No. 20-1530

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

BRIEF OF KENTUCKY, ARIZONA, MISSISSIPPI, AND NEW HAMPSHIRE AS *AMICI CURIAE* SUPPORTING PETITIONERS

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INTERESTS OF *AMICI CURIAE*

This case is about whether the Environmental Protection Agency (EPA) has the authority to usurp the traditional police powers of the States to regulate utilities and the intrastate energy market. How this Court answers that question will affect the *amici* States in two important ways.

Narrowly, the *amici* States—like the State Petitioners—will bear the brunt of any regulatory action from the EPA that requires significant generation shifting from coal-fired fuel to renewable resources. After all, the statutory provision at issue, 42 U.S.C. § 7411(d), puts the burden on the States to comply with the EPA's rule, and it is the States that must ensure their citizens maintain access to reliable and affordable energy during a destabilizing shift to whichever not-yet-established sources end up replacing coal-fired fuel.

Broadly, the *amici* States have a strong interest in protecting their historic police powers from unnecessary federal interference. How this Court resolves the statutory question here could impact countless other attempts by federal agencies to wield little-known laws to intrude on the traditional powers of the States.

SUMMARY OF THE ARGUMENT

The Constitution strikes a delicate balance between the power of the States and the federal government. The federal government's authority is supreme

but limited, while the States retain broad police powers that must yield only when preempted by an otherwise lawful act of Congress.

This structural balance requires courts to exercise caution before interpreting federal statutes to intrude on the police power of the States. As this Court has explained, "[i]t is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides this balance." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). To that end, courts require Congress to use exceedingly clear language before authorizing an intrusion on the authority that historically rests with the States. And from criminal law to landlord-tenant relations, this Court has repeatedly applied this statutory canon to prevent unnecessary (and perhaps inadvertent) conflict between State and federal power.

One such realm of historic State power is the authority to regulate utilities and the intrastate energy market. The States have traditionally been the frontline regulators within this industry. From regulating the size of the energy market more broadly to the rates that utilities may charge their customers, the States have exercised their general police power—a power the federal government lacks—to ensure that their citizens have reliable and affordable electricity.

The D.C. Circuit's interpretation of Section 111(d) fundamentally disrupts the States' authority in this area and thus cannot be upheld unless the Clean Air Act makes that power exceedingly clear. It does not.

The textual gymnastics that the D.C. Circuit relied on below to explain the meaning of Section 111(d) defy basic rules of grammar and statutory interpretation. The decision required ignoring the difference between plural and singular terms, redefining already-existing terms, and stretching the ordinary meaning of language beyond its breaking point. But most importantly, it did all of this in a way that undermines the purpose of Section 111(d), which is to allow the States to custom fit the appropriate standards of performance for the already-existing power generators that are necessary to maintain a stable and affordable energy supply.

Affirming the D.C. Circuit's interpretation of Section 111(d) and restoring the Clean Power Plan would lead to devastating economic effects for States like Kentucky that depend on the abundant and low-cost coal-powered energy as a primary source of electricity. But more fundamentally, allowing a federal agency to disrupt the States' traditional police power through a novel interpretation of an ancillary provision of a federal statute undermines the structural features of our Constitution that make America what it is.

ARGUMENT

This case is about whether the Clean Air Act (CAA) grants the EPA authority to regulate the coal industry out of existence. The statute plainly does no such thing.

Section 111 of the CAA grants the EPA and the States a mix of authority to regulate certain emissions from stationary power sources. 42 U.S.C. § 7411. For new sources (*i.e.*, power plants that have not yet been built), the EPA has broad authority to establish emission limits by adopting a "standard of performance" for each source category. 42 U.S.C. § 7411(a)(1), (b)(1)(B). But for existing sources—power plants and other energy sources that are already integral to a State's power grid—the CAA grants *the States* the primary authority to set those same standards. *Id.* § 7411(d)(1). The result is the kind of cooperative federalism that has become a hallmark of energy and environmental regulation in the United States. *See New York v. United States*, 505 U.S. 144, 167–68 (1992). Congress grants the EPA *some* power, while preserving or extending other authority directly to the States.

The dispute now before the Court is whether Section 111(d) authorizes the EPA to impose sweeping emission standards with the intent and effect of shutting down existing, coal-fired power plants that are otherwise critical to the energy grid in many States. Under President Obama, the EPA asserted precisely that kind of authority based on a novel reading of what is an otherwise ancillary provision of the CAA. And the D.C. Circuit agreed. But that reading of Section 111(d) would obliterate the careful balance the CAA struck between State and federal power, and it would do so at the expense of the historic powers of the State.

