No. 20-1778

In The

Supreme Court of the United States

WESTMORELAND MINING HOLDINGS LLC,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Whether 42 U.S.C. § 7411(d) clearly authorizes the EPA to decide such matters of vast economic and political significance as whether and how to restructure the nation's energy system?

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

This case interests Cato because the decision below threatens individual liberty by encouraging the EPA to resolve major questions of economic and social significance without a clear delegation from Congress.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2009, the House of Representatives passed a "cap-and-trade" policy to fight global warming. *See* American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009). But the bill stalled in the Senate, where it ultimately expired when the clock ran out on the 111th Congress. "So President Obama ordered the EPA to do what Congress wouldn't," App. 169a (Walker, J., dissenting), and the agency promulgated the Clean Power Plan, *see* 80 Fed. Reg. 64,662 (Oct. 23, 2015), which was designed to restructure the electricity grid, *id.* at 64,760–64,771 (setting out supposed statutory basis for requiring "generation shifting" to

[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. Further, no party's counsel authored this brief in any part and *amicus* alone funded its preparation and submission.

climate-friendly energy sources). For compliance, the EPA proposed to operate nationwide "model trading rules," also known as a cap-and-trade. *See* 80 Fed. Reg. 64,966 (Oct. 23, 2015). The agency "expected" states to participate. *See* 80 Fed. Reg. 64,662, 64,726 ("[I]t is entirely feasible for states to establish standards of performance that incorporate emissions trading, and it is reasonable to expect that states will do so."). The upshot is that the Clean Power Plan is the same major policy—nationwide cap-and-trade to reorder energy production—that the 111th Congress had declined to adopt after much deliberation.

On its face, this regulatory history should prompt suspicion. Why would Congress spends time on major climate policy if the EPA already had the authority to enact it? Consistent with such skepticism, the Court issued an unprecedented stay of the rule. *See West Virginia v. EPA*, 136 S. Ct. 1000 (2016); *see also* Courtney Scobie, "Supreme Court Stays EPA's Clean Power Plan," ABA Practice Points, Feb. 27, 2016, https://bit.ly/2V4JVzu (reporting "the first time the Supreme Court has ever issued a stay on regulations before an initial review by a federal appeals court"). Still, in a split 2-1 decision, the court below found "ample discretion" in the interstices of the Clean Air Act to authorize the Clean Power Plan, and more. App. 66a; *see also*, Pet. Br. 17–18 (describing how the court below interpreted the EPA's authority "to extend beyond that claimed in the [Clean Power Plan]").

It's worth elaborating on the attenuated textual basis for the D.C. Circuit's sweeping conclusions regarding the EPA's regulatory authority. The majority below described the operative statutory provision as a

"gap-filler" that "is intended to reach pollutants that do not fit squarely within the ambit of the Act's other regulatory provisions." App. 24a, 67a. Within this "catchall" provision, the court located the agency's power in its authority to "fill the gap[s] the Congress left." App. at 63a. Putting it all together, the panel read the statute to confer regulatory authority over the entire electricity grid in the gaps of a gap-filler. *But see Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001) ("Congress . . . does not, one might say, hide elephants in mouseholes.").

Only two courts—this one and the court below—can pronounce on the EPA's implied authority to regulate greenhouse gases from stationary sources under the Clean Air Act. *See* 42 U.S.C. § 7607(b) (establishing the D.C. Circuit as the exclusive venue for judicial review of nationwide air quality regulations). After the divided decision below, however, the judiciary is sending mutually exclusive instructions regarding the EPA's power to fill in the gaps left by Congress. Where this Court calls for a cautious approach, the split panel threw caution to the wind, urging the agency to reorient the electricity grid through generation-shifting. As a result of the D.C. Circuit's departure from this Court's rulings, the EPA is set to (again) waste its limited time and budget on a historic scale. To prevent a massive misallocation of scarce public resources, this Court should grant certiorari

and harmonize judicial guidance on the crucial interpretive question raised by the petitioner.

