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

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 Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF THE AMERICA FIRST POLICY INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

The America First Policy Institute is a non-profit, non-partisan research institute dedicated to the advancement of policies that put the American People first. Its guiding principles are liberty, free enterprise, the rule of law, America-first foreign policy, and a belief that American workers, families, and communities are the key to the success of our country. It is the job of policymakers to advance and serve these interests above all others. As part of its mission, the America First Policy Institute seeks to advance policies that couple American innovation with conservation efforts to continue to make America the leader in clean air, clean water, and the environment.

[1] All of the parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part, and no person or entity other than *amici* or their counsel made a monetary contribution intended to fund its preparation or submission.

INTRODUCTION AND BACKGROUND

[T]hink of the word 'constitution;' it does not mean a bill of rights, it means structure. . . . Structure is what our Framers debated that whole summer in Philadelphia, in 1787. . . . So the real key to the distinctiveness of America is the structure of our Government.

– Justice Antonin Scalia[2]

The genius of the American system of government is that its structural divisions of power are designed to reinforce and support that structure over time. As many Presidents have learned through hard experience, this structure makes it difficult to enact sweeping changes in policy or law. The perpetual temptation of Presidents is thus to use the "pen and phone" to dictate what could not be attained through the legislative process. With the rise of the administrative state, the opportunities for such end-runs have grown exponentially, and the main battleground in contests of policy and power is now the rough terrain of the Administrative Procedure Act.

This case arises out of one of the most ambitious and, frankly, indefensible examples of such "pen and phone" administrative overreach in our Nation's history: the Clean Power Plan. After a decade of failed attempts to pass a cap-and-trade law for greenhouse gas emissions, like the 1990 amendments to the Clean

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[2] *Considering the Role of Judges Under the Constitution of the United States: Hearing Before the S. Comm. on the Judiciary*, 112th Cong. 7 (2011) (testimony of Antonin Scalia, Associate Justice, U.S. Supreme Court).

Air Act addressing sulfur dioxide emissions and acid rain, President Obama directed his administration to proceed alone. *See, e.g.*, Barack Obama, President of the United States, State of the Union Address (Feb. 12, 2013) ("But if Congress won't act soon to protect future generations, I will. I will direct my Cabinet 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.").

The Environmental Protection Agency ("EPA") responded by creating the Clean Power Plan, the most significant rule in the agency's history. The Clean Power Plan was designed to "show[] the world that the United States is committed to leading global efforts to address climate change." *FACT SHEET: Overview of the Clean Power Plan*, EPA, https://19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan_.html (last visited Dec. 18, 2021). To achieve this, EPA discovered within obscure and little used provisions of section 111 of the Clean Air Act a hitherto unknown power to create a nationwide cap-and-trade program and impose power generation shifting on sources in the energy industry.

And the Clean Power Plan delivered exactly what it promised: a centralized *plan* to "clean" the American energy industry from the top down. It did this, not by working with states to ensure that existing sources are regulated in a way that "reflects . . . the best system of emission reduction" that EPA believes has been "adequately demonstrated," as section 111(d) directs, but by setting unachievable "standards of performance" for disfavored sources—like coal-fired

plants—and then requiring those sources either to shut down or buy emission credits from competitors using favored sources within the energy market, like wind and solar power.

The scope of the plan was breathtaking. As EPA's attorney explained at oral argument, while the rule expresses itself in an endlessly complicated series of data points and determinations, the process

> really simplifies and boils down to this, the Clean Power Plan pulled out a map of America. It put colored pins in the map where coal plants are, where gas plants are, where renewable plants are in the year around 2014. Then they made, effectively, another map with new pins for where they were projecting and wanted to see America's coal plants, gas plants, and then where they thought there could be renewable plants . . . eight years into the future.
>
> Then, after creating their map, their plan, the CPP then backed into and calculated state emission caps based on that plan for the future . . . and then told states and industry of America they need to go out and figure out how to [meet these goals].

Transcript of Oral Argument at 53–54, *Am. Lung Assoc. & Am. Pub. Health Assoc. v. EPA*, 985 F.3d 914 (D.C. Cir. 2021). In other words, EPA claimed that it could do under section 111(d) what *Congress* did when it created the acid rain program codified in Title IV of the Clean Air Act: enact emission caps for sources and allow nationwide trading of unused emission credits to meet those limits. The Clean Power Plan, however,

was far more ambitious in scope. Unlike Title IV—which specified numerical reductions on a plant-by-plant basis in the statute—the Clean Power Plan rested on a statutory interpretation that put no limit on the reductions EPA could demand, even going to zero emissions (or beyond). It also marginalized the role of states in implementation and ignored the requirement in section 111(d) that states be able to tailor the application of "standards of performance" to individual sources. And, as EPA acknowledged, the Clean Power Plan would have cost billions of dollars and fundamentally restructured the Nation's entire electrical grid, permanently shifting the energy economy away from fossil fuels towards renewables. This was not a byproduct of the plan, it *was* the plan.

