No. 20-1530

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL REGAN, ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

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

BRIEF OF *AMICUS CURIAE* COMMONWEALTH OF KENTUCKY IN SUPPORT OF PETITIONERS

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Cong. Research Serv., R44922, The U.S. Coal Industry: Historical Trends and Recent Developments (2017) 12

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STATEMENT OF INTEREST[1]

This case will determine the future of the coal industry in Kentucky and elsewhere. The decision below by the D.C. Circuit permits the Environmental Protection Agency to reshape the nation's power sector by mandating emissions standards that will be extraordinarily difficult—if not impossible—for Kentucky's coal-fired power plants to meet. That decision—and its empowerment of the EPA to try to eliminate coal—should not stand.

Coal is under attack. It has been for some time. The D.C. Circuit's decision permits the EPA to continue this assault through unrealistic emissions standards. If such standards endure, coal-fired power plants cannot comply without limiting their operations, shutting down, or investing in EPA-preferred alternative energy. The war on coal has already limited the operations of Kentucky's coal industry. The industry has shrunk by over 10,000 jobs and 300 million tons in 20 years.[2] And it cannot subsidize investment in the alternative sources that the EPA prefers because such sources are not viable in Kentucky's coal communities.

A continued decline of the coal industry will have devastating economic consequences. It will

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[1] Amicus has timely notified counsel for all parties of its intent to file this brief. Sup. Ct. Rules 37.2(a), 37.4.

[2] *Kentucky Coal Facts*, Kentucky Energy and Environment Cabinet 9–14 (2017), https://eec.ky.gov/Energy/Coal%20Facts%20%20Annual%20Editions/Kentucky%20Coal%20Facts%20-%2017th%20Edition%20(2017).pdf [hereinafter *Kentucky Coal Facts, 2017*].

increase the electricity rates in some of the nation's poorest regions. It will decrease the number of good-paying jobs in those regions. It will deprive those communities of tax revenue essential for their schools, infrastructure, and emergency responders. And all this will happen without allowing citizens from Kentucky and other coal-producing states, through their elected representatives, to have a say in the matter. For these reasons, Kentucky has a strong interest in ensuring that a critical component of the nation's power sector is not harmed because of the D.C. Circuit's misinterpretation of EPA authority.

SUMMARY OF THE ARGUMENT

Although portrayed as a simple extension of *Massachusetts v. EPA*, the lower court's decision does what Congress never authorized by granting the EPA unfettered authority to address climate change. As the Clean Power Plan ("CPP") demonstrated, the EPA—if not properly constrained—will commandeer the Clean Air Act to restructure the power sector by effectively eliminating entire industries.

Such authority does not belong to the EPA. This Court has never said that the EPA may regulate emissions by reshaping how the nation's power demand is met or by selecting certain industries for favorable treatment and others for elimination. Decisions regarding climate change and the power sector are major policy questions with vast economic and political significance that should be handled by Congress, where the people have a voice.

The significant and harmful impact of allowing the EPA to restructure the power sector by greatly reducing—possibly even eliminating—coal is exemplified by Kentucky and other similarly-situated states who would bear the disproportionate burden.

ARGUMENT

I. The EPA lacks authority to restructure the power sector.

This case is about who gets to make climate-change policy. Congress has the sole authority to legislate. U.S. Const. art. I, § 1. Yet agency rulemaking like the CPP demonstrates a rejection of this foundational principle. Agency rulemaking cannot be a substitute for Congressional legislative action; that Congress has been unable or unwilling to pass climate-change legislation[3] does not mean the EPA may make climate-change policy in its stead. The significance of climate-change policy indicates it falls within the purview of Congress' power, and unless Congress delegates the authority to the EPA, the EPA may not act.

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[3] *See Congress Climate History*, Center for Climate and Energy Solutions, https://www.c2es.org/content/congress-climate-history/ (last visited May 24, 2021) (providing a history of major climate change legislation and detailing failed attempts, including the Cap and Trade legislation that passed in the House (H.R. 2454, 111th Cong. (2009)), but failed in the Senate).

A. Whether the power sector should be restructured to address climate change is a major question that Congress has not delegated to the EPA.

It is Congress that must make the "critical policy decisions." *Indus. Union Dept., AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 687 (1980). Therefore, Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Util. Air Regulatory Group v. EPA,* 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160); *see also Indus. Union Dept.*, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment) (stating that the "filling in of the blanks" can be left to the agencies, but the "elected representatives of the people" must make the "hard choices"). Here, the EPA sought to make decisions of such significance without a clear assignment from Congress.

