rule does not help their cause. The D.C. Circuit vacated the Clean Air Mercury Rule on other grounds,

so no court ever grappled with whether Section 111(d) authorized that Rule's emissions trading regime. *See New Jersey*, 517 F.3d at 577–78. Further, in the Clean Air Mercury Rule, the required emission reductions were "based on control technology available in the relevant timeframe" that could be installed at the regulated source, 70 Fed. Reg. at 28,617, and EPA asserted that the standard could be achieved without emission trading, *id.* at 28,620 & n.5. That is, of course, not true for the Clean Power Plan, since EPA did not establish its "emission performance rates" based on what could be achieved by installing controls at an existing source. *See supra* pp. 7–9.

3. Trespassing On The Traditional Authority Of States And Other Agencies

The Clean Power Plan infringes on traditional state authority, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489, while also straying into the zone of expertise of other agencies, *see, e.g.*, *King*, 576 U.S. at 486; *Gonzales*, 546 U.S. at 267.

This Court has long held that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States," *Ark. Elec. Co-op. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983), which power should not be "superseded" by statute "unless that was the clear and manifest purpose of Congress," *Pac.*

Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n, 461 U.S. 190, 206 (1983) (citations omitted). Particularly relevant here, the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States"—indeed, the "franchise to operate a public utility . . . is a special privilege which . . . may be granted or withheld at the pleasure of the State." *Id.* at 205 (citations omitted); *see also Conn. Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 481 (D.C. Cir. 2009) ("State and municipal authorities retain the right to forbid new entrants from providing new capacity, to require retirement of existing generators, to limit new construction to more expensive, environmentally-friendly units, or to take any other action in their role as regulators of generation facilities without direct interference from" FERC).

Congress has recognized and confirmed the States' constitutional authority in this area of regulation. In the Federal Power Act, 16 U.S.C. §§ 791a, *et seq.*, Congress drew "a bright line easily ascertained, between state and federal jurisdiction" in the energy-regulation sphere. *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 215 (1964). So, under the Federal Power Act, "the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co.*, 461 U.S. at 205; *S. Cal. Edison Co.*, 376 U.S. at 215. This is why Congress cabined the

power of FERC—the federal agency charged with fulfilling the federal government's limited role in this area—"to those matters which are not subject to regulation by the States," 16 U.S.C. § 824(a), and why Congress disclaimed federal authority "over facilities used for the generation of electric energy," *id.* § 824(b)(1); *see also id.* § 824o(i)(2) ("This section does not authorize . . . [FERC] to order the construction of additional generation or transmission capacity[.]"). Thus, even FERC lacks the power to interfere with "state authority in such traditional areas as the . . . administration of integrated resource planning and . . . utility generation and resource portfolios." *New York v. FERC*, 535 U.S. 1, 24 (2002).

The Clean Power Plan would have usurped States' traditional powers. To achieve the Plan's generation-shifting-based emission reductions, the Plan would have in effect required States to shift from fossil fuel-fired plants to new renewable resources. 80 Fed. Reg. at 64,732–33. Therefore, under the Clean Power Plan, States would no longer have the full breadth of their traditional authority to decide for themselves their mix of energy resources. 84 Fed. Reg. at 32,529.

As EPA explained, the "States' reserved authority" over energy regulation "includes control over in-state 'facilities used for the generation of electric energy.'" 84 Fed. Reg. at 32,530 n.107 (citation omitted). Thus, among other things, federal "'law places beyond FERC['s power] and leaves to the

States alone, the regulation of 'any other sale'—most notably, any retail sale—of electricity.'" *Id.* at 32,530 (quoting *Hughes v. Talen Energy Marketing, L.L.C.*, 136 S. Ct. 1288, 1292 (2016)). Indeed, Section 111 itself—EPA's own alleged authority for the Clean Power Plan—recognizes the State's domain here. *See, e.g.*, 42 U.S.C. § 7411(d)(1) (requiring Section 111(d) rules must allow States to "take into consideration, among other factors, the remaining useful life of the existing source" when applying performance standards). The Clean Power Plan "ignored the statutory directive [in Section 111] to establish standards *for* sources and overextended federal authority into matters traditionally reserved for states: 'administration of integrated resource planning and . . . utility generation and resource portfolios.'" 84 Fed. Reg. at 32,529 (quoting *New York*, 535 U.S. at 24) (emphasis added).

