No. 20-1530

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

REPLY BRIEF FOR PETITIONERS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Statutes

TABLE OF AUTHORITIES
(*continued*)

Page(s)

Regulations

Other Authorities

INTRODUCTION

The decision below gives EPA unprecedented power to control how the country generates electricity, to subjugate States to the agency's vision, and to force parties to shutter plants or subsidize competitors to make it real. Rather than defend these outcomes, Respondents largely deny them. They greet the major-questions and federalism canons with a shrug, never identifying the "clear statement" from Congress they require. Instead, they insist the doctrines have no place here at all.

But both canons were tailor-made for circumstances like these. The D.C. Circuit matched thin statutory text with a momentous purpose to fashion broad new agency powers. Without a clear statement, that will not do.

Respondents further retreat to counterarguments old and new. They insist that as long as EPA continues to take a will-they-or-won't-they approach to expansive power-plant regulation, and as long as the D.C. Circuit holds back part of its mandate, then Petitioners are out of luck for lack of standing. That argument disregards the States' interests and the harms from the decision below. Respondents also spin purported ambiguity into sweeping grants of agency authority. But that result requires reading pieces of Section 111 in isolation, placing the CAA's purposes ahead of its text, and drawing false conclusions from comparisons to other statutory provisions.

Our system of government gives the "responsibility" to weigh tough tradeoffs to "those chosen by the people through democratic processes." *Nat'l Fed'n of Indep. Bus.* v. *OSHA*, 142 S. Ct. 661, 666 (2022) (per curiam). Congress has not given EPA the power to make those calls on its own. The Court should reverse.

ARGUMENT

I. Section 111 Does Not Clearly Empower EPA To Reorganize American Industry.

The majority below read Section 111 to set practically "no limits on the types of measures" EPA should consider when imposing industry-shaping rules. JA.108; see also JA.106-10, 115, 118. It did so even without a "serious and sustained argument that [Section] 111 includes a clear statement unambiguously authorizing" this power. JA.224. The lower court's enablement thus constitutes an extraordinary delegation of "power over American industry" without "a clear [textual] mandate." *Indus. Union Dept., AFLCIO* v. *Am. Petroleum Inst.*, 448 U.S. 607, 645-46 (1980) (plurality op.).

Though Respondents urge the Court not to limit the agency's reach unless the statute clearly forbids it, *e.g.*, U.S.Br.30, this type of power grab is unsupportable unless Congress clearly allows it. In fact, the Court recently reminded agencies how delegations like this should work, "rightly appl[ying] the major questions doctrine" to stay an agency-imposed vaccine-or-test mandate for millions of Americans. *NFIB*, 142 S. Ct. at 668 (Gorsuch, J., concurring). Like EPA's newfound power, that mandate was "a significant encroachment into the lives … of a vast number of" regulated people, reflecting power of "vast economic and political significance" that Congress had not clearly authorized. *Id.* at 665 (per curiam).

No wonder, then, that most Respondents bury mention of "major questions" at the back of their briefs. See U.S.Br.44-50; NGO.Br.42-49; NY.Br.38-47. And once they get there, they cannot answer how the power the D.C. Circuit unleashed is anything but "major." See Westmoreland.Reply.2-16.

A. Legally, the nature of the power at stake is the core of a major question. Respondents muddy the waters through contradictory arguments about supposed costs and effects. Sometimes they say that any legal challenge must wait until EPA finishes its latest round of rulemaking. U.S.Br.45-48; NY.Br.42-43; PowerCo.Br.21-23. Other times they point to the CPP and after-the-fact assessments to say the regulatory consequences would not be so great. U.S.Br.47; PowerCo.Br.26-27. Still other times they say that even a restrained reading of Section 111 would not prevent EPA from issuing rules with substantial effects. U.S.Br.47.

No matter how they frame it, Respondents err in elevating effects above all else. None of the Court's major-questions cases do that. Take *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000). Federal Respondents say the Court was concerned that the "logical implication" of the FDA's new statutory interpretation would require it to ban tobacco. U.S.Br.47. But the Court identified a major question there because of the "breadth of authority" the agency claimed over a "significant portion of the American economy." *Brown & Williamson*, 529 U.S. at 159-60. It then confirmed its assessment based on the "unique political history" surrounding tobacco—another non-effects-focused factor. *Id.* Likewise, the Court's concern in *UARG* was the "enormous and transformative expansion in EPA's regulatory authority," not just the specific number of permits that would flow from it. *Util. Air Regul. Grp.* v. *EPA*, 573 U.S. 302, 324 (2014).