According to the EPA, it promulgated the CPP because it believed climate change was a significant issue. At the time, the EPA asserted that "[c]limate change is one of the greatest environmental and public health challenges we face."[4] It further declared: "Taking action now is critical. Reducing CO_2 emissions from power plants, and driving investment in clean energy technologies strategies that do so, is an

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[4] *Fact Sheet: Overview of the Clean Power Plan*, U.S. Environmental Protection Agency, 19january2017snapshot.epa.gov/cleanpowerplan/fact-sheet-overview-clean-power-plan_.html (last visited May 19, 2021).

essential step in lessening the impacts of climate change and providing a more certain future for our health, our environment, and future generations."[5] In announcing the CPP, Brian Deese, an advisor to then President Obama, asserted that the CPP represented the "biggest step that any single president has made to curb the carbon pollution that is fueling climate change."[6]

Indeed, it was a big step that would have had significant consequences had it not been later repealed and replaced by the Affordable Clean Energy Rule.[7] Industry analysts projected that under the CPP's generation-shifting[8] strategy, wholesale electricity costs would have increased by $214 billion.[9] Additionally, the power industry projected that it would have had to spend $64 billion to replace the capacity lost from coal-fired power plants.[10] The EPA's

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5 *Id.*

6 Adam Vaughn, *Obama's Clean Power Plan Hailed as US's Strongest Ever Climate Action*, The Guardian (Aug. 5, 2015), https://ourworld.unu.edu/en/obamas-clean-power-plan-hailed-as-uss-strongest-ever-climate-action.

7 Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guideline Implementing Regulations; Revisions to New Source Review Program, 83 Fed. Reg. 44746 (Aug. 31, 2018) (to be codified at 40 C.F.R. pts. 51, 52, 60).

8 The phrases "generation shifting" and "power generation shifting" refer to the CPP's mandated shift away from energy sources with higher carbon to lower carbon sources like natural gas and renewables.

9 *EPA's Clean Power Plan: An Economic Impact Analysis*, Energy Ventures Analysis 4 (Nov. 13, 2015), https://nma.org/wp-content/uploads/2017/02/11.13.15-NMA_EPAs-Clean-Power-Plan-An-Economic-Impact-Analysis.pdf.

10 *Id.* at 6.

own projections predicted that upward of 31,000 jobs would be lost as a result of schemes like the CPP.[11]

The EPA justified these costs and job losses with the "important benefits" to health and the climate expected to result from the CPP.[12] However, the EPA cannot simply sidestep the major question doctrine by conducting an analysis of costs, non-air impacts, and energy requirements. Rather, the EPA's cost-benefit analysis for the CPP demonstrates the vast significance of the issue by highlighting what is at stake if the EPA is allowed to assert such sweeping authority. The massive price tag and far-reaching economic impacts make it obvious that the EPA cannot act on such a major issue without clear authority from Congress.

Congress, however, did not manifest clear intent to give the EPA this authority—including to restructure the nation's power sector—when it enacted 42 U.S.C. § 7411. Section 7411 provides that "the Administrator shall publish proposed regulations, establishing Federal standards of performance" for new stationary sources that "cause[], or contribute[] significantly to, air pollution which may reasonably be

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[11] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64661, 64682 (Oct. 23, 2015) (to be codified at 40 C.F.R. pt. 60). The EPA estimated a net decrease of 31,000 to 34,000 "job-years" by 2030. According to the EPA, a "job-year is not an individual job; rather a job-year is the amount of work performed by the equivalent of one full-time individual for one year. For example, 20 job-years may represent 20 full-time jobs or 40 half-time jobs."

[12] *Fact Sheet: Overview of the Clean Power Plan*, *supra* note 4.

anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b). For existing sources, § 7411 mandates collaboration between the EPA and the States,[13] and calls for the Administrator to "prescribe regulations . . . under which each state shall submit to the Administrator a plan" establishing "standards of performance" and providing for "implementation and enforcement." 42 U.S.C. § 7411(d)(1). The statute defines a "standard of performance" as:

> a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. § 7411(a)(1).