Textually, the D.C. Circuit's reading of Section 111(d) is indefensible. But *at most* this is a close call. And that's a problem for the lower court's expansive reading of the EPA's authority because regulating utilities and the energy market is a power that historically belongs to the States. This Court has made clear that Congress cannot "significantly alter the balance between federal and state power" without "exceedingly clear language." *U.S. Forest Serv. v. Cowpasture River Preservation Ass'n*, 140 S. Ct. 1837, 1849–50 (2020). Yet nowhere in Section 111(d) is there anything resembling "exceedingly clear" language authorizing the EPA to engage in a wholesale restructuring of the *existing* energy sector.

I. Regulating energy and utility markets is primarily and historically a job for the States, not the federal government.

1. Regulating energy is one of those issues that has long belonged to the States. *See Ark. Elec. Co-op. Corp. v. Ark. Public Serv. Comm'n*, 461 U.S. 375, 377 (1983).

Thomas Edison built the first centralized power plant in the late nineteenth century. *See* Richard F. Hirsh, *Emergence of Electrical Utilities in America*, Smithsonian Institution (2002), https://perma.cc/ER77-72XA. Soon after, the market for electricity took off. Businesses looking to capitalize on the new industry "sought franchises from municipal governments to build power stations that would dot city landscapes." *Id.* And because most customers "needed to be within one mile of a generating plant to receive power," in the

beginning cities were "populated by numerous power plants" owned by different companies. *Id.*

It is not hard to guess what happened next. Economies of scale took over, and consolidation became the new game. *Id.* Natural monopolies emerged, and with them, the need for some measure of regulatory control. *Id.* But where should that regulation come from? It started locally and soon moved to the States. *Id.* While some municipal governments opted for wholly owned utility companies, by 1914 "state regulation of utilities became commonplace" with at least 45 States having enacted laws providing "oversight of electric utilities." *Id.*

State regulation mostly covered the expected ground. Like common carriers and other public goods, *see Munn v. Illinois*, 94 U.S. 113, 125–26 (1876), the States historically required power companies "to serve all customers without discrimination" and charge only reasonable rates, Hirsh, *supra* 5. States also regulated the "[n]eed for new power facilities, their economic feasibility, and rates and services." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). With few exceptions, "these economic aspects of electrical generation have been regulated for many years and in great detail by the states." *Id.* at 206; *see also* William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 Colum. L. Rev. 426, 454–55, 458–75 (1979).

Energy regulation falls neatly within the States' broader police power. States have long regulated oth-

erwise private property "clothed with a public interest" that "affect[s] the community at large." *Munn*, 94 U.S. at 126. Electric utilities are no different. *See Frost v. Corp. Comm'n*, 278 U.S. 515, 534 (1929) (Brandeis, J., dissenting); *see also Cent. Hudson Gas & Electric Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 569 (1980) (recognizing the "clear and substantial governmental interest" in making sure "that rates be fair and efficient"). And unlike the federal government, "[t]he States have broad authority to enact legislation for the public good." *Bond v. United States*, 572 U.S. 844, 854 (2014).

2. The federal government jumped into the energy game in the mid-twentieth century when Congress enacted the Federal Power Act of 1935 (FPA). *See* 16 U.S.C. §§ 791a *et seq*. Not surprisingly, this initial move into the States' historic domain was done carefully.

The FPA only allowed the federal government to regulate the interstate aspects of energy sales (primarily wholesale transactions and distribution). This preserved the historic role of the States over the intrastate (or retail) energy market. *See Ark. Elec. Co-op Corp.*, 461 U.S. at 378–79. As this Court explained, that jurisdictional line "was deliberate." *Panhandle E. Pipe Line Co. v. Public Serv. Comm'n of Ind.*, 332 U.S. 507, 516 (1947). Congress initiated the federal government's reach into the energy market slowly and with significant deference toward the traditional authority of the States. And it has continued to "maintain[] a zone of exclusive state jurisdiction" over "within-state wholesale sales or . . . retail energy sales." *F.E.R.C. v.*

Elec. Power Supply Ass'n, 577 U.S. 260, 266–67 (2016) ("*EPSA*").

There is no doubt that the federal government's reach into the energy market has expanded significantly since Congress first enacted the FPA. The Clean Water Act allows the federal government to regulate utilities through controls over water quality. The same is true for emissions under the CAA. Yet even though these pollution-control laws "greatly scaled back" State autonomy, the "states continue to wield considerable regulatory authority." John P. Dwyer, *The Practice of Federalism Under the Clean Air Act*, 54 Maryland L. Rev. 1183, 1190 (1995). Rather than trying to preempt the field through an expansive interpretation of its Commerce Clause power, Congress has made environmental regulation "fertile ground" for "cooperative federalism." *See* Robert L. Fischman, *Cooperative Federalism & Natural Res. Law*, 14 N.Y.U. Env't L. J. 179, 188 (2005). As even the CAA makes clear, "air pollution prevention . . . and air pollution control at its source is the primary responsibility of States and local governments." 42 U.S.C. § 7401(a)(3).

