No. 20-1530
(Consolidated with Nos. 20-1531, 20-1780, and 20-1778)

IN THE

Supreme Court of the United States

WEST VIRGINIA, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

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

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BRIEF OF 91 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici are Senators and Representatives duly elected to serve in the United States Congress, in which the Constitution vests all legislative powers. As elected members of Congress, Amici have strong institutional interests in protecting Congress's power to enact legislation governing our nation, including laws addressing greenhouse gas emissions. Amici include:

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Senate Republican Leader Mitch McConnell of Kentucky

Representative Cathy McMorris Rodgers of Washington, 5th Congressional District

Minority Leader Kevin McCarthy of California, 23rd Congressional District

Senator John Barrasso, M.D., of Wyoming

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Senator Roy Blunt of Missouri

Senator John Boozman of Arkansas

Senator Mike Braun of Indiana

Senator Richard Burr of North Carolina

Senator Bill Cassidy, M.D., of Louisiana

Senator John Cornyn of Texas

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[1] Pursuant to Supreme Court Rule 37.6, amici represent that this brief was not authored in whole or in part by any party or counsel for any party. No person or party other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have filed blanket consents to the filing of amicus curiae briefs. See S. Ct. R. 37.3.

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SUMMARY OF ARGUMENT

For decades, Congress has debated policies to address greenhouse gas emissions in the United States. Elected members have expressed a wide range of views over the years as to the appropriate reach and scope of legislative proposals. Some proposals have succeeded, and others have not. In recent years, however, Congress has addressed major policy questions concerning greenhouse gas emissions by enacting legislation, signed into law by the President, that provides explicit and specific direction to administrative agencies.

Amici have not necessarily supported the substance of these laws, but they fully support the legislative process and together recognize that Congress is the constitutionally appropriate forum for addressing major policy questions concerning greenhouse gas emissions from the electric power sector.

In deciding this case, the Court must consider the appropriate scope of Section 111(d) of the Clean Air Act, which the Environmental Protection Agency attempted to morph into a broad grant of authority for the agency to regulate greenhouse gas emissions from the electric power sector. Relying on an exceptionally broad interpretation of Section 111(d), the EPA issued a rule seeking to set emission guidelines for power plants as part of the agency's "Clean Power Plan." 80 Fed. Reg. 64,510, 64,547 (Oct. 23, 2015). This Court rightfully stayed that rule before it could go into effect.

If Congress had intended to give the EPA such sweeping authority to transform an entire sector of our economy, Congress would have done so explicitly. An administrative agency like the EPA may decide issues of such vast economic and political significance only when the agency can point to "clear congressional

authorization." *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 324 (2014). The ancillary provision of the Clean Air Act relied on by the EPA provided no such authority.

Section 111(d) provides limited authority for the EPA to prescribe regulations in certain narrow circumstances. Section 111(d) does not provide the EPA with the authority to compel a substantial and costly shift in electric power generation across the entire nation.

Decisions regarding greenhouse gas emissions and the power sector are major policy questions with vast economic and political significance. Only elected members of Congress, representing the will of the people, may decide these questions. The EPA's attempt to issue expansive regulations cannot stand in the absence of clear congressional authorization.

Congress knows how to address greenhouse gas emissions. In recent years, Congress has decided to pass transformative laws that incentivize reductions in greenhouse gas emissions from a wide range of industries, including the electric power sector. These laws include favorable tax treatment for certain technologies as well as grants to support research and development, thus providing "carrots," not "sticks," to achieve emissions reductions. Congress also has vested the EPA with new regulatory authority—outside of the Clean Air Act—to regulate hydrofluorocarbons, one type of greenhouse gas.

When Congress intends to address the reduction of greenhouse gas emissions, it specifically does so in plain legislative text.

ARGUMENT

I. The major questions doctrine forecloses the EPA's far-reaching assertion of agency power.

This Court rightly expects "Congress to speak clearly" when it wishes to delegate to an administrative agency sweeping regulatory powers to decide divisive issues "of vast economic and political significance." *Utility Air Regulatory Grp.*, 573 U.S. at 324 (internal quotation marks omitted). This straightforward principle makes "common sense" because it connects the people to significant policy choices made by their government. *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Indeed, the Framers deliberately structured the federal government "to assure full, vigorous, and open debate on the great issues affecting the people and to provide avenues for the operation of checks on the exercise of governmental power." *Bowsher* v. *Synar*, 478 U.S. 714, 723 (1986).