Of course, this (literal and figurative) power grab was never fully realized, as this Court stayed the Clean Power Plan and EPA repealed and replaced it with a far more modest regulation: the Affordable Clean Energy ("ACE") rule, which returned to the historic pattern of requiring energy efficiencies on an individual source basis. In the preamble to the ACE rule, EPA recognized that the Clean Power Plan was grounded in an impermissibly expansive interpretation of section 111(d).

But the D.C. Circuit below disagreed. It vacated the more modest regulation because it apparently thought that the great difficulty of government was not to "oblige it to control itself," The Federalist No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961), but to oblige it to use every scintilla of authority that can be wrung from the most creative interpretation of statutory text. This administrative maximalism replaced the clear statement rule embodied in the

"major questions doctrine" with what amounts to an *anti*-major questions doctrine. Under the D.C. Circuit's approach, the government has no duty to persuade the court that a novel and expansive interpretation of a statute is supported by the text. Rather, the burden is shifted to those injured by the rule, who must show that "it is implausible in light of the statute and subject matter in question that Congress authorized such unusual agency action." J.A. 135–36.

This Court granted certiorari.

SUMMARY OF ARGUMENT

1. The major questions doctrine is the application of an ordinary rule of human communication. The more important something is, the more clearly and directly it will be expressed, especially when it represents a significant departure from the status quo. The fundamental proposition of our system of government is that *Congress* makes the laws, and thus when it does something significant economically or politically, we expect it to say so clearly.

The major questions doctrine is a rule that, in highly significant cases, this interpretive principle requires that courts not defer to agency interpretations of law. The contours of this rule are not completely clear, however, since ambiguity is (often) viewed as an implicit delegation of authority to the executive to fill in statutory gaps. Sometimes this Court has applied the major questions doctrine at "step zero" of its analysis under *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984) (*Chevron* does not apply), sometimes at "step one" (*Chevron* applies, but there is no ambiguity), and sometimes at "step two" (*Chevron*

applies, there is ambiguity, but the interpretation is unreasonable). While the major questions doctrine can be applied effectively at each of these steps, resolving the issue as a threshold inquiry makes the most sense since it speaks to whether Congress delegated authority to the agency.

In addition, it is important that lower courts have guidance about what level of generality to use when considering the scope of a rule's economic and political impact. As the decision below demonstrates, lower courts have used the lack of clarity on this point to "narrow from below" or twist relevant precedents into requiring the opposite of what they actually require. Such threats to the doctrine are only increasing, as demonstrated by the recent eviction moratorium and the pending litigation surrounding the Occupational Safety and Health Administration ("OSHA") vaccine mandate.

2.a. A separate reason for strengthening and clarifying the major questions doctrine is that without this interpretive guardrail, statutory ambiguity threatens to create serious non-delegation concerns. Thus, in addition to its status as a principle of communication and interpretation, the major questions doctrine is also an application of the canon of constitutional avoidance.

b. Broad delegation of authority to administrative agencies would also vitiate the Recommendations Clause's requirement that the President "recommend . . . Measures" to Congress rather than impose them alone.

3. Finally, the Clean Power Plan's approach to section 111(d) fails as a matter of statutory interpretation. The D.C. Circuit was able to reach its conclusion only by performing an audacious experiment in interpretive vivisection. It cut the statute into a number of pieces, expansively read certain favored words (especially "system"), discarded unfavored bits, and then sewed the transformed parts back together into a statutory Frankenstein's monster, a "being of a gigantic stature" and immense strength, yet deformed. The process is no doubt impressive—the operation spans dozens of pages of the F.4th—but the court's creation has no relation to the section 111(d) Congress enacted.

ARGUMENT

I. This Court Should Take This Opportunity to Develop Its Major Questions Jurisprudence.

Legislation is a form of communication. And as with all forms of communication, the important information is usually conveyed with greater clarity and precision than ancillary matters. The major questions doctrine—also referred to at times as the "major rules doctrine"—is simply this general principle put into action. The doctrine reflects the "common sense" that Congress will speak clearly when authorizing agencies to make decisions of vast "economic and political significance," and that judicial deference to agency interpretations of ambiguous statutory law is thus not appropriate in such situations. *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 160 (2000); *see Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021); *King v. Burwell*, 576 U.S. 473, 485–86 (2015); *Util. Air*

Reg. Grp. (*"UARG"*) *v. EPA*, 573 U.S. 302, 324 (2014); *Gonzalez v. Oregon*, 546 U.S. 243, 267 (2006); *MCI Telecomms. Corp. v. AT&T Co.*, 512 U. S. 218, 231 (1994); *Indus. Union Dept., AFL–CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645–46 (1980) (plurality opinion); *see also* Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 370 (1986) ("A court may also ask whether the legal question is an important one. Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters to answer themselves in the course of the statute's daily administration."). In so doing, and relatedly, Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (citing *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159–60; *MCI Telecomms. Corp.*, 512 U.S. at 231); *see also Gonzalez*, 546 U.S. at 267; *Brannan v. Stark*, 342 U.S. 451, 463 (1952) ("We do not think it likely that Congress, in fashioning this intricate . . . machinery, would thus hang one of the main gears on the tail pipe.").

