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

BRIEF OF 190 MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are 190 currently-elected members of the United States Senate and United States House of Representatives,[2] who support the proper interpretation of the Clean Air Act, 42 U.S.C. §§ 7401–7671q [*hereinafter*, "the Act" or "CAA"], as conferring broad authority upon the Environmental Protection Agency ("EPA") to regulate emissions of greenhouse gases. Many of the signatories either actively serve on, or have previously served on, committees with jurisdiction over the CAA and/or the EPA.

Based on their experience as members of Congress, *amici* understand the importance of relying on the expert judgment of administrative agencies in technical areas where scientific knowledge, regulatory best practices, and market conditions continue to evolve.

As explained herein, the 1970 Amendments conferred broad regulatory authority on the EPA to devise and implement standards

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[1] In accordance with Supreme Court Rule 37.6, *amici curiae* state that neither the parties, nor their counsel, had any role in authoring, nor made any monetary contribution to fund the preparation or submission of this brief. All parties, to the extent blanket consent was not already given, were timely notified and consented to the filing of this brief.

[2] A full listing of *amici* appears in the Appendix hereto.

addressing both new and existing sources of air pollution, and did so, in part, through the addition of Section 111(d), 42 U.S.C. § 7411(d). As is relevant here, that provision broadly authorizes the EPA to establish new regulatory "standards of performance" for "any existing sources of air pollution" from stationary sources, for which "air quality criteria have not been issued" pursuant to various other sections in the Act, 42 U.S.C. § 7411(d)(1).

Amici have a strong interest in the proper interpretation of this provision, insofar as it effectuates the intent of Congress to ensure that the scope of EPA's authority under legislation as significant and consequential as the CAA would not be limited to addressing only those pollutants that were known and specifically identified in the enumerated provisions of the 1970 Amendments.

Accordingly, *amici* submit this brief to affirm that, consistent with the plain text of Section 111(d)(1), 42 U.S.C. § 7411(d)(1), that provision was, indeed, intended to confer broad authority on the EPA to regulate and respond to both new and existing air pollutants, as needed to carry out the stated purpose of the CAA.

Finally, *amici* further submit this brief to address various arguments raised by other members of Congress as *amici* in support of Petitioners. *See Br. of Amici Curiae* 91 Members of Cong. (Dec. 20, 2021).

SUMMARY OF ARGUMENT

In 2015, to address the air pollution significantly contributing to climate change, the EPA exercised its authority under Section 111(d)(1), 42 U.S.C. § 7411(d)(1), to issue the Clean Power Plan, *see* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015). The Clean Power Plan was rescinded in 2019, through the implementation of the so-called "ACE Rule," *see* 84 Fed. Reg. 32,520 (July 8, 2019), which was subsequently vacated by the U.S. Court of Appeals for the D.C. Circuit. *See Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021).

Notwithstanding this complex procedural history, the case that is presently before this Court concerns neither the Clean Power Plan nor the subsequent ACE Rule—but rather, the proper interpretation of a discrete provision in the CAA, and the scope of EPA's authority to implement future regulations thereunder. To that end, it is worth noting, at the outset, that this case raises considerable justiciability issues

arising from what appears to be a request for a declaratory concerning the precise intent of Congress with respect to the authority that it has conferred upon the EPA under Section 111(d)(1), 42 U.S.C. § 7411(d)(1). *See* Non-Governmental Org. and Trade Ass'n Resp'ts Br. 23-31; Fed. Resp'ts Br. 23-31. While the undersigned members of Congress certainly share these concerns and hereby endorse the view that this case should be dismissed as having been improvidently granted—this brief only seeks to address the merits question before this Court.

The question presented before this Court essentially concerns the scope of EPA's authority to regulate existing sources of air pollution from stationary sources like fossil fuel-fired power plants, as contemplated in Section 111(d)(1), 42 U.S.C. § 7411(d).