Effects do matter—big consequences often follow big strokes of agency power—but they are not dispositive in the way Respondents would have it. The major-questions doctrine respects Congress's choice to keep significant

policy questions for itself. It does not demand that agencies seek a second congressional stamp of approval after passing a certain monetary or other tangible threshold.

This understanding also explains why it is not too early to examine EPA's new Section 111 powers through the major-questions lens. *E.g.*, NY.Br.42. No authority requires parties to wait and see what havoc the D.C. Circuit's statutory construction will wreak. Even Respondents' own logic is against them. The Court's (limited) discussion in *Brown & Williamson* of a potential tobacco ban shows that the Court focused on more than the immediate, near-term effects of the specific rule before it. The Court also cared about how much further the agency could go next. *Brown & Williamson*, 529 U.S. at 137.

Waiting for another rule would change the doctrine, which asks when agencies may take on major questions. Respondents seem focused on major *answers*. Nothing justifies that shift here, particularly as the D.C. Circuit's decision crystallizes the questions at stake: EPA now has "no limits" other than its own creativity and the need to take account of a few factors when it decides which regulatory measures to deploy. And truth is, much of this argument is a warmed-over version of Respondents' justiciability arguments. The Court rejected them at the certiorari stage, they fail when repackaged as standing, and they crumble in this guise, too.

B. Respondents are also wrong factually: This case involves real power.

First, Respondents improperly downplay EPA's new task as "interstitial" "fact-finding." U.S.Br.45; see also NY.Br.39-41. That gloss obscures the nature and effects

of the power EPA now commands. How to structure new "market-based" systems. How to deploy certain existing sources and squeeze out other disfavored ones. When, how much, and where to spur generation shifting and new capital investments to support it. The list goes on—each decision loaded with serious and substantial policy judgments, not run-of-the-mill agency fact-finding.

These powers do not implicate EPA's expertise, either—a key sign of a major question. See WV.Br.27. "[G]rid reliability" is beyond the CAA's scope and "not the province of EPA." *Del. Dep't of Nat. Res. & Env't Control* v. *EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015). EPA itself said as much. Seven years ago it told Congress that the CPP required it to "tap into technical and policy expertise not traditionally needed in EPA regulatory development," including in areas like "electricity transmission, distribution, and storage." EPA, FISCAL YEAR 2016: JUSTIFICATION OF APPROPRIATION ESTIMATES FOR THE COMMITTEE ON APPROPRIATIONS 213 (2015), https://perma.cc/V5DM-VYZK. Its "traditional[]" focus, by contrast, is on "emitting sources and 'end of pipe' controls" only. *Id.*

Second, it is EPA—not the States—exercising this power. Respondents claim that EPA does not directly regulate because the real work happens during state-level standard-setting. See, *e.g.*, U.S.Br.44-46. They overlook how much rope the lower court's interpretation gives EPA to tie the States' hands. In the CPP, for example, EPA did not offer States a true menu of compliance options; it set an aggressive target that States could reach only by implementing EPA's preferred ends. See, *e.g.*, WV.Br.41. EPA cannot disclaim responsibility for major rules by alluding to measures that might theoretically get a State to the agency's target but in reality do not exist.

Third, the remaining indicia of a major question are here as well. Novelty, notoriety, and number of new regulated parties, for sure. As for costs, Respondents soft-pedal the dollars-and-cents effects of EPA's new authority. Yes, the private market might have adjusted to regulatory change before it arrived, but a preemptive shift does not mean those costs were never felt. Many of the States where the CPP's forced transformations would be most disruptive have also not yet realized them. Compare JA.1027-29 (States' emission targets under the CPP), with *Net Generation by State by Type of Producer by Energy Source and U.S. Electric Power Industry Estimated Emissions by State*, U.S. ENERGY INFO. ADMIN. (Sept. 15, 2021), https://www.eia.gov/electricity/data/state/ (showing that 20 States are not yet meeting final targets). And nothing in Respondents' statutory approach would stop EPA from going further still. Respondents maintain these costs are not unique to outside-the-fenceline measures, U.S.Br.46, but they never explain why. Common sense teaches that wholesale reordering of the electricity market is about as expensive a task as one could imagine in this field. All told, the power EPA claims is "major."