Congress would not have given the EPA authority to restructure the power sector "in so cryptic

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[13] Historically, states have had control over the generation of electricity. "Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983). Except for the authority of the Federal Energy Regulatory Commission over the need for and pricing of electrical power transmitted in interstate commerce, "economic aspects of electrical generation have been regulated for many years and in great detail by the states." *Id*. at 206.

a fashion." *See Brown & Williamson*, 529 U.S. at 160. In *MCI Telecommunications Corp., v. American Telephone & Telegraph Co.*, the Federal Communications Commission contended that because Congress had statutorily given it the discretion to "modify any requirement" imposed under the statute, it possessed the authority to render voluntary certain requirements that were otherwise mandatory. 512 U.S. 218, 225 (1994). This Court disagreed and concluded that it "is highly unlikely that Congress would leave the determination of whether an industry will be entirely, or even substantially, rate-regulated to agency discretion . . . ." *Id.* at 231. Similarly, given that § 7411 does not even authorize the Administrator to require a new or modified source of pollution to "install and operate any particular technological system of continuous emission reduction to comply with any . . . standard of performance," 42 U.S.C. § 7411(b)(5), it is highly unlikely that Congress intended for the EPA to wield § 7411(d) to take actions that might have the effect of eliminating entire industries from the power grid.

The EPA cannot simply claim authority to seize control of the power sector; if Congress wants the EPA to address climate change by radically restructuring the power sector, it must say so clearly. Nothing in § 7411 demonstrates that intent by Congress.

B. This Court's decision in *Massachusetts v. EPA* did not give the EPA *carte blanche* authority to regulate all emissions, much less the ability to restructure the nation's power sector.

In rejecting the assertion that the CPP had to be repealed because it was outside the scope of the EPA's congressionally granted authority, the lower court relied on this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007). In that case, this Court held that the Clean Air Act authorizes the EPA to regulate new motor vehicle emissions if the EPA forms a judgment that such emissions endanger public health or welfare by contributing to climate change. *Id.* at 529–533. This Court further opined that the "broad language of § 202(a)(1) reflect[ed] an intentional effort to confer the flexibility necessary to forestall . . . obsolescence" in the face of "changing circumstances and scientific developments." *Id.* at 532. The lower court now asserts that the same flexibility should be found in § 7411, thereby giving the EPA authority to restructure the nation's power sector. *Am. Lung Ass'n. v. EPA*, 985 F.3d 914, 947 (D.C. Cir. 2021).

Yet, regulating with the effect of potentially eliminating entire power sources from the U.S. power sector is an extreme measure that would overextend the authority recognized in *Massachusetts v. EPA*. In *Massachusetts*, this Court contrasted the regulation of emissions from motor vehicles with the "extreme measures," 549 U.S. at 531, taken by the Federal Drug Administration in *FDA v. Brown & Williamson*

Tobacco Corp., 529 U.S. 120 (2000). This Court held in *Brown & Williamson* that the FDA's classification of tobacco products as "drugs" or "devices" was outside the agency's authority because it was "unlikely that Congress meant to ban tobacco products, which the FDCA would have required had such products been [thus] classified . . . ." *Massachusetts*, 549 U.S. at 531 (citing *Brown & Williamson*, at 135–37). In contrast, EPA jurisdiction over greenhouse gas emissions from motor vehicles would lead to "no such extreme measures" because the "EPA would only *regulate* emissions . . . ." *Massachusetts*, 549 U.S. at 531 (emphasis in original).

A power-generation-shifting strategy, like the CPP, would be much more akin to the "extreme measures" in *Brown & Williamson* than the mere regulation of emissions in *Massachusetts*. After all, the CPP would have dictated a nationwide change in how and where electricity is produced, amounting to a massive expansion of authority compared to *regulating* carbon emissions at their source. The final CPP required carbon emissions in the United States to be reduced by 32% by 2030.[14] According to the EPA, this drastic cut in carbon emissions could be accomplished through power generation shifting—*i.e.*, moving from energy sources with higher carbon to lower carbon sources like natural gas or renewables.[15] The result

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[14] 80 Fed. Reg., *supra* note 11, at 64736.

[15] *See* David Marshall Coover III, *Square Pegs and Round Holes: Why the Environmental Protection Agency's New Section 111 Greenhouse Gas Regulations Do Not Fit With Supreme Court Precedent or Congressional Intent in the Clean*

would have been the severely reduced operation, if not the complete closure, of coal-fired power plants.[16] This would be a significant change to the U.S. power grid, which currently relies on coal-fired generation for almost one-fifth of its power.[17] Yet, the lower court asserted that the statutory authority given to the EPA to identify the best system of emission reduction could extend to such a plan.