As explained herein, that provision plainly authorizes the EPA to regulate greenhouse gases through what the agency determines to be the best system of emissions limitation, subject to the statutory constraints imposed by Congress. Specifically, the text of Section 111(d)(1), 42 U.S.C. § 7411(d)(1), authorizes the EPA to regulate "any existing sources of air pollution" for which "air quality criteria have not been issued" pursuant to various other sections in the Act, 42 U.S.C. § 7411(d)(1), which plainly

encompasses the implementation of regulatory standards for greenhouse gas emissions from stationary sources, such as fossil fuel-fired power plants, *infra,* at ___-___ (section I-A). And as further set forth herein, the only other legislative enactment that has spoken directly to the purpose and effect of this provision to date is a Congressional Disapproval Resolution that expressly refuted the Trump Administration's attempt to advance an artificially narrow reading of Section 111(d)(1), 42 U.S.C. § 7411(d)(1), through a regulation about methane emissions standards, *infra* ___-___ (section I-B). Moreover, this Court's precedents further establish that Section 111(d), 42 U.S.C. § 7411(d), must be read as broadly authorizing the EPA to address new and evolving air pollution problems, including greenhouse gas emissions from existing stationary sources. *infra* ___-___(section I-C).

Contrary to the arguments advanced by the minority of those members of Congress who support the repeal of Section 111(d), 42 U.S.C. § 7411(d), and who filed a brief in support of the Petitioners for that reason—no other subsequent legislative enactments have either expressly or by implication, curtailed the EPA's continuing authority to

regulate air pollution from stationary sources under that provision, *infra* ___-___(section II).

Furthermore, to the extent that Petitioners and their supporting *amici* seek to invoke the major questions doctrine as support for their artificially narrow reading of Section 111(d), 42 U.S.C. § 7411(d), the legislative history of the CAA and the various unsuccessful efforts by certain members of Congress to repeal or restrict the EPA's broad authority thereunder, further demonstrate the political process has functioned as it should—and that the decisions of elected members of Congress merely reflect the American public's overwhelming support for sound public policy directed towards the regulation of greenhouse gases that significantly contribute to climate change, *infra* ___-___ (section III). Having failed to achieve sufficient support to ratify these changes through the legislative process, Petitioners now turn to this Court, seeking what is fundamentally a legislative and political end, through judicial means. This Court should not reward this attempted end-run around the legislative process.

For these reasons, this Court should either dismiss this case as having been improvidently granted, or reaffirm, once again, that the text

of the CAA plainly authorizes the EPA to regulate greenhouse gas emissions—including those arising from existing stationary sources, such as fossil fuel-fired power plants—as set forth in Section 111(d)(1), 42 U.S.C. § 7411(d)(1).

ARGUMENT

I. THE CLEAN AIR ACT CONFERS BROAD AUTHORITY ON THE EPA TO REGULATE GREENHOUSE GAS EMISSIONS.

The stated purpose of the Clean Air Act is to "protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1). This purpose was informed by the congressional finding in 1963, when the CAA was enacted, that the cumulative effects from "the growth in the amount and complexity of air pollution brought about by urbanization, industrial development, and the increasing use of motor vehicles," had already resulted in "mounting dangers to the public health and welfare." *See* Sanne H. Knudsen, *Regulating Cumulative Risk*, 101 Minn. L. Rev. 2313, 2326 (2017) (quoting 42 U.S.C. § 7401(a)(2)).

The statutory provision that is currently at issue before this Court was added through the 1970 Amendments to the CAA, which sought to to "speed up, expand, and intensify the war against air pollution in the

United States." H.R. Rep. No. 91-1146 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 5356, 5356; *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976) ("the 1970 Amendments to the Clean Air Act were a drastic remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution"); Diane Pamela Wood, *Coordinating the EPA, NEPA, and the Clean Air Act*, 52 Tex. L. Rev. 527, 551 (1974) (explaining that "Congress intended to expedite all procedures under the Clean Air Act," through the 1970 Amendments). The 1970 Amendments to the CAA conferred broad regulatory authority on the EPA to devise and implement standards addressing both new and existing sources of air pollution, and did so, in part, through the addition of Section 111, 42 U.S.C. § 7411.

As is relevant here, Section 111(d)(1) authorizes the EPA to establish "standards of performance" for air pollution that endangers public health or welfare from existing stationary sources "for which air quality criteria have not been issued," 42 U.S.C. § 7411(d)(1), under the CAA provisions covering criteria pollutants (the National Ambient Air Quality Standards Program), *id.* §§ 7408-7410, and hazard pollutants (the National Emission Standards for Hazardous Air Pollutants

program), *id.* § 7412. *See also* State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340 (Nov. 17, 1975) (explaining that Section 111(d) covers air pollutants that "are (or may be) harmful to public health or welfare but are not or cannot be controlled" under the other programs covering standards of performance for existing stationary sources).