Exactly how to apply the major questions doctrine in particular cases has been a subject of disagreement, making the proper resolution of this case all the more important, given the overwhelming need for its consistent application and a body of case law to elucidate the subject. For its part, this Court has applied the major questions doctrine at various phases of its analysis of agency statutory interpretations (and subsequent action) under *Chevron*.

In *King*, for example, the Court declined to embark on an analysis under *Chevron* at all because the question at issue was "of deep economic and political significance" that was "central to th[e] statutory scheme." 576 U.S. at 485–86 (internal quotation marks omitted); *see also Gonzales*, 546 U.S. at 268. Additional cases like *Alabama Assoc'n of Realtors* reviewed agency action without mentioning *Chevron* at all. *See* 141 S. Ct. at 2489.

In *Brown & Williamson Tobacco Corp.*, the Court similarly was "confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." 529 U.S. at 160. But the Court then considered additional factors and found it "clear . . . that Congress ha[d] directly spoken to the question at issue and precluded the FDA from regulating tobacco products," ultimately resolving the case at the first step of the *Chevron* analysis. *Id.*

And in *UARG*, the Court concluded that the lack of a clear statement rendered the agency action "patently unreasonable—not to say outrageous," resolving the case at the second step of *Chevron*. 573 U.S. at 324. The Court was "not willing to stand on the dock and wave goodbye as EPA embark[ed] on this multiyear voyage of discovery." *Id.* at 328; *see also MCI Telecomms. Corp.*, 512 U.S. at 229.

Because the major questions doctrine follows from the canonic presumption that Congress does not delegate authority to make decisions of vast economic and political significance without a clear statement—*i.e.*, it does not make such delegations implicitly—identifying major questions and the requisite clear delegation of authority is necessarily a predicate to any

analysis under *Chevron*, which is premised on the delegation of authority from Congress to the agency. *Cf. United States v. Mead Corp.*, 533 U.S. 218 (2001). As noted, the Court has applied the major questions doctrine without ever reaching (or even mentioning) an analysis under *Chevron*. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489. The major questions doctrine and requisite clear statement should thus be a threshold matter for courts to resolve.

The need for clarity is demonstrated by the decision below, which adopted an *anti*-major questions doctrine, interpreting the ambiguous language of section 111 to *require* the agency to consider promulgating major rules unless that reading would be "implausible." J.A. 135. Rather than recognizing that Congress will speak clearly when delegating authority to make decisions of vast economic and political significance, the D.C. Circuit imposed the exact opposite presumption and invoked statutory ambiguity to direct EPA to consider the possibility of broad rulemaking.

It is further important to clarify the level of generality at which the major question should be defined. When reviewing agency action, courts do not consider abstract questions about delegation—*i.e.*, does EPA have authority to regulate air pollutants? Rather, courts review specific agency actions. The major questions doctrine should therefore be defined to the degree of specificity in the proposed agency action—*i.e.*, does EPA have authority to impose carbon emission limits on stationary sources that will require generation shifting or implement a cap-and-trade program? This reflects why the major questions doctrine is sometimes referred to as the major rules doctrine. *See,*

e.g., *U.S. Telecom. Assoc. v. Fed. Commc'ns Comm.*, 855 F.3d 381, 417 (Kavanaugh, J., dissenting). Such clarification will decrease confusion in the application of the doctrine and prevent parties from trying to bypass the major questions doctrine by defining issues in such broad or abstract terms that any delegation from Congress would suffice.

Finally, courts below that have refused to apply the major questions doctrine have expressed confusion or uncertainty about what it means for a question to be "major." For example, just last Friday, the Sixth Circuit brushed aside arguments that OSHA's nationwide vaccine mandate ran afoul of the major questions doctrine by claiming that it was "seldom used" and that, while it demands clarity from Congress, "[t]he doctrine itself is hardly a model of clarity, and its precise contours—specifically, what constitutes a question concerning deep economic and political significance—remain undefined." *In re: MCP No. 165*, ___ F. 4th ___ (6th Cir. 2021). This statement is an error, in our view, but the existence of such errors indicates why the Court should take this opportunity to further define and apply the doctrine, especially by addressing the following three points, all of which are grounded in previous major questions decisions:

1. The major questions doctrine applies to rules that involve "vast economic . . . significance." *UARG*, 573 U.S. at 324. For example, the Court in *King* viewed "billions of dollars in spending each year and affecting the price of health insurance for millions of people" as a sufficient economic concern to defeat deference to the agency. 576 U.S. at 485. Separate from monetary figures, agency attempts to regulate "a significant portion of the American economy" would also

qualify. *UARG*, 573, U.S. at 324 (quoting *Brown & Williamson Tobacco Corp.*, 529 U.S. at 159)).