Any EPA decision that incorporates generation shifting, resulting in the elimination of some industries from the power sector, is little different than the extreme measures taken by the FDA in *Brown & Williamson*. Mandatory generation shifting is not a natural extension of the EPA's authority

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Air Act, 45 Tex. Envtl. L.J. 1, 24 (2015) (arguing this represented a novel approach for the EPA's selection of the best system of emission reduction because while the EPA's past emission guidelines were based on systems available at the affected source, the EPA newly asserted that the "highly interconnected and integrated nature" of the power sector allowed it to set emission caps that would require steps beyond each affected source).

[16] *See* Herman K. Trabish, *Most states on track to meet EPA Clean Power Plan, but political & legal contention remains*, Utility Dive (Jun. 16, 2015), https://www.utilitydive.com/news/most-states-on-track-to-meet-epa-clean-power-plan-but-political-legal-co/400407/ (asserting that states can meet emission standard goals by closing coal plants); s*ee also* Naveena Sadasivam, *Kentucky May Accidentally Comply With EPA's Clean Power Plan*, Inside Climate News (May 26, 2015), https://insideclimatenews.org/news/26052015/kentucky-may-accidentally-comply-epa-clean-power-plan-coal/ (noting that even the 18% cut in the proposed rule would likely require "retiring coal plants" in Kentucky).

[17] *Electricity in the United States*, U.S. Energy Information Administration, https://www.eia.gov/energyexplained/electricity/electricity-in-the-us.php (last updated Mar. 18, 2021).

described by this Court in *Massachusetts*. An interpretation that "would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization" is unreasonable. *Util. Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) (allowing the EPA to require utilization of best-available control technology by emission sources already subject to review, but not permitting the EPA to "lay[] claim to extravagant statutory authority over the national economy"). The Court should take this opportunity to clarify that in *Massachusetts* it was not indicating that the EPA's authority would include extreme measures like restructuring the power sector.

II. Allowing the EPA to mandate generation shifting disproportionately burdens some states without the protection of the political process.

Mandated generation shifting forces some states to bear the disproportionate burden of addressing climate change. The majority of coal reserves in the United States—70%—is concentrated in five states: Wyoming, West Virginia, Pennsylvania, Illinois, and Kentucky.[18] Coal-powered electricity stimulates economic growth in these states by lowering the costs of doing business.[19] Because of coal, in 2019 Kentucky

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[18] Cong. Research Serv., R44922, The U.S. Coal Industry: Historical Trends and Recent Developments 3 (2017).

[19] *Kentucky Energy Profile*, Kentucky Energy and Environment Cabinet Office of Energy Policy 2 (2019),

offered the seventh-lowest industrial electricity prices in the United States and the lowest east of the Mississippi River.[20] Any rule like the CPP, which effectively mandates a shift away from coal power, would place a disproportionate burden on these states and stifle economic growth. For example, the EPA estimated the reduction in coal-fired electricity production under the CPP would lead to a loss of over 30,000 jobs.[21] Kentucky, which has the third-highest number of operating coal mines[22] and the second-highest number of coal workers in the United States,[23] would be severely impacted by such a rule.

The substantial workforce reductions will be paired with devastating increases in the cost of electricity.[24] Currently, Kentucky relies on coal-fired

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https://eec.ky.gov/Energy/KY%20Energy%20Profile/Kentucky%20Energy%20Profile%202019.pdf.

20 *Id.*

21 Josh Bivens, *A Comprehensive Analysis of the Employment Impacts of the EPA's Proposed Clean Power Plan*, Economic Policy Institute 28 (Jun. 9, 2015), https://files.epi.org/pdf/79246.pdf.

22 U.S. Energy Information Administration – Kentucky State Profile and Energy Estimates, https://www.eia.gov/state/?sid=KY#:~:text=Kentucky%20has%20two%20oil%20refineries,Virginia%2C%20Wyoming%2C%20and%20Missouri (last visited May 19, 2021).

23 *Kentucky Coal Facts, 2017*, *supra* note 2, at 29.