By careful design, our Constitution "prescribes a process for making law, and within that process there are many accountability checkpoints." *Dep't of Transp.* v. *Ass'n of Am. Railroads*, 575 U.S. 43, 61 (2015) (Alito, J., concurring). Public debate—even fervent opposition to a policy choice one way or the other—enhances the people's engagement with their government. Elected representatives of the people, not administrative agencies, therefore must be responsible for making the difficult policy choices that have tremendous economic and political impacts on our entire nation.

When Congress settles major policy questions by democratically enacting laws, it strengthens the connection between the people and governmental regulation.

Laws that profoundly impact the national economy often require political value choices. See, *e.g.*, *United States* v. *Philadelphia Nat'l Bank*, 374 U.S. 321, 371 (1963) (referring to a "value choice" made by Congress in amending banking laws). And, as a democratically accountable institution, Congress embodies the will of the people as it debates and decides how best to proceed. The major questions doctrine thus reflects well-established principles of democratic rule.

"Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice." *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam). Of course, Congress may delegate some authority to administrative agencies "under broad general directives" that articulate "an intelligible principle." *Mistretta* v. *United States*, 488 U.S. 361, 372 (1989). But if Congress wishes to delegate far-reaching authority to an agency to vastly alter an existing regulatory scheme, it must "speak with the requisite clarity to place that intent beyond dispute." *United States Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020). The simple "act of delegation" cannot suffice absent a "clear congressional command." *Id.*

Congress does not impliedly delegate the authority to resolve immensely important matters to administrative agencies. Nor does Congress "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); accord *Gonzales* v. *Oregon*, 546 U.S. 243, 267 (2006).

Any attempt to read into Section 111(d) of the Clean Air Act the expansive authority to transform the entire electric power sector must founder on this

fundamental principle. If this Court were to accept a boundless interpretation of Section 111(d), "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Utility Air Regulatory Grp.*, 573 U.S. at 324. To be sure, "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Brown & Williamson*, 529 U.S. at 160.

As Congress considered amending the Clean Air Act decades ago, one of the amendments' architects described Section 111(d) as "some obscure, never-used section of the law." *Clean Air Act Amendments of 1987: Hearings on S.300, S.321, S.1351, & S.1384 before the Subcmte. on Envtl. Prot. of the S. Cmte. on Env't & Public Works*, 100th Cong. 13 (1987). In fact, outside of regulations focused on emissions from waste facilities, EPA sparingly has relied on Section 111(d) to regulate emissions of any type from existing sources.[2]

To accept an expansive reading of Section 111(d) as providing authority to regulate greenhouse gas emissions and to transform the electric power sector, this Court "would have to conclude that Congress not only had hidden a rather large elephant in a rather obscure

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[2] E.g., *Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review*, 86 Fed. Reg. 63,110 (Nov. 15, 2021) (proposal to regulate methane from oil and gas sources); *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (Clean Power Plan); *Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units*, 70 Fed. Reg. 28,605 (May 5, 2005) (final rule to regulate mercury from power plants), vacated by *New Jersey* v. *EPA*, 517 F.3d 574 (D.C. Cir. 2008).

mousehole, but had buried the ambiguity in which the pachyderm lurks beneath an incredibly deep mound of specificity, none of which bears the footprints of the beast or any indication that Congress even suspected its presence." *Am. Bar Ass'n* v. *FTC*, 430 F.3d 457, 468 (D.C. Cir. 2005). There is no good reason for the Court to reach this conclusion.

"When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy," this Court understandably has approached that discovery "with a measure of skepticism." *Utility Air Regulatory Grp.*, 573 U.S. at 324 (internal quotation marks omitted). Deciding how best to address greenhouse gas emissions encompasses precisely the hard choices that must be made by the elected representatives of the people.

II. In recent years, Congress has addressed greenhouse gas emissions in several bills that the President has signed into law.

For decades, Congress has debated legislation to address greenhouse gas emissions from a variety of different sectors. Some proposals have become laws, while others have not. In general, Congress has addressed greenhouse gas emissions using legislative "carrots" such as tax incentives, preferential loans, and federal investments in research and development aimed at new technologies. Less often, Congress has employed "sticks" to achieve emissions reductions through the direct regulation of specific economic sectors. When it has decided to do so, Congress has been explicit and deliberate.