As demonstrated by the legislative history of the 1970 Amendments, these changes were designed to ensure that there would be "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91-1196, at 20 (1970); *see also id.* at 4 ("this bill would extend the Clean Air Act of 1963 as amended in 1965, 1966, and 1967 to provide a much more intensive and comprehensive attack on air pollution"); S. Consideration of H.R. Conf. Rep. No. 91-1783, 1970 CAA Legis. Hist. at 130 (Dec. 17, 1970) (statement of Sen. Ed Muskie) (explaining, as the 1970 CAA amendment's lead Senate sponsor, that Section 111's "system of emission reduction" language authorizes the EPA to develop standards "based on the latest available control technology, processes, operating methods, and other alternatives").

Simply put, Section 111(d), 42 U.S.C. § 7411(d), is a critical provision that gives the EPA flexibility to set standards addressing air pollution from existing stationary sources, including new and evolving air pollution threats like greenhouse gas emissions from power plants.

A. The text of Section 111(d) plainly authorizes the EPA to set standards for air pollution from existing stationary sources, such as greenhouse gas emissions from coal-fired power plants.

Applying this Court's precedents concerning basic principles of statutory interpretation, the precise meaning of Section 111(d), 42 U.S.C. § 7411(d), should initially be guided by the plain text of that provision. *See Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 471 (2001) (Scalia, J.) ("courts may choose only between reasonably available interpretations of a text"); *see also* Antonin Scalia & Bryan A. Garner, *Reading the Law: The Interpretation of Legal Texts* 16 (2012) ("In their full context, words mean what they conveyed to reasonable people at the time they were written.").

To that end, Section 111(d) provides that:

> The Administrator shall prescribe regulations which shall establish a procedure … under which each State shall submit . . . a plan which (A) establishes standards of performance for ***any existing source for any air pollutant (i) for***

> ***which air quality criteria have not been issued*** or which is not included [in criteria pollutant or hazardous pollutant categories], . . . and (B) provides for the implementation and enforcement of such standards of performance.

42 U.S.C. § 7411(d)(1) (emphasis added).

The meaning of this provision is further elucidated by the following definitions:

> The term "**standard of performance**" means 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 … the Administrator determines has been adequately demonstrated.
>
> The term "**new source**" means any stationary source, the construction or modification of which is commenced after the publication of regulations … prescribing a standard of performance under this section which will be applicable to such source.
>
> The term "**stationary source**" means any building, structure, facility, or installation which emits or may emit any air pollutant...
>
> . . .
>
> The term "**existing source**" means any stationary source other than a new source.

Id. § 7411(a)(1)-(3), (6) (emphasis added).

This text does not demonstrate ambiguity or uncertainty. Rather, these definitions, read in combination with the text of Section 111(d)

itself, explicitly confer expansive authority on the Administrator of the EPA to "establish[] . . . standards of performance for any existing source for any air pollutant" from a stationary source, for which other applicable "air quality criteria have not been issued." *Id.* § 7411(d)(1); *cf. Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008) (Thomas, J.) ("We have previously noted that '[r]ead naturally, the word "any" has an expansive meaning, that is, "one or some indiscriminately of whatever kind."'" (alteration in original) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997))).

Petitioners and their *amici* may disagree with the policy wisdom of Congress's decision in 1970 to write Section 111(d), 42 U.S.C. § 7411(d), broadly, or the EPA's decisions in 2015 about how to use it when promulgating the Clean Power Plan, or even how they speculate it may be used in the future. But those disagreements do not transform the clear into the ambiguous. "'[T]he fact that [a statute] has been applied in situations not expressly anticipated' . . . does not demonstrate ambiguity; instead, it simply 'demonstrates [the] breadth' of a legislative command." *Bostock v. Clayton Cty., Ga.*, — U.S. —, 140 S. Ct. 1731, 1749 (2020) (Gorsuch, J.) (quoting *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 499

(1985)). Section 111(d), 42 U.S.C. § 7411(d), "means what it says" and "[t]here is no basis in the text for limiting" it according to the policy preferences of Petitioners and their *amici*. *Gonzales*, 520 U.S. at 5; *see also Chamber of Com. of U.S. v. Whiting*, 563 U.S. 582, 599 (2011) (Roberts, C.J.) (rejecting narrow textual interpretation where "no such limit is remotely discernible in the statutory text").