The Clean Power Plan would also have simultaneously intruded upon FERC's core powers. As EPA explained when repealing the Clean Power Plan, the Plan was "based largely on measures and subjects exclusively left to FERC . . . , rather than inflicting only permissible, incidental effects on [FERC's] domain[ ]." *Id.* at 32,530. The Plan's forcing of generation shifting across the entire energy sector as a "best system of emission reduction" strays into FERC's authority to regulate the interstate transmission of energy. *See id.*

B. Section 111(d) Does Not Clearly Authorize The Clean Power Plan.

Given that the Clean Power Plan triggers the major questions doctrine, it could only be lawful if Congress clearly and unambiguously delegated to EPA via statute the authority to decide whether to shift the power sector away from coal-fired energy to renewable resources. But nothing in Section 111(d) even arguably approaches a clear statement authorizing EPA to make that decision. That is why "[h]ardly any party in this case makes a serious and sustained argument that § 111 includes a clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting." J.A.217.

There could be no serious argument that Section 111(d) provides a sufficiently clear statement to authorize the Clean Power Plan, under the major questions doctrine. Section 111(d) contains only two relevant sentences, and nothing in those sentences comes close to containing the clear statement that the major questions doctrine requires. The first sentence requires EPA to establish a "procedure" for States—not EPA—to establish "standards of performance" for existing sources of emissions. 42 U.S.C. § 7411(d)(1). The second sentence merely clarifies the first, explaining that States must be allowed to "take into consideration, among other factors, the remaining useful life of the existing source" when applying a standard of performance to "any particular source."

Id. While Section 111(d) cross-references the definition of "standards of performance" to allow EPA to select the "best system of emission reduction," those general words are not a clear grant to EPA of the broad authority to demand a transformative shift in the development and use of the Nation's energy resources.[14]

Congress's direction in Title IV of the Clean Air Act for EPA to address acid rain through a nationwide cap-and-trade program provides a stark contrast to the lack of clear authority for the Clean Power Plan in Section 111(d). In Title IV, 42 U.S.C. § 7651, *et seq.*, Congress addressed the acid rain problem by explicitly setting a specific, numeric cap on sulfur dioxide emissions and establishing an emission allowance trading program based on the determination that compliance could be achieved in part through generation shifting. *See* 42 U.S.C. §§ 7651–7651c; *see also* 80 Fed. Reg. at 64,770 ("Generation shift and [renewable energy] were part of Congress's basis for the Title IV emission requirements[.]"). Thus, Title IV illustrates how Congress would be expected to speak clearly in establishing an emission allowance trading program based on generation shifting. While the similarities

[14] To be clear, National Mining Association strongly supports State Petitioners' argument that, in fact, this language *forecloses* generation-shifting, State Pet. Br. Part II, but this Court need not reach that argument given that the major questions doctrine is a predicate inquiry, *see supra* Part I.B.

between the Acid Rain Program and the Clean Power Plan are striking, the statutory authority underlying them—Title IV and Section 111(d)—could not be any more different. Compared to the two highly general and ambiguous sentences comprising Section 111(d), Title IV contains numerous provisions establishing specific emission targets and allocating specific allowance values to expressly named individual facilities, and it provides significant detail on how to implement the program, including how the trading program should work. 42 U.S.C. §§ 7651b-7651c.