A. Congress has authorized transformative incentives for new technologies and appropriated billions of dollars for new programs.

1. In 2018, as a component of a larger budget bill, Congress passed legislation to expand and to improve a tax credit for the development of carbon capture, utilization, and storage projects, which the President signed into law. Originally introduced as the Furthering carbon capture, Utilization, Technology, Underground storage, and Reduced Emissions (FUTURE) Act, the legislation received broad bipartisan and stakeholder support to incentivize further investment in projects throughout the United States across a wide range of industries. See Bipartisan Budget Act of 2018, Pub. L. No. 115-123, § 41119, 132 Stat. 162–68. Given its popularity, the FUTURE Act has become a model for other greenhouse gas legislation because it accelerates the deployment of technology designed to prevent, reduce, or reverse greenhouse gas emissions while, at the same time, facilitating economic growth and minimizing localized economic disruption and job losses.[3]

Congress first enacted a tax credit for carbon capture, utilization, and storage projects—referred to as 45Q for the relevant section of the Internal Revenue

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[3] Senator Shelley Moore Capito of West Virginia, the lead Republican on the FUTURE Act, cited the benefits to her state's industries as the basis of her support for the legislation: "Not only will this policy help drive economic growth domestically and reduce future emissions abroad, but it will also help our country fully embrace the kind of all-of-the-above energy strategy—including West Virginia coal and natural gas—we need to reach our full potential." https://www.capito.senate.gov/news/press-releases/capito-heitkamp-announce-bipartisan-carbon-capture-technology-bill-signed-into-law.

Code—as a provision in the Energy Improvement and Extension Act of 2008, Pub. L. No. 110-343, § 115, 122 Stat. 3829. Some facilities and even entire industries, however, could not take advantage of the tax credits because Congress originally had limited participation to "qualified" facilities that captured no less than 500,000 metric tons of carbon dioxide during the taxable year. See 26 U.S.C. § 45Q(c)(3) (2008). To ensure that a broader range of industries could participate in the tax-credit program, the FUTURE Act redefined the eligibility threshold for a "qualified" industrial facility as one that captures "not less than 25,000 metric tons of qualified carbon." See *id.* § 45Q(d)(2)(A) (2020). Congress made these changes to incentivize investment in more facilities and industrial sectors, where innovation is greatly needed to enable broader deployment.

Congress also increased the value of the tax credit. Over a ten-year period, the FUTURE Act incrementally increases the value of the tax credit up to $35 per metric ton of carbon stored geologically through enhanced oil recovery and up to $50 per ton for saline and other forms of geologic storage. See 26 U.S.C. § 45Q(b)(1)(A)(i). And for every calendar year after 2026, the value of the tax credit will be adjusted for inflation. See *id.* § 45Q(b)(1)(A)(ii). Congress made these adjustments to increase incentives for industries—particularly the power sector—to capture carbon dioxide, the primary greenhouse gas emitted by human activities.

2. Two years later, within the Consolidated Appropriations Act of 2021, Congress created transformative new programs to reduce greenhouse gas emissions under Division S, "Innovation for the Environment." Pub. L. No. 116-260, 134 Stat. 2243–72.

As a legislative "carrot," Section 102 included the Utilizing Significant Emissions with Innovative Technologies (USE IT) Act, which supports carbon utilization and direct-air capture research as well as ongoing collaboration between federal, state, and nongovernmental agencies in the construction and development of carbon capture, utilization, and sequestration facilities. 134 Stat. 2243–55.[4]

Using a "stick" approach, Section 103 included the American Innovation and Manufacturing (AIM) Act, which directs the EPA to address hydrofluorocarbons by phasing down production and consumption, maximizing reclamation and minimizing releases from equipment, and facilitating the transition to next-generation technologies through sector-based restrictions. 134 Stat. 2255–72. The AIM Act illustrates how Congress explicitly provides an agency with significant regulatory authority to address one type of greenhouse gas.