The Clean Power Plan plainly reflected vast economic significance, which EPA readily acknowledged would cost billions of dollars annually to implement. *See* EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, Ch. 3, at 22 (2015), https://archive.epa.gov/epa/sites/production/files/2015-08/documents/cpp-final-rule-ria.pdf. Changes in energy production would also reverberate throughout the entire American economy.

2. Aside from cost, the major questions doctrine also applies to rules that involve "vast . . . political significance." *UARG*, 573 U.S. at 324. This can be demonstrated in numerous ways. The Court has observed that the significance of an issue might be determined by the presence of "'earnest and profound debate' across the county," which "makes the oblique form of [a] claimed delegation all the more suspect." *Gonzales*, 546 U.S. at 267–68 (quoting *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997)). "Unprecedented" claims of agency authority can also qualify as of vast political significance, *Ala. Ass'n of Realtors*, 141 S. Ct. at 2489, as can "claims to discover in a long extant statute an unheralded power," *UARG*, 573 U.S. at 324. Attempts to "bring about an enormous and transformative expansion" of regulatory authority, *id.*, to effect a "radical or fundamental change" in a statutory requirement, *MCI Telecomms. Corp.*, 512 U.S. at 229, or to "alter the fundamental details of a regulatory scheme," *Am. Trucking Ass'ns*, 531 U.S. at 468, are further sufficient. The Court has explained that "whether a change is minor or major depends to some extent upon the importance of the item changed to the

whole," including if the agency attempts to impose "a whole new regime of regulation." *MCI Telecomms. Corp.*, 512 U.S. at 229, 234. Each of these situations carries immense policy implications, often involving the authority of an agency to regulate the public, and they therefore each qualify as being of vast political significance.

The EPA authority sanctioned by the D.C. Circuit and exercised in promulgating the Clean Power Plan easily satisfies these considerations. The subject matter is no stranger to national "earnest and profound debate," *Gonzales*, 546 U.S. at 267–68 (quoting *Glucksberg*, 521 U.S. at 735), as readily demonstrated by Congress. In 1990, Congress adopted a successful cap-and-trade program for dealing with sulfur-dioxide emissions and acid rain, and Congress and the public for years have debated whether to apply a similar program to limit greenhouse gas emissions. The Climate Stewardship Act of 2003, S. 139, 108th Cong. (2003), the Energy Policy Act of 2005, H.R. 6, 109th Cong. (2005), the Energy Independence and Security Act of 2007, H.R. 6, 110th Cong. (2007), the Lieberman-Warner Climate Security Act of 2007, S. 2191, 110th Cong. (2007), and the American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009), are but a few examples of times Congress has considered this issue without enacting any legislation. The partial dissent below further catalogued numerous examples of legislation proposed in Congress to address climate change over the past decade. *See* J.A. 221 n.19 (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part).

The D.C. Circuit's interpretation of section 111 would allow EPA to restructure the entire energy

market in an unprecedented manner, including by attempting to scuttle the use of disfavored sources such as coal-fired plants altogether. It thus blessed the Clean Power Plan's "claim[] to discover in a long extant statute an unheralded power" to effect "an enormous and transformative expansion" of its regulatory authority. *UARG*, 573 U.S. at 324. The D.C. Circuit reached its conclusion despite the obvious fact that this authority would extend to "alter[ing] the fundamental details of a regulatory scheme," *Am. Trucking Ass'ns*, 531 U.S. at 468, imposing generation shifting and a cap-and-trade program on carbon-dioxide emissions by stationary sources for the first time, and in the absence of any statutory directive. This would have been "a whole new regime of regulation . . . , which may well be a better regime but is not the one that Congress established." *MCI Telecomms. Corp.*, 512 U.S. at 234.

3. Agency action that encroaches on the traditional authority of states implicates both the major questions doctrine and the federalism canon of statutory interpretation. The two canons frequently travel together because regulations that impinge traditional areas of state authority are also likely to be transformative in nature, politically salient, and economically significant. Unsurprisingly, this Court has previously considered both the major questions doctrine and the federalism canon of construction side by side. *See Ala. Ass'n of Realtors*, 141 S. Ct. at 2489.

Like the major questions doctrine, the federalism canon requires "a clear indication" from Congress before a court will read a statute to intrude on traditional state powers. *See Bond v. United States*, 572 U.S. 844, 857 (2014); *see also Ala. Ass'n of Realtors*,

141 S. Ct. at 2489 ("Our precedents require Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power and the power of the Government over private property." (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849–50 (2020))). So, whether federalism considerations are viewed as an aspect of the major questions doctrine or as a separate canon of construction, the result is the same.

Federalism considerations support petitioners here (who include some twenty states). By setting carbon limits below what each source could individually achieve, imposing generation shifting and a cap-and-trade program, the Clean Power Plan interfered with the "traditional responsibility" of states "in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." *PG&E v. State Energy Comm'n*, 461 U.S. 190, 205 (1983) ("Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by States."); *cf. Hughes v. Talen Energy Mktg., LLC*, 136 S.Ct. 1288, 1292 (2016) (explaining that the "reserved authority" of states under the Federal Power Act, 16 U.S.C. § 791a *et seq.*, "includes control over in-state 'facilities used for the generation of electric energy."). The relevant statute does not speak with sufficient clarity to sanction that agency action.