In promulgating the Clean Power Plan, EPA cited Congress's reliance on generation shifting to address the acid rain problem via Title IV as justification for requiring generation shifting in the Clean Power Plan promulgated under Section 111(d). 80 Fed. Reg. at 64,771. EPA claimed that "Congress's reliance on generation shifting and [renewable energy] to reduce acid rain precursors from affected [electric generating units] in Title IV strongly supports the EPA's authority to identify those same measures as part of the CAA section 111 'system of emission reduction' to reduce CO_2 emissions from those same sources." *Id.* This gets the major questions doctrine precisely backwards: that Congress clearly established a generation-shifting trading program to address acid rain under Title IV only further illustrates that Congress did not grant EPA the authority to wield that same power under Section 111(d).

If this Court were to uphold the decision below that Section 111(d) grants EPA the authority needed to impose the generation-shifting Clean Power Plan, that would raise grave constitutional concerns for the statute. The Clean Power Plan does not merely "'fill up the details'" of a statutory regime assigned to EPA by Congress. *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (citation omitted). It is, rather, EPA's attempt to address climate change precisely because Congress has failed to act, using a transformational, generation-shifting methodology. Nor does the Plan implement "non-legislative responsibilities" that are already "'within the scope'" of the Executive Branch's "'power.'" *Id.* at 2137 (citation omitted). Instead, the Clean Power Plan deals with one of the most important, "major national policy decisions" of our time. *Paul*, 140 S. Ct. at 342 (Kavanaugh, J., respecting the denial of certiorari). If Section 111(d)'s general terms permit EPA to grasp that amount of authority at its option, that provision would be unconstitutional under the nondelegation doctrine. *See Gundy*, 139 S. Ct. at 2137 (Gorsuch, J., dissenting).

C. The Panel Majority's Contrary Conclusion Below Was Wrong.

Nothing in the panel majority's decision below articulates any persuasive challenge to this analysis.

The panel majority concluded that the major questions doctrine did not invalidate the Clean Power

Plan because "there is no question that the regulation of greenhouse gas emissions by power plants across the Nation falls squarely within the EPA's wheelhouse." J.A.137 (citing *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007)). But *Massachusetts v. EPA* does not suggest that EPA can enact any and all regulations, no matter how transformative, as this Court's decision in *UARG* makes clear. 573 U.S. at 316–19.

The majority also incorrectly interpreted this Court's major-questions-doctrine jurisprudence, unduly focusing the doctrine on "*whom* the EPA was attempting to regulate." J.A.138–40 (emphasis added). The major questions doctrine looks at far more than just the target of agency regulations. *U.S. Telecom Ass'n*, 855 F.3d at 422–23 (Kavanaugh, J., dissenting from the denial of rehearing en banc). As explained above, three independently sufficient tests, drawn from this Court's case law, may demonstrate that an agency has attempted to address a major question. *See supra* Part I.C.

Finally, the panel majority's conclusion that the Clean Power Plan does not trigger the major questions doctrine because it "does not impose" generation shifting "on anyone," and therefore it is "entirely internal to the EPA," is incorrect. J.A.142–48. The CO_2 emission performance rates that the Clean Power Plan set based upon EPA's generation-shifting methodology cannot be achieved by individual sources, making compliance by those

sources' owners and operators possible only through shifting the power sector away from coal-fired generation toward renewable energy. *See supra* pp. 7–9. That is why, when announcing the Clean Power Plan, the White House touted that the Plan would "'aggressive[ly] transform[ ] . . . the domestic energy industry.'" Joby Warrick, The Washington Post, *White House Set to Adopt Sweeping Curbs on Carbon Pollution* (Aug. 1, 2015) (quoting White House fact sheet to press).[15] The decision of whether such a transformation should occur, and at what pace, is one that under the Constitution and laws of the United States only Congress can make.

[15] *Available at* https://www.washingtonpost.com/national/health-science/white-house-set-to-adopt-sweeping-curbs-on-carbon-pollution/2015/08/01/ba6627fa-385c-11e5-b673-1df005a0fb28_story.html.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals and remand for further proceedings.

Respectfully submitted,

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