The Energy Act of 2020, under Division Z of the Consolidated Appropriations Act of 2021, was the first comprehensive update to our nation's energy policy in more than a decade. In several provisions of the Energy Act, Congress addressed greenhouse gas emissions, including new programs to reduce emissions in

[4] The USE IT Act—like the FUTURE Act—followed an incentive-based approach. As the bill's sponsor explained, members of the Senate Committee on Environment and Public Works "worked together to reduce emissions and to do it through innovation—not taxation, not regulation, but do it through innovation—free market innovation, not punishing government regulations." 166 Cong. Rec. S7913 (daily ed. Dec. 21, 2020) (statement of Sen. Barrasso).

the electric power sector[5] and within the industrial and manufacturing sectors.[6]

As Senator Lisa Murkowski, then-Chairman of the Senate Energy and Natural Resources Committee explained, the Energy Act of 2020 reflected a "strong commitment to cleaner energy to help us address climate change without raising the cost of energy or imposing divisive mandates."[7]

3. In November 2021, Congress passed the Infrastructure Investment and Jobs Act, Pub. L. No. 117-58, 135 Stat. 429. As a central component of that legislation, Congress addressed federal surface transportation programs in a division cited as the Surface Transportation Reauthorization Act of 2021. This Act added a new "Climate Change" subtitle (Division A, Title I, Subtitle D). *Id.* §§ 11401–06, 135 Stat. 546–78.

Within this subtitle, Congress established a new core highway formula program, referred to as the Carbon Reduction Program. See *id.* § 11403, 135 Stat. 555–58 (codified at 23 U.S.C. § 175). Congress authorized $6.4 billion over five years to all States and the

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[5] See Title IV, "Carbon Management," where Congress established under Section 4002(b) a large-scale program "for the development of transformational technologies that will significantly improve the efficiency, effectiveness, costs, emissions reductions, and environmental performance of coal and natural gas use, including in manufacturing and industrial facilities." 134 Stat. 2529.

[6] See Title VI, "Industrial and Manufacturing Technologies," where Congress created under Section 6003, the Industrial Emissions Reduction Technology Development Program to reduce greenhouse gas emissions from energy services and industrial processes. 134 Stat. 2553–56.

[7] 166 Cong. Rec. S7909 (daily ed. Dec. 21, 2020) (statement of Sen. Murkowski).

District of Columbia to carry out eligible projects that will support the reduction of transportation emissions.

The Infrastructure Investment and Jobs Act also provided funds to the Department of Energy, including funding for carbon-capture demonstration and pilot projects, renewable energy projects, and demonstrations for new industrial emissions projects. See *id.* §§ 41004, 41007, 41008, 135 Stat. 1128–30, 1370, 1377–78.

B. Outside of the Clean Air Act, Congress passed a new law to reduce greenhouse gas emissions.

As discussed above, Congress recently passed the AIM Act as a component of the Consolidated Appropriations Act of 2021, which the President signed into law. This law addresses our nation's production and consumption of hydrofluorocarbons—potent greenhouse gases used primarily as coolants in air conditioning systems and refrigerators. For the first time, Congress explicitly told the EPA to reduce hydrofluorocarbon use and consumption throughout our national economy. And Congress chose to do so in a new statute outside of the Clean Air Act. See 42 U.S.C. § 7675.

Congress specifically directed the EPA to issue regulations that will reduce the production and consumption of hydrofluorocarbons in the United States by 85 percent over the next fifteen years. See *id.* § 7675(e)(2)(A)–(C). To comply with this law, the EPA must calculate the allowable quantity of hydrofluorocarbons that may be used each year and then allocate "allowances" that authorize companies to produce or to consume their allotted share. *Id.* § 7675(e)(2)(D).

Throughout the AIM Act, Congress balanced competing interests—i.e., compliance costs versus environmental benefits—and purposefully sought "to speak clearly" as it delegated authority to the EPA to decide issues "of vast economic and political significance." *Utility Air Regulatory Grp.*, 573 U.S. at 324.

For instance, Congress statutorily designated "essential uses" for hydrofluorocarbons, including a list of mandatory allocations for certain uses, such as defense sprays, metered-dose medical inhalers, and mission-critical military end uses, to guarantee supply. See 42 U.S.C. § 7675(e)(4)(B)(iv)(I).

The AIM Act also included statutory provisions allowing the EPA to designate additional applications for hydrofluorocarbons as an "essential use" in response to a petition from a private party. *Id.* § 7675(e)(4)(B)(ii). In considering whether to grant a petition, Congress specifically told the EPA to consider, as a relevant factor, the "*overall economic costs*" of compliance as well as "technical achievability" and "commercial demands" as the agency allocates allowances for essential use. See *id.* § 7675(e)(4)(B)(i) (emphasis added).