ARGUMENT: BY DEPARTING FROM THIS COURT'S RELEVANT GUIDANCE, THE MAJORITY BELOW ENCOURAGES THE EPA TO WASTE ITS LIMITED RESOURCES

Because Congress has yet to legislate a response to climate change, the EPA must rely on its existing delegation under the Clean Air Act. But that statute was designed to control conventional pollution, so it doesn't speak directly to mitigating global warming. Complicating matters further, conventional pollutants are emitted at levels that are orders of magnitude less than greenhouse gases, which makes for an uneasy fit between the statute's programs and climate policy. Here, the EPA's authority is both interstitial and awkward.

In *Util. Air Regulatory Group v. EPA (UARG)*, this Court provided much-needed interpretive guidance regarding *the same regulatory context as the instant case*. *See* 573 U.S. 302 (2014) (addressing the agency's implied authority to regulate greenhouse gases from stationary sources under the Clean Air Act). In that case, the Court said that it "expect[s] Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Id.* at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *see also Paul v. United States*, 140 S. Ct. 342 (2019) (statement of Kavanaugh, J.) ("In order for an executive or independent agency to exercise regulatory authority over a ma-

jor policy question of great economic and political importance, Congress must . . . expressly and specifically delegate to the agency the authority." (cleaned up). Even where the Clean Air Act is "clear" on how to proceed with controls for greenhouse gases, *UARG* still "acknowledged the potential" for "an unreasonable and unanticipated degree of regulation" and, accordingly, the Court emphasized that EPA lacks a "free rein." 573 U.S. at 332; *see also Massachusetts v. EPA*, 549 U.S. 497, 531 (2007) (observing that climate regulation under the Clean Air Act would not lead to "extreme measures").

For this Court, therefore, the absence of textual clarity is an interpretive red flag that warrants "a measure of skepticism" whenever an agency claims to "discover" significant authority based on a novel interpretation of a "long-extant statute." *UARG*, 573 U.S. at 324. Yet the D.C. Circuit adopted the opposite approach. Far from "skepticism" in the face of statutory ambiguity, the majority was "struck" by the "paucity of restrictive language" in the EPA's gap-filling authority. App. 68a. To the majority below, the catchall's lack of clarity is part of a calibrated design—it's "muscle that Congress deliberately built up" so as to "entrust the EPA with flexible powers to craft effective solutions." App. 78a; *see also*, App. 79a ("We do not believe that Congress drafted such an enfeebled gap-filling authority in Section 7411.").

By finding regulatory "muscle" in the gaps of a gap-filler, the D.C. Circuit reached the bizarre conclusion that the Clean Power Plan "does nothing to enlarge the Agency's regulatory domain." App. 102a; see also App. 94a ("[T]he EPA made no new discovery of

regulatory power with the Clean Power Plan."). Instead of implicating the EPA's authority, the majority posited that any "regulatory consequences" of the Clean Power Plan "are a product of the greenhouse gas problem, not of [the EPA's] role in the solution." App. 95a–96a. Accordingly, "any nationwide regulation of [power plants'] greenhouse gas pollution that meaningfully addresses emissions will necessarily affect a broad swath of the Nation's electricity customers." App. 96s. On the basis of this tautology—climate change is a major problem, so its regulation must be major—the court below gave the EPA the very "free rein" that this Court warned against.

In *UARG*, this Court established a presumption against the EPA's exercising an implied delegation to achieve major climate policy. Below, the majority established the opposite presumption, going so far as to suggest that major climate policy is required under any reasonable interpretation of the enabling act's ambiguity. App. 53a ("[T]he record before the EPA shows that generation shifting to prioritize use of the cleanest sources of power is one of the most cost-effective means of reducing emissions."). *See also* App. 66a (warning that the EPA "may not shirk its responsibility by imagining new limitations that the plain language of the statute does not clearly require"). In sum, federal courts are sending conflicting guidance on the scope of the EPA's authority to regulate greenhouse gases pursuant to ambiguous or silent statutory text.