* * *

Section 111 charges EPA with determining what sort of system is "best" for different kinds of existing sources. It does not authorize the kind of "voyage[s] of discovery" endorsed by the decision below. This Court should reverse on that basis, take the opportunity to

set forth "the correct reading" of section 111, *King*, 576 U.S. at 474, and clarify the scope and applicability of the major questions doctrine.

II. Unless Cabined by the Major Questions Doctrine, Statutory Ambiguity Threatens the Separation of Powers.

A. The Major Questions Doctrine Avoids Non-Delegation Issues.

The Constitution vests "[a]ll legislative Powers" in Congress, U.S. Const. art. I, § 1, and "Congress generally cannot delegate its legislative power to another Branch," *Mistretta v. United States*, 488 U.S. 361, 371–72 (1989). This "is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). Congress simply may not "delegate . . . powers which are strictly and exclusively legislative." *Wayman v. Southard*, 10 Wheat. 1, 42–43 (1825).

To be sure, the Court has only twice held that a statute amounted to an unconstitutional delegation of authority by Congress. *See A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495, 539 (1935); *Panama Refin. Co. v. Ryan*, 293 U.S. 388 (1935). But the Court has since invoked the non-delegation doctrine as a reason to interpret statutes narrowly, recognizing that the non-delegation doctrine may cut more broadly. *See Mistretta*, 488 U.S. 373 n.7 ("In recent years, our application of the nondelegation doctrine principally has been limited to the interpretation of

statutory texts, and, more particularly, to giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional.").[3]

In *Kent v. Dulles*, 357 U.S. 116 (1958), for example, the Secretary of State claimed authority to deny passports to communists and communist sympathizers under the Act of July 3, 1926, ch. 772, 44 Stat. 887. That statute authorized the Secretary of State to "grant and issue passports . . . under such rules as the President shall designate and prescribe." *Id.* at 123 (quoting Act of July 3, 1926, § 1). The Court in part cited *Panama Refining Co.* and explained that if Congress had delegated authority as broadly as the Secretary claimed, the "standards must be adequate to pass scrutiny by the accepted tests." *Id.* at 129. The Court was "hesita[nt] to find in this broad generalized power an authority to trench so heavily on the rights of the citizen," and thus interpreted the statute to avoid constitutional issues. *Id.*

In *National Cable Television Ass'n, Inc. v. United States*, 415 U.S. 336 (1974), the Court narrowly construed the authority of Federal Communications

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[3] Members of this Court have written separate opinions suggesting that further development and application of the non-delegation doctrine may be appropriate. *See Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J. concurring in the judgment); *id.* at 2138 (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); *Paul v. United States*, 140 S. Ct. 342 (2019) (Kavanaugh, J., concurring in denial of certiorari); *see also Am. Trucking Ass'ns*, 531 U.S. at 487 (Thomas, J., concurring) ("[T]here are cases in which the principle is intelligible and yet the significance of the delegated decision is simply too great for the decision to be called anything other than 'legislative.'").

Commission ("FCC") under the Independent Offices Appropriations Act, 1952, to avoid constitutional concerns about the delegation of legislative authority. After citing *A.L.A. Schechter Poultry Corp.*, the Court opined that the FCC could only impose licensing fees on community antenna television systems commensurate with the "value to the recipient," not the "public policy or interest served, and other pertinent facts," even though each of those considerations was expressly authorized by the statute. *Id.* at 342–43 (quoting Independent Offices Appropriation Act, 1952, tit. 5). The Court was concerned that "the addition of 'public policy or interest served, and other pertinent facts,' if read literally, carries an agency far from its customary orbit and puts it in search of revenue in the manner of an Appropriations Committee of the House." *Id.* at 341. Moreover, considerations of public policy would allow for "mak[ing] the assessment heavy . . . to discourage the activity," "mak[ing] the levy slight if a bounty is to be bestowed," or "mak[ing] a substantial levy to keep entrepreneurs from exploiting a semipublic cause of their own personal aggrandizement," which the Court viewed as "in the nature of 'taxes' which under our constitutional regime are traditionally levied by Congress." *Id.*

Such fundamental policy decisions about what activity to encourage and discourage led the Court to "read the Act narrowly to avoid constitutional problems" under the non-delegation doctrine. *Id.* at 342. Importantly, the Court saw potential hurdles under both *A.L.A. Schechter Poultry Corp.* and *J.W. Hampton Jr., & Co. v. United States*, 276 U.S. 394 (1928), suggesting that delegations of authority that allowed agencies to determine public policy might not satisfy

the "intelligible principle" test established in the latter case. *See Nat'l Cable Television Ass'n, Inc.*, 415 U.S. at 342; *cf. Panama Refin. Co.*, 293 U.S. at 420 ("The question whether such a delegation of legislative power is permitted by the Constitution is not answered by the argument that it should be assumed that the President has acted, and will act, for what he believes to be the public good. The point is not one of motives, but of constitutional authority, for which the best of motives is not a substitute.").