Additionally, Congress established statutory procedures for a party to petition the EPA to adopt an "accelerated schedule for the phasedown of production or consumption" of hydrofluorocarbons. *Id.* § 7675(f)(3)(A). And Congress again told the EPA that it "*shall*, to the extent practicable," consider "*affordability* for residential and small business consumers, safety, *consumer costs*, building codes, appliance efficiency standards, contractor *training costs*, and other relevant factors" as the agency decides whether to grant or to deny a petition. *Id.* § 7675(f)(3)(C)(ii)(II) (emphasis added).

Unlike the ancillary provision of the Clean Air Act, 42 U.S.C. § 7411(d), that the EPA relied on to issue its Clean Power Plan rule, Congress specifically addressed "Technology Transitions" in a separate subsection of the AIM Act. 42 U.S.C. § 7675(i). "In carrying out a rulemaking" to transition to new technology, Congress directed the EPA to evaluate carefully delineated criteria, including the "overall economic costs and environmental impacts, as compared to historical trends." *Id.* § 7675(i)(4)(C).

C. Within the Clean Air Act, Congress has added only references to carbon dioxide and greenhouse gas emissions.

Congress passed the modern version of the Clean Air Act more than fifty years ago. In the time since, Congress has never amended the Act to require the EPA to set national carbon dioxide emission standards for the electric power sector.

In fact, Congress has added only a few references to carbon dioxide and greenhouse gas emissions to the legislative text of the Clean Air Act. Those limited references fall within provisions of the Act that are irrelevant to this case.

1. The only regulatory section of the Clean Air Act that includes a reference to carbon dioxide is Section 211(o), which is in Title II of the Act governing *moving* sources—e.g., motor vehicles. In 2005, Congress passed legislation to amend the Act to establish a renewable fuel program, and in 2007 Congress further amended the Act to revise those provisions to add references to greenhouse gases. See Energy Independence and Security Act of 2007, Pub. L. No. 110-140, § 201, 121 Stat. 1492, 1519–40.

In 2007, Congress amended Section 211(o) to define "greenhouse gas" as "carbon dioxide, hydrofluorocarbons, methane, nitrous oxide, perfluorocarbons, sulfur hexafluoride." 121 Stat. 1520 (codified at 42 U.S.C. § 7545(o)(1)(G)). Congress made clear that this definition has no effect on any other provision of the Act. Nothing in Section 211(o) "shall affect or be construed to affect the regulatory status of carbon dioxide or any other greenhouse gas, or to expand or limit regulatory authority regarding carbon dioxide or any other greenhouse gas, for purposes of other provisions." 121 Stat. 1532 (codified at 42 U.S.C. § 7545(o)(12)).

Since 2007, Congress has passed no other legislation instructing the EPA to regulate carbon dioxide emissions in any other context.

2. Section 103, a nonregulatory section of the Clean Air Act, also includes references to carbon dioxide. See 42 U.S.C. § 7403(a) (requiring the EPA to establish "a national research and development program"). In 1990, Congress added the first reference to carbon dioxide in Section 103 as it relates to improvements in nonregulatory strategies and technologies for preventing or reducing "carbon dioxide, from stationary sources, including fossil fuel power plants." Pub. L. No. 101-549, § 901, 104 Stat. 2703.

In 2020, Congress added new nonregulatory references to carbon dioxide in Section 103 when it passed the USE IT Act, within the Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, 134 Stat. 2243–55. Context matters: those references apply to research "carrots," not regulatory "sticks."

The USE IT Act added references to carbon dioxide in Section 103 of the Clean Air Act merely to ensure that the EPA's research and development program

will continue to explore new technologies. As an example, Congress specifically directed the EPA to incentivize carbon capture, utilization, and storage research. See 134 Stat. 2244–47. None of those provisions have regulatory effects.

* * *

In sum, when Congress decides to address greenhouse gas emissions in an entire sector of our national economy, it does so with explicit and specific legislative text. This Court should not permit agencies to "discover" expansive regulatory authorities where none exist.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals of the District of Columbia Circuit should be reversed.

Respectfully submitted,

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