Petitioners and their *amici*'s attempt to breathe ambiguity into the unambiguous is not persuasive. Nor is their invocation of the major questions doctrine. The major questions, or so-called "no-elephants-in-mouseholes cannon," *Bostock*, 140 S. Ct. at 1753, "recognizes that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions.'" *Id.* (quoting *Whitman*, 531 U.S. at 468). But Section 111(d), 42 U.S.C. § 7411(d), is neither vague nor ancillary. It is a core part of the regulatory scheme concerning air pollution from stationary structures. In other words, the EPA's authority under Section 111 may well be "an elephant. But where's the mousehole?" *Bostock*, 140 S. Ct. at 1753.[3]

[3] *Amici* respectfully submit that the major questions doctrine is inapplicable in this case for several reasons. First, as explained above,
(continued…)

B. Congress recently reaffirmed its intent to confer such authority on the EPA under Section 111(d) of the Clean Air Act.

The only other legislative enactment that speaks directly to the scope of Section 111(d), 42 U.S.C. § 7411(d), is the Joint Resolution Providing for Congressional Disapproval under Chapter 8 of Title 5, United States Code, of the Rule Submitted by the Environmental Protection Agency relating to "Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources Review," Pub. L. No. 117-23, 135 Stat. 295 [*hereinafter*, the "Congressional Disapproval Resolution"]. The Congressional Disapproval Resolution further reinforces that Section 111(d), 42 U.S.C. § 7411(d), conferred broad

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there is no need to consider the major questions doctrine when the statutory text is unambiguous, as it is here. *See Mass. v. EPA*, 549 U.S. 497, 529 (2007) (explaining the CAA is "unambiguous" and broadly defines "any air pollutant" to include greenhouse gas emissions). Second, no agency decision "of such economic and political significance" would implicate the major questions doctrine because the Clean Power Plan has been rescinded. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000). Third, there is no "backdrop of the [agency's] consistent and repeated statements that it lacked authority under the [authorizing statute]" that might support a narrower textual interpretation. *Id.* at 144; *see also Mass.*, 549 U.S. at 530-32 (distinguishing application of major questions doctrine to Food, Drug & Cosmetic Act in *Brown & Williamson* from application to CAA in case at bar).

statutory authority on the EPA to regulate greenhouse gases from existing stationary sources.

On June 30, 2021, the President signed into law a joint resolution of Congress, adopted by a bipartisan vote pursuant to the Congressional Review Act, disapproving a 2020 regulation promulgated by the EPA. *See* Oil and Natural Gas Sector: Emission Standards for New, Reconstructed and Modified Sources Review, 85 Fed. Reg. 57,018 (Sept. 14, 2020) [*hereinafter*, the "Methane Rescission Rule"]. The Methane Rescission Rule, among other things, concluded that "EPA is not authorized to promulgate CAA section 111(d) guidelines for existing sources" of methane. Methane Rescission Rule, 85 Fed. Reg. at 57,033. A regulation for which Congress adopts a resolution of disapproval under the Congressional Review Act "shall be treated as though such rule had never taken effect." 5 U.S.C. § 801(f)(2).

Through the Congressional Disapproval Resolution, Congress expressly rebuked the artificially narrow and incorrect interpretation of the EPA's authority under Section 111(d), 42 U.S.C. § 7411(d), that Petitioners now seek to advance in this case. To the extent there is any doubt about the intended purpose of the Congressional Disapproval

Resolution, the legislative history confirms that it was enacted to, *inter alia*, clarify the "EPA's statutory obligation to regulate existing oil and gas sources under Section 111(d). . . ." H.R. Rept. 117–64, at 4 (2021); s*ee also* 167 Cong. Rec. S2283 (daily ed. Apr. 28, 2021) (joint statement of Sens. Charles Schumer, Tom Carper, Martin Heinrich, Angus King, Edward Markey) ("In rejecting the methane rescission rule's misguided legal interpretations, the resolution clarifies our intent that EPA should regulate methane and other pollution emissions from all oil and gas sources, including production, processing, transmission, and storage segments under authority of section 111 of the Clean Air Act."); *id.* ("In addition, we intend that section 111 of the Clean Air Act obligates and provides EPA with the legal authority to regulate existing sources of methane emissions in all of these segments.").

In sum, through the Congressional Disapproval Resolution, Congress spoke again to affirm that Section 111's scope includes authority for the EPA to regulate greenhouse gas emissions from stationary sources.

C. This Court's precedents further confirm the EPA's authority to regulate greenhouse gases pursuant to the Clean Air Act.