Despite expanding federal power, consider what parts of the utility and energy market the States *still* retain exclusive (or near exclusive) authority over. The States have control over retail electricity sales. *See EPSA*, 577 U.S. at 279 (citing 16 U.S.C. § 824(b)). They "retain the right to forbid new entrants from providing new capacity" within their State borders, *Conn. Dep't of Public Utility Control v. F.E.R.C.*, 569 F.3d 477, 481 (D.C. Cir. 2009), just as they could a cen-

tury ago, *see Frost*, 278 U.S. at 534 (Brandeis, J., dissenting). And the States continue to maintain "authority over utility generation and resource portfolios." *New York v. F.E.R.C.*, 535 U.S. 1, 24 (2002). That means the States today remain the primary regulators over the utilities that produce and distribute energy to their citizens.

There are plenty of good reasons for Congress to have decided *not* to preempt the entire field of energy regulation. The federal government, for example, likely "needs state bureaucracies (with their technical and administrative resources) and state politicians (with their political and budgetary support) to achieve its environmental goals." Dwyer, *supra* 8 at 1190. The EPA is not equipped to manage retail energy distribution at the local level. Yet whatever the reason may be, Congress has intervened in only discrete aspects of the utility market, and it thus continues to legislate against the backdrop of "a field in which the States have traditionally operated" and continue to operate today. *See Pac. Gas & Elec. Co.*, 461 U.S. at 205.

II. The presumption against disrupting the federal-state balance of power decisively weighs against the D.C. Circuit's interpretation of Section 111(d).

1. When Congress "intends to pre-empt the historic powers of the States," it must "make its intention clear and manifest." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (quotation marks omitted). This principle is deeply ingrained in this Court's precedent. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230

(1947). It flows from the "assumption" that Congress does not ordinarily intend to "suspend[]" the States' police powers. *Id.* So when "Congress legislate[s] . . . in [a] field which the States have traditionally occupied," the judiciary must start with a baseline presumption that federal law has not "superseded" State authority. *Id.* And that presumption is overcome only when Congress makes it "exceedingly clear" that Congress intends to "alter the balance between federal and state power." *Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1849–50.

While similar to the Court's major-questions doctrine, *see Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014), the federalism canon is not limited to interpreting congressional delegations of power. Rather, the rule guides all kinds of statutory questions. The Court has used it to narrowly construe the scope of a federal criminal statute. *See Bond*, 572 U.S. at 848. It has relied on the canon to limit the reach of federal civil-rights laws, *Will*, 491 U.S. at 65; *Gregory v. Ashcroft*, 501 U.S. 452, 460–61 (1991), and to decide which agency has jurisdiction over federal land, *Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1849–50. And yes, the Court has wielded the canon to confine the scope of legislative delegations of power. *See Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam). No matter the statutory context, courts must guard against inadvertent intrusions on traditional State power by ensuring that Congress makes its purpose "unmistakably clear." *Will*, 491 U.S. at 65.

The federalism canon is a tool of statutory interpretation, not a constitutional doctrine limiting congressional power. It guides courts in deciding not whether Congress *could* take a particular action, but whether Congress intended to do so. This is perhaps best illustrated in *Alabama Realtors*, the Court's most recent decision applying the canon. There, the Center for Disease Control and Prevention claimed that a statute providing it authority to "prevent the introduction, transmission, or spread of communicable diseases from foreign countries into the States . . . or from one State . . . into any other," allowed it to impose a moratorium on landlords evicting tenants during the pandemic. 141 S. Ct. at 2488. In ruling against the CDC, the Court did not consider whether Congress *could* give the CDC the kind of power it asserted under the Commerce Clause or another one of its enumerated powers. Instead, the Court found that—because "landlord-tenant relationship[s]" fall within a "particular domain of state law," Congress must use "exceedingly clear language" to do so. *Id.* at 2489. Because that kind of clear statement does not exist, the CDC does not have the statutory authority it insisted upon. *Id.*

This presumption against disturbing traditional State power follows naturally from the structure of the Constitution. After all, "[t]he States exist as a refutation of th[e] concept" that the federal government is "the ultimate, preferred mechanism for expressing the people's will." *Alden v. Maine*, 527 U.S. 706, 759 (1999). That is, in fact, what makes this Nation so

unique. America divided its power not just between the branches of a single government, but between governments themselves—"one state and one federal, each protected from incursion by the other." *Saenz v. Roe*, 526 U.S. 489, 504 n.17 (1999) (citation omitted). And so the States "are not relegated to the role of mere provinces or political corporations, but retain the dignity, though not the full authority, of sovereignty." *Alden*, 527 U.S. at 715. The result is a federal government that is supreme but limited, with States that retain "numerous and indefinite" powers that "extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people." The Federalist No. 45 (J. Madison).