C. Respondents pick out nothing in Section 111 clearly authorizing this type of agency power. They make a half-hearted run at finding a clear statement in Section 111(a)(1), which tasks EPA with identifying the best system of emission reduction. See, *e.g.*, NY.Br.39. This reference is too weak to carry the weight Respondents need. Compare the provisions the Court considered in *Gonzales* v. *Oregon*, 546 U.S. 243, 259 (2006). Even though the statute there empowered the Attorney General to regulate areas pertaining to the "registration and control" of drugs, the Attorney General overstepped when he issued regulations prohibiting doctors from prescribing

drugs for physician-assisted suicide. *Id.* at 259-68. In much the same way, Section 111(a)(1) assigns EPA *a* role in regulating emission-reduction measures, but EPA goes too far in wresting control of the field through any conceivable "system."

Respondents next look for a clear statement in one of this Court's decisions. See, *e.g.*, NGO.Br.43; NY.Br.38-39. But *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011), does not sweepingly endorse agency power. Though *AEP* reiterates that EPA has responsibility for regulating carbon-dioxide emissions, it does not hold that this assignment is limitless. Pressed to pinpoint the statute's clarity about "how" EPA may regulate, Respondents fall back on "EPA's determination of the best system of emission reduction." NY.Br.41. But that response does not answer whether the language clearly permits industry-wide "systems" no matter how far-reaching the consequences. Indeed, "whether and how" cannot stretch so far: *AEP* also disclaimed the notion that Congress granted EPA a "roving license" to regulate carbon-dioxide emissions. 564 U.S. at 426-27. As one of Respondents' amici recognizes, "[a] reasoned application of the major questions doctrine … would allow the Court to constrain" EPA from exercising broad powers—even given *AEP*.[1] EEI.Br.33. When EPA regulates in this space, it must respect the boundaries Congress set.

Finally, while EPA must "take into account" three factors when determining the best system of emission reduction, they offer neither a clear statement

[1] The same amicus worries this case might topple *AEP* and *Massachusetts* v. *EPA*, 549 U.S. 497 (2007). But the question presented asks *how* Congress directed EPA to regulate greenhouse-gas emissions under Section 111. Whether it can at all is a different issue.

nor a cure for its lack. Respondents' argument, *e.g.*, U.S.Br.49, confuses the standards governing an agency's exercise of delegated power with the authorization required to delegate power over a major question in the first place. To say EPA must consider certain factors when crafting a rule does not resolve whether that rule may regulate entire industries or energy grids. And beyond that, those standards cannot salvage a too-broadly construed Section 111 from non-delegation concerns. WV.Br.44-49. Respondents think the factors will "guard against the possibility of emission guidelines that have transformational consequences." U.S.Br.49. But considering the factors proved no barrier to even the CPP's "transformation[s]," this assurance is thin.

II. EPA's New Powers Offend Federalism.

The federalism clear-statement canon is an independent reason for the Court to reverse—and Respondents all but ignore it. Just as separation of powers on the federal level "prevent[s] the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse." *Gregory* v. *Ashcroft*, 501 U.S. 452, 458 (1991). Respondents do not challenge the States' traditional control over electricity management. And they never identify "exceedingly clear language" from Congress directing EPA to take it over. *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020). Yet they would hand control over to the EPA anyway. See WV.Br.26-31.

The federalism canon is more than a footnote, a coda, or an afterthought. See NGO.Br.45 n.16; U.S.Br.51; NY.Br.45-46. No one defends the lower court's attempts to push the doctrine aside. WV.Br.28-31. And Petitioners

already rebutted the idea that the majority's interpretation allows actions that merely "influence areas of state control." NGO.Br.45 n.16 (cleaned up). EPA can now force changes at the core of the States' energy-management power, not its edge. WV.Br.29-31. For their part, Federal Respondents seem to agree that some federal emission limits can be stringent enough to compel States to restructure their power sectors, but argue this reality does not support a "categorical rule." U.S.Br.51. The federalism canon says otherwise. Section 111 cannot permit that intrusion because Congress did not make clear its intent to go so far.

And though Respondents insist their view gives States choices when fashioning standards of performance, that argument is wrong, *infra* Part III.D., and misses the point. Offering a few more options for States to achieve EPA's vision for power-grid management does not cure the invasion of state powers. The federalism clear-statement canon assumes that Congress would speak directly before EPA could impose its vision in the first place.