This Court's precedents further confirm that Section 111(d), 42 U.S.C. § 7411(d), must be read as broadly authorizing the EPA to address new and evolving air pollution problems, including greenhouse gas emissions from existing stationary sources. Indeed, this Court has repeatedly affirmed the scope of the EPA's authority to regulate greenhouse gases pursuant to its authorities under the CAA. *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302 (2014) [*hereinafter*, "*UARG*"]; *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410 (2011) [*hereinafter*, "*AEP*"]; *Mass.*, 549 U.S. 497.

This Court first recognized that the CAA authorizes EPA to regulate greenhouse gases in *Massachusetts v. EPA*, which held that the use of the phrase "air pollutant," as used in 42 U.S.C. § 7521(a)(1), "unquestionably" and "unambiguous[ly]" encompasses greenhouse gases, which Congress specifically sought to address through its passage of the 1970 Amendments. *Mass.*, 549 U.S. at 506, 529 n.26, 532. The Court further explained that the CAA uses broad language to "confer the flexibility necessary to forestall . . . obsolescence." *Id.* at 532 (observing

that "without regulatory flexibility, changing circumstances and scientific developments would soon render the [CAA] obsolete").

In *AEP*, the scope of the EPA's authority to regulate greenhouse gas emissions under the CAA was again before this Court. 564 U.S. 410. This Court explained that "Congress [had] delegated to EPA the decision [of] whether and how to regulate carbon-dioxide emissions from powerplants" under the CAA, *id.* at 426, and acknowledged the common-sense rationale for doing so. As this Court further explained: "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum: As with other questions of national or international policy, informed assessment of competing interests is required," and "[t]he Clean Air Act entrusts such complex balancing to EPA in the first instance, in combination with state regulators." *Id.* at 427; *see also id.* at 428 ("It is altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions."). Moreover, this Court's decision in *AEP* pointed specifically to Section 111, 42 U.S.C. § 7411, as a provision that "speaks directly to emissions of carbon dioxide from . . . [power] plants." *Id.* at 424.

Finally, in *UARG*, this Court again confirmed that *Massachusetts v. EPA* is settled law. In validating the EPA's interpretation of the CAA to require that certain standards apply to greenhouse gases emitted from so-called "anyway" sources—facilities otherwise subject to a specific type of review and permitting—seven members of this Court rejected petitioners' "urge[s]" that the Court disallow the EPA from ever requiring certain pollution control methods for greenhouse gases. *See UARG*, 573 U.S. *at* 329, 331-32. This Court reaffirmed the EPA's authority to interpret the CAA's provisions as applying to greenhouse gas emissions from stationary sources. *See id.* at 334 (holding that "EPA may . . . continue to treat greenhouse gases as a 'pollutant subject to regulation under this chapter [of the CAA]' for" stationary sources of greenhouse gases that were already subject to relevant CAA program regulations).

Here, as in *UARG*, "[w]e are not talking about extending EPA jurisdiction over millions of previously unregulated entities, but [rather,] about . . . the demands EPA (or a state permitting authority) can make of entities already subject to its regulation." *UARG*, 573 U.S. at 332;[4] *see*

[4] To the extent that *UARG* separately held that the EPA had exceeded its statutory authority by interpreting the CAA as imposing
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also Ann E. Carlson & Megan M. Herzog, *Text in Context: The Fate of Emergent Climate Regulation After UARG and EME Homer*, 39 Harv. Envtl. L. Rev. 23, 33 (2015) ("Section 111(d) contains broad grants of authority . . . . Moreover, adding a layer of regulation to the power sector is far from a significant expansion of regulatory authority into a previously unregulated sector of the economy, as was at issue in *UARG* . . . . Power plants have been subjects of CAA regulation since the CAA's inception.").

"the PSD and Title V permitting requirements . . . to all stationary sources with the potential to emit greenhouse gases in excess of the statutory thresholds . . . ," *UARG*, 573 U.S. at 310, *amici* note that: (1) neither the PSD nor Title V programs are implicated by the ACE Rule (nor, to the extent it is even at issue, the Clean Power Plan); and (2) in this case, Section 111 applies only to categories of stationary sources the EPA determines "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b). "Source categories," including power plants, have been subject to regulation (and related litigation) under the CAA—and Section 111 in particular—for decades. *See, e.g.*, *Sierra Club v. Costle*, 657 F.2d 298, 318 (D.C. Cir. 1981); *Olijato Chapter of Navajo Tribe v. Train*, 515 F.2d 654, 656-57 (D.C. Cir. 1975), *superseded by statute on other grounds*, Pub. L. No. 95-95, § 305(c)(3), 91 Stat. 685 (1977); *cf. UARG*, 573 U.S. at 328 (noting that the PSD and Title V programs, as the EPA read the CAA at the time, would create "newfound authority to regulate millions of small sources").