In *Industrial Union Department, AFL–CIO*, commonly known as the *Benzene Case*, the plurality invoked similar concerns to limit a delegation of authority to the Secretary of Labor. The Occupational Safety and Health Act ("OSH Act") directed the Secretary to promulgate standards that were "reasonably necessary or appropriate to provide safe or healthful employment and places of employment." 448 U.S. at 612 (plurality) (quoting OSH Act § 3(8)). This included regulating the amount of "toxic materials or harmful physical agents" permitted in the workplace by "set[ting] the standard which most adequately assures, to the extent feasible, . . . that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard." *Id.* (quoting OSH Act § 6(b)(5)). Despite the articulation of what the Secretary should regulate, for what purpose, and to what extent, a plurality of the Court cited *A.L.A. Schechter Poultry Corp.* and *Panama Refining Co.* and explained in part that this "would make such a 'sweeping delegation of legislative power' that it might be unconstitutional." *Id.* at 646; *see also id.* at 672 (Rehnquist, J., concurring in the judgment) ("Congress, the governmental body best

suited and most obligated to make the choice confronting us in this litigation, has improperly delegated that choice to the Secretary of Labor and, derivatively, to this Court."). The plurality accordingly imposed a "significant risks" standard before the Secretary could regulate toxic substances. *Id.* at 642–43 (plurality).

Lastly, while the Court in *American Trucking* concluded that there was no need to invoke the canon of constitutional avoidance with respect to potential non-delegation issues, it nevertheless construed the statute narrowly. *Compare Am. Trucking Ass'ns*, 531 U.S. at 471 (2001) ("the canon requiring texts to be so construed as to avoid serious constitutional problems has no application here"), *with id.* at 473 (relying on concession at oral argument that "requisite" should be understood as "sufficient, but not more than necessary").

The D.C. Circuit's reading of section 111 would constitute a "sweeping delegation of legislative power" that raises non-delegation concerns, *A.L.A. Schechter Poultry Corp.*, 295 U.S. at 539, providing a further reason for rejecting the decision below. The D.C. Circuit was explicit in its finding that "Congress imposed no limits on the types of measures the EPA may consider beyond three additional criteria: cost, any nonair quality health and environmental impacts, and energy requirements." J.A. 108. But the statute provides no guidance on how to balance those criteria. This would empower EPA to fundamentally restructure the entire energy market and the relationship between the federal government and the respective states in that area. The effects of the regulation would reach into every American home and reverberate through any industry requiring energy. Unlike the

Benzene Case, the Court does not need to read additional requirements into the statute, but instead should interpret the statute consistent with the major questions doctrine and in a manner that avoids nondelegation issues.

B. The Constitution Gives the President the Power to "Recommend" Major Policy Changes to Congress, Not Make Such Changes Alone.

Broad, ill-defined delegations of authority to administrative agencies also threaten to undermine the purpose and function of the Recommendations Clause. In *Youngstown Sheet & Tube Co. v. Sawyer*, the Court was clear that "[t]he Constitution limits [the President's] functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither silent nor equivocal about who shall make laws which the President is to execute." 343 U.S. 579, 587 (1952); *see also id.* at 632 (Douglas, J., concurring) ("The power to recommend legislation, granted to the President, serves only to emphasize that it is his function to recommend and that it is the function of the Congress to legislate."). Yet rather than recommending legislation to Congress, administrative agencies too often take the liberty—sometimes pursuant to broad delegations of authority, sometimes not—to effectively write the very laws they are to enforce.

The Recommendations Clause, and the State of the Union Clause that precedes it, provide that the President "shall from time to time give to the Congress Information of the State of the Union, and recommend to their Consideration such Measures as he shall

judge necessary and expedient." U.S. Const. art II, § 3. The choice of "Measures" in the Recommendations Clause was deliberate and significant. An initial draft of the Constitution by the Committee of Detail at the Constitutional Convention stated that the President "may recommend Matters" to Congress. 2 *The Records of the Federal Convention of 1787*, at 171 (Max Farrand ed., 1966) ("Farrand"). The Chairman of the Committee of Detail, Edward Rutledge, replaced "matters" with "such measures as he shall judge nesy. & expedt." *Id.* While the general term "matters" refers to the conveyance of ideas, *see, e.g.*, 2 Samuel Johnson, *A Dictionary of the English Language* (1755) (def. 3 of "matter": "[s]ubject, thing treated"), the term "measures" indicates a degree of specificity, *see, e.g.*, *id.* (def. 2 of "measure": "[t]he rule by which any thing is adjusted or proportioned"); *see also* J. Gregory Sidak, *The Recommendations Clause*, 77 Geo. L. J. 2079, 2084 (1989). In particular, "[o]ne well-accepted meaning of the word 'measure' at the Founding . . . is a 'legislative bill or enactment.'" Vesan Kesavan & J. Gregory Sidak, *The Legislator-in-Chief*, 44 Wm. & Mary L. Rev. 1, 48–49 (2002).