III. Section 111 Requires Source-Specific Regulation.

EPA read Section 111 properly in 2019: The agency may consider only source-specific measures when determining a "best system of emission reduction." See WV.Br.31-44. Today Federal Respondents get it half-right, reasoning that Section 111(a)(1) "does not encompass the power to institute any industry-wide system." U.S.Br.36. But neither does it let EPA force the same result indirectly by dragooning States into implementing rules premised on system-wide change.

Section 111's text, structure, and context confirm that this backdoor approach cannot be right.

A. Respondents try to narrow the Court's focus by decoupling Section 111(a)(1) (where "best system of emission reduction" is found within the definition of "standard of performance") from Section 111(d) (where States develop plans flowing from that "system"). See, *e.g.*, U.S.Br.33-34; NGO.Br.39. They forget, though, that close textual readings keep "interlocking language and structure" at the fore. *Territory of Guam* v. *United States*, 141 S. Ct. 1608, 1613 (2021). The Court thus reads the provisions of an "interlocking, interrelated, and interdependent … scheme" together. *Mass. Mut. Life Ins. Co.* v. *Russell*, 473 U.S. 134, 146 (1985). Likewise, an agency errs when it isolates one statutory piece "as if it were an independent provision of law" instead of "part of a reticulated legislative scheme with interlacing purposes." *NLRB* v. *Ins. Agents' Int'l Union, AFL-CIO*, 361 U.S. 477, 510 (1960).

So Respondents are wrong to divorce Section 111(a)(1) from (d), as the CAA is just such a comprehensive, interrelated scheme. *E.g.*, *BCCA Appeal Grp.* v. *EPA*, 355 F.3d 817, 821-22 (5th Cir. 2003). Respondents further overlook that definitional provisions in particular must make sense in the statute's operative provisions. WV.Br.32-33. They are not freestanding elements—all of a "statute's various pieces" must "hang together." *New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674, 681 (2010).

In forcing Sections 111(a)(1) and (d) apart, Respondents also overemphasize the regulatory players' separate roles, downplaying how much EPA's actions drive the States'. EPA knows better: A few months ago it called its Section 111(a)(1) emission limitations "model rules" that would apply to "the vast majority of designated

facilities." 86 Fed. Reg. 63,110, 63,249-51 (Nov. 15, 2021). If EPA plans to use "best system of emission reduction" to dictate rules for most sources regulated under Section 111(d), then the Court should consider what that section says. An untethered construction of Section 111(a)(1), by contrast, lets EPA set demands the States might be unable to meet without losing their Section 111(d) discretion.

B. Respondents are also incorrect that "system" can mean almost anything and "appl[y]" to nearly everything. See, *e.g.*, NY.Br.21.

Everyone agrees that statutory construction "begins with the text." U.S.Br.33. But this means looking at *all* the text and making sense of its context, too. Courts consider more than just the "bare meaning" of a word, *Holloway* v. *United States*, 526 U.S. 1, 6 (1999) (cleaned up), and do not "look merely to a particular clause in which general words may be used," *Kokoszka* v. *Belford*, 417 U.S. 642, 650 (1974).

When it comes to a best "system," Respondents insist that all measures "directed toward [a] shared objective" count. NY.Br.21. That understanding "ha[s] no limiting principle." *Dirks* v. *SEC*, 463 U.S. 646, 664 (1983). It also produces nonsense. Rockets and skateboards could then comprise a system, as both are "directed toward" the "shared objective" of moving people from one place to another. Respondents brush off "far-fetched suggestions" because they have faith in EPA's restraint and duty to apply other statutory factors, yet point to nothing about "system" itself that gives the term limits. PowerCo.Br.29. Better, then, to construe "system" from its context. See, *e.g.*, *Small* v. *United States*, 544 U.S. 385, 388 (2005) (looking beyond the "broad interpretation" of the word "any"). The Court should read it against the Act as a

whole, which advances "air pollution control *at its source*." 42 U.S.C. § 7401(a)(3) (emphasis added).