Accordingly, Petitioners' artificially narrow reading of Section 111(d), 42 U.S.C. § 7411(d), is not only belied by the plain text of the statute but is also irreconcilable with this Court's prior precedents.

II. SUBSEQUENT LEGISLATIVE ENACTMENTS HAVE ONLY REINFORCED THE BROAD REGULATORY AUTHORITY ORIGINALLY CONFERRED ON THE EPA THROUGH THE CLEAN AIR ACT.

The 91 members of Congress that support Petitioners in this case seek to suggest that the passage of subsequent legislation on greenhouse gas emissions somehow evinces the intent of Congress to weaken or implicitly repeal the EPA's scope of authority under Section 111(d), 42 U.S.C. § 7411(d). *See* 91 Members Br. at 13-19.

Specifically, those members point to the FUTURE Act of 2018, Pub. L. No. 115-123, 132 Stat. 162–68 (2017), the Consolidated Appropriations Act of 2021, Pub. L. No. 116-260 (2021), 134 Stat. 2243–72, and the Infrastructure Investment and Jobs Act of 2021, Pub. L. No. 117-58, 135 Stat. 429 (2021),[5] as examples of legislation that have specifically

[5] Among other provisions, the Infrastructure Investment and Jobs Act made substantial investments that could have an enormous influence on the mix and environmental impact of power generation sources in the United States. *See* Pub. L. No. 117-58 § 40323 ($6 billion for nuclear power plant operations); (2) *id.* § 41004 ($3.5 billion for carbon capture demonstration projects); (3) *id.* § 40314 ($8 billion for

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targeted greenhouse gases, and attempt to characterize these subsequent enactments as evidence that Congress did not intend for the EPA to continue exercising its authority to regulate greenhouse gases under the CAA. That is simply not how legislation works.[6]

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clean hydrogen hubs); *id.* §§ 40101-40127 (new program, including $5 billion in grants, to modernize the electrical grid).

This Court should not circumvent the plain text to unnecessarily narrow the EPA's statutory authority before the agency has even had an opportunity to develop and promulgate any new regulations pursuant to Section 111(d) it might consider in light of these additional tools and investments. Substantial new investments in, *inter alia*, nuclear power, carbon capture and sequestration, hydrogen power, and electrical grid modernization over the next several years will likely have a material impact on the EPA's analysis of the economic impact and national energy necessity of fossil fuel-based power sources that can be regulated under Section 111(d). If some justiciable dispute arises from future regulations, those issues can be litigated at the appropriate time when there has been a complete rulemaking process.

[6] While Congress has enacted additional laws designed to specifically reduce the proliferation of greenhouse gas emissions in the United States, none of those provisions have sought to curtail, either expressly or by implication, the EPA's continuing authority to regulate greenhouse gases, pursuant to various provisions of the CAA.

For example, the FUTURE Act references the CAA only by adopting its definition of "lifecycle greenhouse gas emissions," Pub. L. No. 115-123, § 45Q(f)(3)(B)(ii), and does not create any competing duties concerning the creation of air pollution standards for existing stationary sources not otherwise regulated by the CAA.

Similarly, the Infrastructure Investment and Jobs Act only refers to the CAA to incorporate relevant statutory definitions and standards therefrom, *see* Pub. L. No. 116-260, § 11115(1)(C)(II) (amending 23

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As an initial matter, this argument misapplies the "implied repeal" doctrine. It also fundamentally misconstrues the duty of Congress to consider and adopt multi-faceted approaches to complex policy problems. Congress has done exactly that to address a complex challenge like climate change, giving federal agencies, states, municipalities, and the private sector a combination of authorities, appropriations, incentives, and duties that help to solve the problem.