It is this unique structural feature that compels caution when interpreting federal statutes that may interfere with the natural authority of the States. *See Bond*, 572 U.S. at 848 ("Because our constitutional structure leaves local criminal activity primarily to the States, we have generally declined to read federal law as intruding on that responsibility, unless Congress has clearly indicated that the law should have such reach."). Consider it a companion to another tool of statutory interpretation—the canon of constitutional avoidance. *See Clark v. Martinez*, 543 U.S. 371, 381 (2005). Just as courts—recognizing that they comprise only one of three equal branches of the federal government—should resist unnecessarily interpreting an act of Congress so that it is unconstitutional, *see Nat'l Fed'n of Ind. Bus. v. Sebelius*, 567 U.S. 519, 538

(2012), so too must courts avoid unnecessarily interpreting federal statutes to disrupt the traditional balance of power between the States and the federal government. Both canons operate as "a means of giving effect to congressional intent." *Clark*, 543 U.S. at 382 (describing constitutional avoidance); *Bond*, 572 U.S. at 858 (explaining the similar rationale for the federalism canon).

2. Applying the federalism canon here turns a complicated disagreement over statutory interpretation into an easy bottom line. The CAA plainly intrudes on an area traditionally regulated by the States. *See supra* 5–9. And the D.C. Circuit's interpretation of Section 111(d) expands on that intrusion exponentially—allowing a federal agency to wholly transform the existing power sector in every State by regulating unfavored energy sources out of existence. Congress may grant that kind of authority only with "exceedingly clear language." *Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1849–50. No such language exists here.

The State Petitioners ably explain why that is the case, but consider just a few of the textual distortions required to find support for the D.C. Circuit's reading of Section 111(d). To reach its determination, the D.C. Circuit relied on redefining key terms and ignoring the definition of others, State Pet'rs Br. at 40, transforming singular words into plurals, *id.* at 39, adopting hyperliteral definitions of "infinite breadth," *id.* at 41 (quoting *EPSA*, 577 U.S. at 278), sidestepping basic

rules of grammar, *id.* at 37, and rendering entire clauses illusory, *id.* at 41. And it used these textual maneuvers to affirm outcomes (like implementing cap-and-trade emission controls) that Congress knows how to prescribe directly but chose not to in Section 111(d). *Id.* at 42. A rigorous statutory analysis would yield the conclusion that Section 111(d) simply does not authorize the EPA to remake the Nation's existing energy market as it sees fit. *See* State Pet'rs Br. at 31–44. And there is no "exceedingly clear" support for the opposite determination. *Cowpasture River Pres. Ass'n*, 140 S. Ct. at 1849–50.

3. Yet the breadth of authority that the D.C. Circuit found in Section 111(d) is startling. The States have traditionally had exclusive authority to regulate things like the "[n]eed for new power facilities" and "their economic feasibility." *Pac. Gas & Elec. Co.*, 461 U.S. at 205; *see also supra* 5–9; Ky. Rev. Stat. § 278.020. And Section 111(d) provides for that continuing regulatory authority by granting *the States* the primary power to set standards of performance for existing sources that take into consideration the remaining useful life of each source. 42 U.S.C. § 7411(d). Yet the D.C. Circuit's interpretation of the statute would allow the EPA to usurp that traditional State authority by making it economically infeasible to continue operating existing coal-fired generators, thus *requiring* new kinds of electrical sources that the EPA has selected for the States.

That, in turn, will require billions in investments into new power plants to replace lost power capacity from the loss of existing coal-fired electricity. *See EPA's Clean Power Plan: An Economic Impact Analysis,* Energy Ventures Analysis, 7–8 (Nov. 13, 2015), https://perma.cc/4UKG-NY7B. New investments must be paid for—and those costs would likely pass down to the consumers through their rates. And the States are the political bodies responsible for regulating those rates. *Pac. Gas & Elec. Co.*, 461 U.S. at 205; *see e.g.,* Ky. Rev. Stat. § 278.040(2) (vesting "exclusive jurisdiction over the regulation of rates and services" with the Kentucky Public Service Commission); Fla. Stat. § 350.011; Fla. Admin. Code. 25-14.001. At every turn, the D.C. Circuit's blessing of the limitless authority contemplated by the Clean Power Plan would amount to an unprecedented intrusion into the energy sector that implicates and commandeers the States' traditional role of regulating utilities within their borders. Section 111(d) "is a wafer-thin reed on which to rest such sweeping power." *Alabama Realtors*, 141 S. Ct. at 2489.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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