Even the statutory history Respondents favor confirms "system's" narrower scope. Congress last amended Section 111 and tweaked its discussion of "best system of emission reduction" in 1990. At the same time, it added three provisions directing or allowing outside-the-fenceline emission-control measures: the Acid Deposition Control Program, the Stratospheric Ozone Protection Program, and certain market-based measures in the National Ambient Air Quality Program. See WV.Br.42. The 101st Congress knew how to authorize system-wide measures when it wanted to. Section 111 didn't make the list. Even so, Respondents argue that because "system" appears in one of these cap-and-trade provisions the term must "describe outside-the-fenceline measures" in Section 111, too. U.S.Br.31. This statutory sleuthing flips the canon: When the "same Congress that enacted" a challenged law "expressly" authorizes certain measures in other statutes but not the one in question, that statutory silence matters. See *Rimini St., Inc.* v. *Oracle USA, Inc.*, 139 S. Ct. 873, 877 (2019).

Respondents distort other "words of general meaning" in Section 111, as well—leading to similarly "absurd results." *Pub. Citizen* v. *U.S. Dep't of Justice*, 491 U.S. 440, 454 (1989). They give no real warrant for construing function words like "for" broadly, see NY.Br.45, when this Court typically reads them narrowly, see WV.Br.40-41. They also double down on the lower court's idea that "application," as in "application of the best system of emission reduction," 42 U.S.C. § 7411(a)(1), can be read without an object. For all the discussions of nominalizations and indirect objects, though, Respondents have no convincing example of an objectless

"application." Their best shot is "a judge's application of precedent." PowerCo.Br.43; see also NY.Br.23-24. But no judge applies precedent in the abstract. Application's object there is a given set of facts. So too a "best system" must "appl[y]" to some object or entity or else lose its meaning. See WV.Br.37-38; see also NY.Br.24 (admitting it is proper to "infer[]" an object "from context"). Section 111's only plausible candidate is the regulated "source."

Moving to other statutory terms, Respondents say Section 111(a)(1)'s reference to "achievable" systems should encompass generation shifting and trading regimes, which private parties often implement in the energy market. See, *e.g.*, PowerCo.Br.36-37; U.S.Br.40-41. But to say that a given measure is achievable for some entity or person on some level does not answer which entity or person or level Congress authorized EPA to regulate. Respondents also cannot explain how "achievable" keeps real meaning if EPA can adjust the actors and regulatory scale at will. EPA could create with impunity a standard that many existing sources could not achieve, so long as the energy grid as a whole could instead. WV.Br.35.

Trusting words like "best" and phrases like "take into account" to confine EPA's discretion does not help, either. *E.g.*, NY.Br.33-36. The question is whether the claimed agency power exists, not whether other parts of the statute adequately check its abuse. Nor does the Court need to embrace an outside-the-fenceline understanding to keep these terms from becoming superfluous; "best" and factors like cost help EPA choose among inside-the-fenceline measures, too.

For the remaining statutory terms less suited to their tastes, Respondents have little to say. They cannot explain how EPA may regulate an "owner or operator"

even though that term is separately defined, 42 U.S.C. § 7411(a)(5), and the provisions at issue refer to a physical "source." See WV.Br.40; JA.543 (CPP, recognizing that EPA must regulate owners and operators directly to impose beyond-the-fenceline measures). Terms like "performance," "limitation," and "reduction" get little airtime in Respondents' briefs, either. Each confirms that Congress did not authorize system-wide measures that limit or shut down source production as a rule's primary aim, rather than a downstream effect. WV.Br.34-36.

C. The seams Respondents stitch between Section 111 and other parts of the CAA come apart, too. Respondents cite language about "retrofit" technologies, for example, to show that Congress could have similarly reined in Section 111. *E.g.*, NGO.Br.35. But this language would be out of place in a provision that focuses on facilities old *and* new. WV.Br.43. Hammering Section 111(h)(1)'s discussion of "design, equipment, work practice, or operational standard[s]" is also wrong. *E.g.*, PowerCo.Br.32. Providing a technology-only alternative when it is not feasible to capture or measure emissions, 42 U.S.C. § 7411(h)(1)-(2), does not suggest that Congress expected EPA to jettison technological and other source-specific measures more generally. More likely Congress designed the exception to depart from the norm as little as possible.

Respondents are also wrong that "no sound reason" supports construing the scopes of Sections 110 and 111 "differently." U.S.Br.30; see also NY.Br.26-27, NGO.Br.6-9. They point to Section 111(d)'s cross-reference to Section 110, which tasks EPA with developing "a procedure similar to" Section 110's for submitting state plans. 42 U.S.C. § 7411(d)(1). But similar procedures do not imply similar substantive powers.