24 *EPA's Clean Power Plan: An Economic Impact Analysis, supra* note 9, at 4 (estimating that consumers will pay an additional $214 billion for electricity between 2022 and 2030 under the Plan). *But see Fact Sheet: Clean Power Plan by the Numbers*, U.S. Environmental Protection Agency 2 (2017), https://19january2017snapshot.epa.gov/sites/production/files/2015-08/documents/fs-cpp-by-the-numbers.pdf (claiming the CPP would reduce electric bills by around seven dollars per month by 2030).

plants for 73% of its power.[25] Under a scheme like the CPP, electricity costs in Kentucky would increase 27.3%.[26] While Kentuckians currently spend, on average, 3.4% of their household income on electricity, a scheme like the CPP would raise that by almost a full percent.[27] Industry analysts project that the increased burden from average electricity expenditures would be much larger for low-income neighborhoods.[28] This is particularly concerning for Kentucky, where about 16% of the population lives below the poverty line.[29] Kentucky's fifth congressional district—encompassing coal mines that produce about one-third of Kentucky's coal[30]—is the second most impoverished congressional district in the nation.[31] The district already has an average poverty

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[25] U.S. Energy Information Administration – Kentucky State Profile and Energy Estimates, *supra* note 22.

[26] *EPA's Clean Power Plan: An Economic Impact Analysis, supra* note 9, at 3.

[27] Wayne Winegarden & Alexander Specht, *The Clean Power Plan's Economic Impact by Income Group and Local Area*, Pacific Research Institute 45 (2016), https://www.pacificresearch.org/wp-content/uploads/2017/03/CleanPowerPlan_RegressivityReduction_Web.pdf.

[28] *Id*. at 16.

[29] *Quick Facts – Kentucky*, U.S. Census Bureau, https://www.census.gov/quickfacts/fact/table/KY/POP060210 (last visited May 19, 2021).

[30] *Kentucky Coal Facts, 2017*, *supra* note 2, at 17.

[31] Greg Giroux, *Rich, poor, young, old: Congressional districts at a glance,* Bloomberg Gov't (Sept. 15, 2017), https://about.bgov.com/news/rich-poor-young-old-congressional-districts-glance/.

rate of 28.2%, which is over twice the national average.[32]

Additionally, although there may be states that can add or switch easily to alternative energy sources, states that have been large coal producers—like Kentucky—often have geographic limitations that inhibit switching to these sources. In fact, Kentucky would require the largest capital investment in new power plants compared to every other state (estimated at $5.63 billion) to compensate for the loss of coal.[33] This would be the case for a variety of reasons. For example, coal is one of the most abundant natural resources in Kentucky, and, as of 2011, over 80% of the original resource had yet to be mined.[34] And Kentucky's topography and climate preclude the use of wind power as a substitute for coal power.[35]

These potential consequences reinforce why Congress—rather than the EPA—should consider issues relating to climate change and the power sector. In Congress, the states have representatives who can

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[32] *Congressional District 5, KY.*, Data USA, https://datausa.io/profile/geo/congressional-district-5-ky (last visited May 19, 2021).

[33] *EPA's Clean Power Plan: An Economic Impact Analysis, supra* note 9, at 7.

[34] Kentucky Coal Facts, Kentucky Coal Association at i (2011), https://eec.ky.gov/Energy/Coal%20Facts%20%20Annual%20Editions/Kentucky%20Coal%20Facts%20-%2011th%20Edition%20 (2009-2010).pdf.

[35] *See, e.g.*, U.S. Energy Information Administration – Kentucky State Profile and Energy Estimates, *supra* note 22 ("Kentucky has few wind resources suitable for developing utility-scale power projects, and no commercial wind power facilities have been built in the state.").

advocate for their interests. Permitting the EPA to "regulate" emissions to the extent that it can mandate the restructuring of the power sector eliminates one of the principle protections of our Republic: policy must be made by Congress through bicameralism and presentment. Requiring policy to be made in this manner protects the interests of small states and minorities by requiring a consensus. "Major regulations and reforms either reflect a broad political consensus, or they do not become law." *Am. Lung Ass'n. v. EPA,* 985 F.3d 914, 997 (D.C. Cir. 2021) (Walker, J., concurring in part, concurring in judgment, dissenting in part). In contrast, the lower court's decision means the EPA can pick winners and losers within the power sector, disproportionately burdening coal and coal-producing states like Kentucky. This is not a decision that should be left to administrative agencies that are unaccountable to the electorate. States like Kentucky must have a voice in such decisions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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