To the extent the Congressional *amici* supporting Petitioners seek to invoke the doctrine of implied repeal, they have plainly failed to meet

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U.S.C. § 149 to include the definition of motor vehicles from "section 216 of the Clean Air Act"), *id.* § 11516(b)(4) (incorporating "national ambient air quality standards under section 109 of the Clean Air Act" into reports Congress will require of the Comptroller General of the United States), *id.* § 71101 (amending 42 U.S.C. § 16091 to incorporate "[a]ny air pollutant . . . listed pursuant to section 108(a) of the Clean Air Act" into the Energy Policy Act of 2005).

And finally, the Consolidated Appropriations Act of 2021, Pub. L. No. 116-260, directed the EPA to create an incentive program directed towards the development and implementation of carbon sequestration technologies, *id.*, Division S § 102, and expanded the EPA's authority to regulate hydrofluorocarbons used in manufacturing processes, *id.*, Division S § 103, making clear it was only amending "[s]ections 113, 114, 304, and 307 of the Clean Air Act," *id.*, Division S § 103, but did not amend or otherwise implicate any of the language contained in Section 111. Finally, the Consolidated Appropriations Act of 2021 made several amendments to the Energy Policy Act to improve research and incentives related to emissions reduction, *id.*, Division Z, Title IV, VI.

their "heavy burden of showing 'a clearly expressed congressional intention' that" the prior statute was impliedly repealed. *Epic Sys. Corp. v. Lewis*, — U.S. —, 138 S. Ct. 1612, 1624 (2018) (quoting *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528, 533 (1995)). Moreover, it is well-established that "[w]hen confronted with two Acts of Congress allegedly touching on the same topic, this Court is not at 'liberty to pick and choose among congressional enactments' and must instead strive 'to give effect to both.'" *Epic Sys.*, 138 S. Ct. at 1624 (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

This Court has "repeatedly stated . . . that absent 'a clearly expressed congressional intention,' . . . [a]n implied repeal will only be found where provisions in two statutes are in 'irreconcilable conflict,' or where the latter Act covers the whole subject of the earlier one and 'is clearly intended as a substitute.'" *Branch v. Smith*, 538 U.S. 254, 273 (2003) (plurality op.) (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)); *see also J.E.M. Ag Supply, Inc. v. Pioneer Hi-Bred Int'l, Inc.*, 534 U.S. 124, 142 (2001) ("The rarity with which [the Court has] discovered implied repeals is due to the relatively stringent standard for such findings, namely that there be an irreconcilable conflict between the two

federal statutes at issue." (alteration in original) (quoting *Matsushita Elec. Indus. Co., Ltd. v. Epstein*, 516 U.S. 367, 381 (1996))); Scalia & Garner, *Reading the Law: The Interpretation of Legal Texts*, at 327 ("Repeals by implication are disfavored . . . . But a provision that flatly contradicts an earlier-enacted provision repeals it.").

Implied amendments of prior statutes "are no more favored than implied repeals." *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 664 n.8 (2007); *see also, e.g.*, *Reg'l Rail Reorganization Act Cases*, 419 U.S. 102, 134 (1974) ("'A new statute will not be read as wholly or even partially amending a prior one unless there exists a 'positive repugnancy' between the provisions of the new and those of the old that cannot be reconciled.'" (quoting *In re Penn Central Transp. Co.*, 384 F. Supp. 895, 943 (Sp.Ct.R.R.R.A. 1974))).

In this case, there is no conflict between the text of Section 111(d), 42 U.S.C. § 7411(d), and any subsequent legislative enactments—including those referenced by the 91 members of Congress that support Petitioners in this case—that implement complementary strategies to tackle the policy challenge of climate change. As this Court has previously observed, it would indeed be impossible to tackle a challenge

as vast and multi-faceted as climate change without an equally multi-faceted policy response. *See Mass.*, 549 U.S. at 500 ("The Court has no difficulty reconciling Congress' various efforts to promote interagency collaboration and research to better understand climate change with the Agency's pre-existing mandate to regulate 'any air pollutant' that may endanger the public welfare."); *id.* at 529-30 ("EPA never identifies any [post-CAA] action remotely suggesting that Congress meant to curtail its power to treat greenhouse gases as air pollutants. That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant when it amended [the CAA.]").

In short, no complementary subsequent legislation references or conflicts with Section 111, 42 U.S.C. § 7411, in any way. This legislation merely shows that Congress takes climate change extremely seriously and has enacted additional legislation to complement the EPA's authority to regulate greenhouse gases, including its broad delegated authority under Section 111(d), 42 U.S.C. § 7411(d).