Indeed, Section 110 expressly allows certain beyond-the-fenceline compliance mechanisms in National Ambient Air Quality Standards implementation plans. 42 U.S.C. § 7410(a)(2). This difference in wording matters: The Court "generally seek[s] to respect Congress' decision to use different terms to describe different categories." *Mohamad* v. *Palestinian Auth.*, 566 U.S. 449, 456 (2012).

Congress's distinct wording makes sense given the different functions Sections 110 and 111 serve. Section 111 directs EPA to regulate individual sources "to prevent and control emissions to the fullest extent compatible with available technology and economic feasibility." STAFF OF S. COMM. ON PUB. WORKS, 93D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970 VOL. II 900 (Comm. Print 1974). Section 110 focuses on "the attainment of the primary ambient air quality standards" within a State overall. *Id.* at 132. So when Congress authorized States to use emission trading in their NAAQS implementation plans in 1990, that change tracked Section 110's specific statewide focus—which Section 111 does not share. Pub. L. No. 101-549 § 101(b), 104 Stat. 2404.

Similarly, the Court should not read Section 111 broadly because it lacks certain limiting language from Section 112. See PowerCo.Br.33-34. Again, different purposes explain different substantive scopes. Section 112 limits emissions "hazardous to the health of persons," while Section 111 applies to emissions that "may contribute substantially" to more generalized harms. STAFF OF S. COMM. ON PUB. WORKS, 93D CONG., A LEGISLATIVE HISTORY OF THE CLEAN AIR ACT AMENDMENTS OF 1970 VOL. I 195-96 (Comm. Print 1974). So it should surprise no one that Section 112—which concerns more dangerous pollutants—prescribes more

stringent standards than Section 111. Granting EPA broader powers under Section 111 than under Section 112 would therefore turn the CAA's framework upside down. It might also give EPA an out to avoid the specific constraints Congress placed on its significant Section 112 powers.

D. Lastly, two purposes of the Act—emission control and state discretion—do not justify regulatory power beyond the source.

Congress must choose "what competing values will or will not be sacrificed to the achievement of a particular objective," *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987), and courts "respect the limits up to which Congress was prepared to enact a particular policy," *United States* v. *Sisson*, 399 U.S. 267, 298 (1970). Congress writes those choices and limits into the U.S. Code. Presuming "that whatever furthers the statute's primary objective must be the law" thus "frustrates rather than effectuates legislative intent." *Rodriguez*, 480 U.S. at 526. If "policy considerations suggest that" Section 111 "should be altered, Congress must be the one to do it." *Intel Corp. Inv. Pol'y Comm.* v. *Sulyma*, 140 S. Ct. 768, 778 (2020). That truism does not diminish the importance of the issues in play. If anything, it amplifies them—recognizing they are too weighty to be hashed out through gap-filling alone.

At any rate, neither purpose dictates system-wide agency authority. On-site measures have had great success over the CAA's history. Respondents admit as much, faulting only the degree of emission reduction EPA concluded on-site measures would have produced in 2019. PowerCo.Br.42. Yet technology evolves. EPA will no doubt keep pushing plants to develop new ways to reduce emissions. See *Portland Cement Ass'n* v. *Ruckelshaus*,

486 F.2d 375, 391 (D.C. Cir. 1973) ("Section 111 looks toward what may fairly be projected for the regulated future."). In the meantime, courts do not rewrite statutes because they might find their results lacking at a flashpoint in time.

Respondents' professed fealty to federalism is similarly misguided. See, *e.g.*, U.S.Br.26-30. Their concern that a narrower construction of Section 111(a)(1) might limit States' Section 111(d) options contradicts the lower court's insistence that neither provision informs the other. JA.106. It also ignores that offering States a few more compliance options is little comfort if EPA can set benchmarks that presume facilities will shut down. Respondents cannot explain how these purported choices remain genuine under the lower court's interpretation. They try, emphasizing the CPP's "compliance headroom." NY.Br.32-33. But EPA recognized that most States would have had to rely on generation shifting and the like because other options were not cost effective or would not have been enough to hit the mandatory targets. JA.658, 671-73, 854.