Implicit in the Recommendations Clause, and further reflected in the State of the Union Clause, is a recognition that the President will have information not available to Congress, and that the President should use that information to recommend legislation, not act unilaterally. Early commentators made similar observations.[4] The President thus had an obligation to provide the necessary information and to make

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[4] *See* 1 St. George Tucker, *Blackstone's Commentaries* app. at 344 (1803) ("As from the nature of the executive office it possess more

recommendations so that Congress could fulfill its constitutionally designated role. A lack of expertise in Congress was no excuse to delegate the tailoring of laws.

The alternative to excessive delegations from Congress is already embodied in the Constitution—the Recommendations Clause. A primary function of the Recommendations Clause would therefore be defeated if courts were to sit aside while the President decides not to recommend new legislation to Congress, but instead to forge ahead alone, as the President did through EPA in the Clean Power Plan.

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immediately the sources, and means of information than the other departments of government[,] . . . the constitution has made it the duty of the supreme executive functionary, to lay before the federal legislature, a state of such facts as may be necessary to assist their deliberations on the several subjects confided to them by the constitution."); William A. Rawle, *A View of the Constitution of the United States of America* 172 (2d ed. 1829) ("This is an obligation not to be dispensed with. . . . [S]upplied by his high functions with the best means of discovering the public exigencies, and promoting the public good, he would not be guiltless to his constituents if he failed to exhibit [to Congress] on the first opportunity, his own impressions of what it would be useful to do, with his information of what had been done. He will then have discharged his duty, and it will rest with the legislature to act according to their wisdom and discretion."); 3 Joseph Story, *Commentaries on the Constitution of the United States* § 1555 (1833) ("From the nature and duties of the executive department, [the President] must possess more extensive sources of information, as well in regard to domestic as foreign affairs, than can belong to congress. . . . There is great wisdom, therefore, in not merely allowing, but in requiring, the president to law before congress all facts and information, which may assist their deliberations; and in enabling him at once to point out the evil, and to suggest the remedy.").

The comparison between the Clean Power Plan and Title IV's acid rain program is again illustrative. The Clean Power Plan was created as a response to the fact Congress had not acted to curb carbon emissions to the level President Obama wished. The acid rain program was enacted by Congress pursuant to the recommendations of the White House and EPA. See 1990 Clean Air Act Amendment Summary, EPA, https://www.epa.gov/clean-air-act-overview/1990-clean-air-act-amendment-summary (last visited Dec. 20, 2021).These constitutional considerations reinforce the major questions doctrine, underscoring the need for this Court to apply and clarify that doctrine here.

III. The D.C. Circuit's Expansive Reading of Section 111 is Wrong.

Even if it does not run afoul of the major questions doctrine—and it does—the D.C. Circuit's interpretation of section 111 is indefensible simply as a matter of statutory interpretation.

Here, two interlocking provisions are at issue. Recognizing how these two provisions are designed to work together makes their individual meaning all the more obvious. Section 111(a) 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" that has been "adequately demonstrated," as determined by the Administrator of the EPA. 42 U.S.C. § 7411(a). Section 111(d) puts this into effect, providing that the Administrator "shall prescribe regulations which shall establish a procedure" like those used under section 110 of the Clean

Air Act for state implementation of ambient air quality standards. Pursuant to this procedure, states submit pollution control plans for existing stationary sources for EPA approval. *Id.* § 7411(d)(1). These state plans must "establish[] standards of performance for any existing source for any air pollutant" covered by section 111, *id.*, here, carbon dioxide*, see Massachusetts v. EPA*, 549 U.S. 497 (2007). Section 111(d) also requires EPA's regulations to give states an avenue for granting variances to specific sources based on considerations such as their "remaining useful life." 42 U.S.C. § 7411(d)(1).

Until the Clean Power Plan was issued, the word "system" in the definition of "standard of performance" under section 111(a) was read as meaning a mechanical system to be applied to an individual emissions source. *See*, *e.g.,* 42 Fed. Reg. 12,022 (Mar. 1, 1977) (prescribing emissions achievable by "spray-crossflow packed bed" as the best that could be achieved by "installing such system in existing facilities"); 42 Fed. Reg. 55,796 (Oct. 18, 1977) ("section 111(d) requires emission controls based on the general principle of the application of the best adequately demonstrated control *technology"* (emphasis added)); 44 Fed. Reg. 29,829 (May 22, 1979) (setting emissions limits based on some of the best technology that could be "purchased and installed" on existing plants); 45 Fed. Reg. 26,294 (Apr. 17, 1980) (setting limits that could be achieved by retrofitting existing plants with installation of "dry" or "wet scrubbers" with a "few plants" needing to install "reduction cell hooding"); 61 Fed. Reg. 9905 (Mar. 12, 1996) (basing limits on what could be achieved by installing a "combustion device" to burn off gases emitted municipal solid waste landfills).