Faced with these mixed messages from the judiciary, the current administration plainly prefers the expansive interpretation advanced by the D.C. Circuit. For example, President Biden established a goal for

"a carbon pollution-free electricity sector no later than 2035," which would obviously require regulation to remake the grid. Exec. Order No. 14,008, 86 Fed. Reg. 7,619 (Feb. 1, 2021). To this end, White House National Climate Adviser Gina McCarthy recently warned that if Congress doesn't enact grid-wide production quotas for low-carbon power producers, then the EPA will act on its own. *See* Jennifer A. Dlouhy, "Biden Climate Czar Vows Clean-Energy Edict If Congress Fails," Bloomberg Green, July 13, 2021, https://bloom.bg/3zgd9Kk. Again, such a far-reaching policy design would be possible only under the D.C. Circuit's reading of the EPA's interstitial authority.

So, the EPA is set to embark on another "multi-year voyage of discovery" of its implied delegation to control greenhouse gases from stationary sources. *UARG*, 573 U.S. at 328. The problem, as explained by the petitioner, is that "[w]hatever action EPA eventually takes under [the D.C. Circuit's] directive will necessarily be contingent on the decision below remaining good law despite the strong indications by this Court that it is not." Pet. Br. 25.

Petitioners in this and related cases have persuasively explained how this ongoing uncertainty weighs on industry and states. Pet. Br. 20–26; Pet. for Writ of Cert. at 19–25, *West Virginia, et al. v. EPA* (2021) (No. 20-1530). *Amicus* joins their reasons in full and also emphasizes the risk of administrative waste.

Regulating the electricity grid is resource intensive. Here, the Clean Power Plan is illustrative. The rule took more than two years to complete, and contemporary reporting described "marathon meetings

and tense all-day drafting sessions, dozens of lawyers, economists and engineers." Coral Davenport, "E.P.A. Staff Struggling to Create Pollution Rule," N.Y. Times, Feb. 4, 2014, https://nyti.ms/2ToXhWB. In the rule's preamble, the agency describes its "unprecedented and sustained process of engagement with the public and stakeholders," including the review of more than 4.3 million comments. 80 Fed. Reg. 64,662, 64,665. To support these efforts, the agency made the Clean Power Plan its "top priority" in the appropriations process. U.S. Environmental Protection Agency, Fiscal Year 2016 Justification of Appropriation Estimates for the Committee on Appropriations (2015), https://bit.ly/3eGvvfD. In explaining its budget request to Congress, the agency acknowledged that rule's development "require[d] the agency to tap into technical and policy expertise not traditionally needed in EPA regulatory development," including "electricity transmission, distribution, and storage." *Id.* at 312. That is, the agency had to develop an entirely new skill set because managing the electricity grid is outside its core competency.

And it was all for naught. After being stayed by this Court, the rule never took effect and has since been permanently shelved. *See* Resp. Mot. for Partial Stay of Issuance of the Mandate at 3–4, *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021) (No. 19-1140) (informing court below that the EPA is considering the question of its authority under 42 U.S.C. § 7411(d) "afresh" in "a new rulemaking action"). The Clean Power Plan surely ranks among the greatest wastes of administrative resources in the history of American government.

There are indirect costs to a futile "multiyear voyage of discovery," beyond those incurred by the taxpayer. The EPA, like all agencies, has limited resources. The agency also has thousands of nondiscretionary duties with date-certain deadlines (unlike the statutory provision here). *See* William Yeatman, Competitive Enter. Inst., The EPA's Dereliction of Duty, How the EPA's Failure to Meet Its Clean Air Act Deadlines Undermines Congressional Intent (2016), https://bit.ly/3eFdFtA (reviewing EPA's "woeful" performance on more than 1,100 Clean Air Act deadlines). When the agency makes regulating the electricity grid a "top priority," it necessarily renders its other duties less of a priority. And if this "top priority" fails because it far exceeds the agency's statutory authority, then the agency's performance suffers, and environmental quality accordingly diminishes.

CONCLUSION

For the above reasons, the Court should grant the petition and clarify that the EPA's interstitial authority to fight climate change is not without limits.

Respectfully submitted,

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