It is just as off the mark to champion discretion to adjust for a source's "remaining useful life" if EPA's aggressive "*statewide* goals" can remain unmovable. NY.Br.31 n.12. Faced with a statewide target built on regional or nationwide emission trading, States with disfavored sources will run out of options to offload burdens so many of their facilities cannot bear. In other words, even if an inside-the-fenceline approach shrinks the number of theoretical options available to the States, the alternative is worse: letting EPA pick among limitless options and set market-warping "guidelines" that leave the States no realistic option but to fall in line. Cooperative federalism says the States need a fighting

chance when handed their statewide target. Because expanding "best system of emission reduction" hurts state flexibility, any urgency to expand EPA's powers to preserve the States' is imagined.

IV. This Case Is Not Moot—And Petitioners Have Standing.

To keep the Court from cabining EPA's transformative power, Respondents argue that no one has standing. They are mistaken.

A. To begin, Respondents have "confused mootness with standing." *Friends of the Earth, Inc.* v. *Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000). Federal Respondents, for instance, argue that "circumstances have *mooted*" the dispute, so Petitioners "cannot establish *standing*." U.S.Br.17 (emphases added). In their view, "changed circumstances" long after filing—EPA's request to partially stay the mandate—have "eliminated" any possibility Petitioners will suffer harm. U.S.Br.16, 21-22. But the argument that "intervening circumstances [have] deprive[d] the plaintiff of a personal stake in the outcome" goes to mootness.[2] *Genesis Healthcare Corp.* v. *Symczyk*, 569 U.S. 66, 72 (2013) (cleaned up). To be sure, mootness and standing both assess litigants' "personal

[2] In suggesting vacatur, Federal Respondents recognize that their argument sounds in mootness. U.S.Br.22 (citing *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950)). *Munsingwear* vacatur applies in mootness cases, not standing ones. See *Karcher* v. *May*, 484 U.S. 72, 83 (1987). Federal Respondents' request for partial vacatur only, U.S.Br.23 n.2, also provides evidence that at least some part of the D.C. Circuit's holding gives Respondents a real benefit and, conversely, causes Petitioners real harm. And even if this case were moot—it is not—then the appropriate remedy would be total vacatur, as the lower court rejected the CPP repeal and ACE Rule based on the same purported error. JA.215.

interest in the dispute." *Uzuegbunam* v. *Preczewski*, 141 S. Ct. 792, 796 (2021). But mootness considers that interest "throughout the proceedings." *Id.* Standing asks whether it "exists at the outset." *Id.*

Precision matters because swapping standing for mootness "place[s] the burden of proof on the wrong party." *Adarand Constructors, Inc.* v. *Slater*, 528 U.S. 216, 221 (2000). Respondents could not bear their "heavy burden" to show mootness by making it "absolutely clear" that "the challenged conduct cannot reasonably be expected to start up again." *Friends of the Earth*, 528 U.S. at 189-90. Most never try, as doing so would close off the aggressive regulatory options they want to preserve. Even Federal Respondents admit that EPA "*might*" re-adopt the same "regulatory provisions" that the lower court faulted it for repealing. U.S.Br.20-21 (emphasis in original); see also *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 627 n.5 (2018) (explaining that the Court could decide a rule-related issue even after the agencies had proposed to repeal and replace the challenged rule). That reservation shows that EPA's temporary cessation should not end this appeal.

B. Standing would be no reason to dismiss even if it were relevant. If one Petitioner is in danger of "actual or imminent" injury that is "fairly traceable to the challenged action" and "likely" to be "redressed by a favorable decision," the case proceeds. *Lujan* v. *Def. of Wildlife*, 504 U.S. 555, 560-61 (1992) (cleaned up). All Petitioners meet these requirements here. See NACCO.Reply.16-23. A few additional points warrant mention for the States.

First, the States undeniably had standing at the time of filing—when courts evaluate it. *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 734 (2008). No Respondent

suggests otherwise, and Federal Respondents admit the States did. U.S.Br.21-22. For good reason: "The lower the emissions budget [EPA sets], the more difficult and onerous is the states' task" to comply; lower targets thus injure "the states as states." *West Virginia* v. *EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004). Beyond that, the rules the States defended below would have removed "significant and costly compliance measures." *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988). These injuries are enough.