This makes good sense. When read together, section 111(a)(1) and (d)(1) require not only that standards in the state's plan must be "for" "any existing source," *but also* that the Administrator's finding about the "degree of emission limitation achievable" using EPA's preferred "system" must likewise be "for" an existing source—the "standard of performance" must be achievable at some "existing source." 42 U.S.C. § 7411(d)(1). Thus *both* the state standard and the Administrator's findings "reflect[ed]" in the state's standard are equally tethered to a specific existing source for which the system of emission reduction's effectiveness has been "adequately demonstrated." *Id.*

This traditional approach also gives effect to the entire statutory provision, in particular the last sentence of section 111(d)(1), which requires EPA in its regulations to provide a path by which states "applying a standard of performance to any particular source" can grant variances based on, "among other factors, the remaining useful life of the existing source to which such standard applies."[5]

But in the Clean Power Plan, the Administrator interpreted "system of emission reduction" as authorizing a cap-and-trade regime for regulatory cross-subsidies, rather than mechanical systems like heat-rate (*i.e.*, efficiency) improvement, and also economic schemes like generation shifting that requires source operators to subsidize power from intermittent sources like solar and wind. Clearly, the statute did

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[5] The D.C. Circuit simply ignored Congress's use of definite articles and the phrase "particular source." *See* J.A. 144 ("[E]ach State decides for itself what measures to employ to meet the emission limits, and in so doing may elect to consider the 'remaining useful life' of its plants and 'other factors.'").

not use the language "system of emission reduction" to mandate that regulated power companies had to subsidize their competitors. With such a "system," emissions limits could be set below what was physically possible for any individual coal-fired plant, granting the Administrator the ability to set emissions limits at any level if he nominally took into "account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements" under the definition of "standards of performance" in section 111(a). By this reasoning, as long as a way of achieving a standard of performance can be imagined, it can be set to any number, irrespective of whether that number is reasonably and independently achievable. Coal-fired plant emissions standards could be set to zero, with 100% generation shifting, or even negative, with 100% generation shifting *plus* carbon capture.

In justifying this broad interpretation, the D.C. Circuit, loaded section 111 with even *more* power. It reasoned that "[b]ecause it did not set out separate definitions for either 'system'" the word takes on its "ordinary meaning." J.A. 108. And "system," it continued, is defined as "[a] complex unity formed of many often diverse parts subject to a common plan or serving a common purpose," which "reflect[s Congress's] intentional effort to confer the flexibility necessary." J.A. 108–09 (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 2322 (2d ed. 1968); *Massachusetts*, 549 U.S. at 532).

And truly, this reflects tremendous flexibility, including discretion untethered from agency technical expertise in examining potential pollution control

technologies.[6] The Administrator could elect to build any "complex unity," J.A. 108, so long as it is, in his judgment, the best system for emission reduction. Or he could conclude that the best system is the one proposed in the Green New Deal, despite (or even, as here, because of) Congress's refusal to pass such a bill. In the end, EPA could choose whatever number it pleases, completely divorced from what is actually achievable at "any existing source."

If this were the case, why did Congress (and EPA) believe that it was necessary in 1990 to amend the Clean Air Act to add the acid rain program's cap-and-trade program? If section 111(d) allows a nationwide cap-and-trade program for carbon-dioxide emissions, it would surely allow the same for sulfur dioxide, the leading pollutant that contributes to acid rain.

The fact that neither EPA nor Congress approached the matter this way is strong evidence against the implicit delegation that the Clean Power Plan and the D.C. Circuit claimed to find in section 111(d). Indeed, the D.C. Circuit's opinion includes a telling slip about Congress's unique role in establishing cap-and-trade programs: "Regulators—including, for example, Congress in the Clean Air Act's acid rain cap-and-trade program, 42 U.S.C. §§ 7651–7651o—have long facilitated those generation-shifting effects to serve the goal of pollution reduction." J.A. 151. In the same sentence, the D.C. Circuit also falsely equates Congress and agency regulators. The whole point here is that while Congress *can* impose acid-

[6] The relevant expertise on intra- and inter-state power transfer lies not with EPA, but with the states, regional transmission organizations, and the Federal Energy Regulatory Commission.

rain style cap-and-trade systems, it conspicuously *did not* do so in section 111(d).

Simply put, the text and structure of the Clean Air Act in general, and section 111 in particular, do not permit "system" to be read as the D.C. Circuit did. "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *Nat'l Labor Rels. Bd. v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941) (Learned Hand, J.). Section 111 may not be the most elegant linguistic mosaic, but the D.C. Circuit's overwrought and out-of-context analysis of "system" obscures an image that is otherwise plain to see. Section 111(d) is about the regulation of particular kinds of existing sources using systems that can be implemented at those physical locations. The Administrator's discretion is bounded by the text and structure of the statute.

CONCLUSION

The judgment of the court of appeals should be reversed.

December 20, 2021 Respectfully submitted,

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