III. SUBSEQUENT LEGISLATIVE EFFORTS TO REPEAL OR RESTRICT THE EPA'S AUTHORITY TO REGULATE GREENHOUSE GASES THROUGH THE POLITICAL PROCESS HAVE FAILED.

Despite various invocations of the "major questions doctrine" to advance the view that issues relating to the regulation of greenhouse gases should be addressed by elected officials who are accountable to the public—the reality is that this case represents an attempt by Petitioners and their supporting *amici* to end-run and avoid the legislative process altogether, because it has not favored their interests.

Although "failed legislative proposals" are not strongly probative in interpreting other enacted statutes, *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164, 187 (1994), it is worth noting that several current and former members of Congress, including some of Petitioners' supporting *amici*, have sponsored, participated in, or otherwise supported numerous unsuccessful efforts to prevent the EPA from regulating greenhouse gases in a variety of contexts.[7]

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[7] *See, e.g.*, American Energy Renaissance Act of 2014, H.R. 4286 § 7002, S.2170 § 7002, 113th Cong. (2014) (copying language from prior proposed "Energy Tax Prevention Act," seeking to expressly forbid the EPA from taking any action "to address climate change" and redefining "air pollution" in the CAA); Stop the War on Coal Act of 2012, H.R. 3409 § 330(b), 112th Cong. (2012) (same); Grow America Act of 2012, S. 2199

(continued…)

As an example of one such proposed bill, the Electricity Security and Affordability Act. H.R. 3826, 113th Cong. (2014) [*hereinafter*, the ESAA],[8] sought to preclude the EPA from issuing any standards of performance for greenhouse gas emissions from existing stationary sources under Section 111(d) unless separate federal legislation "specif[ied] such rule's or guidelines' effective date." ESAA § 3(b). But, like all other attempts to repeal or amend the EPA's authority to regulate greenhouse gases, the ESAA never gained the support necessary to be enacted into law.

Members of Congress, including some of Petitioners' supporting *amici*, have also attempted to use the Congressional Review Act—as *amici* here successfully did through the Congressional Disapproval Resolution—to rescind what they consider to be overreaching regulations

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§ 371, 112th Cong. (2012) (same); S. Amdt. 183 to S. 439, 112th Cong. (2011) (rejected amendment to Small Business Innovation Research (SBIR) and Small Business Technology Transfer (STTR) Reauthorization Act of 2011 proposing to "prohibit" the EPA "from promulgating any regulation concerning, taking action relating to, or taking into consideration the emission of greenhouse gas to address climate change").

[8] The ESAA passed the House but was not enacted by the Senate. S. 1905, 113th Cong. (2014). Later in the 113th Congress, the ESAA was incorporated into an energy policy omnibus bill. H.R.2, §§ 212-14, 113th Cong. (2014). This legislation was not enacted either.

by the EPA like the Clean Power Plan. Though Congress passed this resolution, the President vetoed it. *See* S.J. Res. 24, 114th Cong. (2015). There was not sufficient support to override the President's veto and the resolution failed.

Members of Congress, including some of Petitioners' supporting *amici*, have also acted in their capacities as members of relevant committees responsible for oversight of the EPA to hold hearings, request information from the EPA related to its regulatory decisions, and otherwise seek to hold the agency politically accountable for what was, in their view, a supposed misuse of its statutory authority. *See, e.g.*, *The Obama Administration's Clean Power Plan*, Republican Members of the Committee on Energy and Commerce, U.S. House of Representatives, https://republicans-energycommerce.house.gov/power-plan/ (last visited Jan. 21, 2022) (describing oversight activities by members of Congress critical of the Clean Power Plan). These oversight efforts have not advanced their goal of repealing or curtailing the EPA's clear statutory authority to regulate greenhouse gas emissions under the CAA.

Having failed to achieve sufficient support to ratify these changes to the CAA through the legislative process, Petitioners and their *amici*

now turn to this Court to achieve what is fundamentally a legislative and political end through judicial means.

Where the text of a statute is clear, albeit broad, members of Congress and their constituents who disagree with an agency's use of that clearly delegated authority have numerous options before them to challenge or change that authority. Members of Congress supporting Petitioners as *amici*, among others, have used them all many times over. But where there is insufficient support in Congress to successfully effect those changes, seeking re-interpretation of the statute by this Court should not be the next step.

CONCLUSION

For these reasons, the judgment of the Court of Appeals of the District of Columbia Circuit should be affirmed.

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Respectfully submitted,

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