Respondents invoke cases in which parties press appeals from decisions that did not injure them in an Article III sense. U.S.Br.15; NGO.Br.24-25. Those cases confirm that courts evaluate parties' standing when they assume control of a case for the first time. Petitioners have been here (and threatened with real injury) from the beginning. More important, they are not side actors. They are not vindicating "quasi-legislative interest[s]," *Arizonans for Off. Eng.* v. *Arizona*, 520 U.S. 43, 65 (1997), or a non-existent right to force the government to prosecute, *Diamond* v. *Charles*, 476 U.S. 54, 65 (1986). Rather, the States must implement and bear the economic fallout of EPA's regulatory scheme. See *Lujan*, 504 U.S. at 562 (explaining that it is "substantially more difficult" to establish standing when parties are not "the object of the [challenged] government action"). So unlike in Respondents' cases, the judgment below affects Petitioners' rights and requires "them to do [and] refrain from doing" certain things. *Hollingsworth* v. *Perry*, 570 U.S. 693, 705 (2013).

Second, it does not matter that EPA might think things over (again) while part of the judgment is stayed. Jurisdiction "cannot be ousted by subsequent events" after it vests. *Grupo Dataflux* v. *Atlas Glob. Grp., L.P.*,

541 U.S. 567, 583 (2004) (cleaned up). And if it could, the States would still have standing today because "[l]egal consequences" flow to the States from the D.C. Circuit's ruling. *Port of Bos. Marine Terminal Ass'n* v. *Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 71 (1970). Lest we forget: the court below struck down an effort to repeal the CPP, vacated its replacement, and ordered EPA to consider even more aggressive options.

Respondents say the partial stay renders the States' injuries intangible. See U.S.Br.18. But they cite nothing saying that a prevailing party may seek a stay and thereby erase their opponents' standing to appeal—especially since stays can be lifted at any time. The lower court's judgment reanimates the CPP; that's what matters for injury. See NACCO.Reply.17-20. Because EPA remains free to "reenact[] precisely the same provision" on remand, the Court has jurisdiction to reverse. *City of Mesquite* v. *Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982).

A "realistic danger of … direct injury" to the States also arises "as a result of the … operation or enforcement" of the un-stayed ACE vacatur. *Babbitt* v. *UFW Nat'l Union*, 442 U.S. 289, 298 (1979). EPA *will* issue a new rule. U.S.Br.19 ("EPA is legally obligated to promulgate a rule governing greenhouse-gas emissions from existing power plants."). The States face harm from the decision requiring it to consider system-wide measures and affirmatively justify any choice not to impose them when it does. "The mere possibility" EPA will exercise restraint "does not suffice to" start this seven-year odyssey anew. *Sackett* v. *EPA*, 566 U.S. 120, 127 (2012). Indeed, the Court has intervened before—over protests that it was too soon—when an agency acted "in excess of its delegated powers and contrary to a specific prohibition." *Leedom* v.

Kyne, 358 U.S. 184, 188 (1958); see also *Champion Int'l Corp.* v. *EPA*, 850 F.2d 182, 185-86 (4th Cir. 1988) (holding that district court "properly inquired whether EPA had exceeded its delegated authority" despite claims of prematurity).

Standing's bar is low. If nominal damages, *Uzuegbunam*, 141 S. Ct. at 798, or a prospect of future enforcement, *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 161 (2014), suffice, then the interests at stake here should, too.

Third, Respondents minimize the "special solicitude" States enjoy "in [the] standing analysis." *Massachusetts*, 549 U.S. at 520. State Petitioners deserve the same room to maneuver that Massachusetts got when it "assert[ed] its rights under the [CAA]." *Id.* at 520 n.17. Respondents try to reduce special solicitude to something that applies only where States fault "*under*-regulation." U.S.Br.18 & n.1. But even if the line between over- and under-regulation were workable—it is not—this distinction finds no support. If potential cross-State environmental consequences can ground state standing, *id.*, then why can cross-State energy consequences not do the same? The Court can hear this case out of respect for the States' sovereign interests, too.

* * * *

Rarely do so many factors lead to the same result. Here, the text does not stand alone in narrowing EPA's authority. The major-questions, federalism, and constitutional-avoidance canons confirm that EPA lacks authority to reorder the entire power sector—or any other area of American life with buildings that emit greenhouse gases. And though Respondents contrive justiciability problems out of EPA's regulatory waffling to prevent the

Court from reaching that result, Petitioners have standing. In the end, then, the answer is plain, and the Court should give it.

CONCLUSION

The Court should reverse.

Respectfully submitted.

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