No. 20-1778

IN THE

Supreme Court of the United States

WESTMORELAND MINING HOLDINGS LLC,

Petitioner,

v.

UNITED STATES 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

REPLY BRIEF OF PETITIONER

MARTIN T. BOOHER
JOSHUA T. WILSON
BAKER & HOSTETLER LLP
2000 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 621-0200

MARK W. DELAQUIL
ANDREW M. GROSSMAN
Counsel of Record
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

REPLY BRIEF FOR PETITIONER

The fundamental questions presented in this case have been opined on by the last four administrations, litigated before the D.C. Circuit three times (including *en banc*), and been the subject of a stay by this Court. That the EPA's authority in this vital area *still* remain so hotly disputed underscores the need for this Court's review of the D.C. Circuit's divided decision. Rather than identify any credible reason why these issues do not merit the Court's review, Respondents seek to delay the day of reckoning. But delay would only inflict damaging uncertainty on industry and the States, frustrate investment, and require yet another years-long voyage of discovery through administrative proceedings and the courts before the very same set of issues reaches this Court again.

None of that is necessary. EPA's representation (at 18) that it is enacting yet another replacement for the CPP and ACE rules means the questions presented by the Petition—concerning EPA's authority to regulate in this area at all—remain live and important notwithstanding any adjustments EPA may make to the technical details. Effectively confirming as much, Respondents chiefly engage those questions on the merits. The Court should also proceed to the merits, lest EPA once again manage to achieve its policy objectives through attrition in the absence of lawfully exercised authority, just as it did with its Section 112 emissions limitations for coal-fired power plants. *See* Pet.4-5 n.4.

It should not be lost on the Court that EPA's brief announces the *third* major shift in climate policy for the energy sector over the past decade, none wrought

in legislation. Each respective Administration has reversed course from its predecessor by reinterpreting existing statutory language to answer a major question never addressed by Congress. The Nation's energy sector is not alone in that respect. The current Administration, for example, is currently preparing the seventh regime over the past 13 years to govern carriage of Internet traffic;[1] announced a reversal (the second in three years) on work requirements for Medicaid recipients;[2] and sought to impose a moratorium on new drilling on federal lands and waters that its predecessor permitted liberally.[3] The need for the Court to clarify when agencies may make "decisions of vast economic and political significance" in the absence of "*clear* congressional authorization" is acute. *U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting). This case is the ideal vehicle.

I. The Court's Review Is Required *Now*

Respondents contend that review of authority EPA has been attempting to exercise for a decade is prem-

---

[1] Thomas W. Hazlett, *Net Neutrality Is Far From Necessary*, *Politico* (Aug./Sept. 2021) https://reason.com/2021/08/21/net-neutrality-is-far-from-necessary/ (accessed Aug. 23, 2021).

[2] Sarah Kliff & Margot Sanger-Katz, *Biden Administration Moves to End Work Requirements in Medicaid*, N.Y. Times, Feb. 12, 2021, https://www.nytimes.com/2021/02/12/upshot/biden-medicaid-reversing-trump.html (accessed Aug. 23, 2021).

[3] Lisa Friedman*, Biden Sets in Motion Plan to Ban New Oil and Gas Leases on Federal Land*, N.Y. Times, Jan. 25, 2021, https://www.nytimes.com/2021/01/25/climate/biden-climate-change.html (accessed Aug. 23, 2021).

ature because EPA has not yet promulgated a replacement for the ACE Rule. But whether EPA uses the entirety of the vast discretion conferred by the decision below is wholly irrelevant to the questions raised by this petition, which ask whether EPA possesses any discretion in the first place.

Regardless, Respondents' wait-and-see approach is particularly irrelevant to Westmoreland's questions presented here regarding the "Section 112 Exclusion"—*i.e.*, whether EPA may use Section 111(d) to impose standards of performance on existing stationary sources that are regulated under Section 112. Although Respondents speculate that EPA could adopt a rule without addressing the scope of its new-found authority to restructure the energy system, there is no dispute that EPA will continue to regulate coal fired power plants under Section 111(d) absent this Court's intervention. BIO.18. Rather than even attempt to argue that EPA's forthcoming action could justify delay in reviewing the Section 112 Exclusion issue, Respondents focus on the merits, implicitly acknowledging that there is no principled reason to delay this Court's review of the merits.

As to the application of the major-questions doctrine, Respondents' call for delay fails on its own terms. In addition to being implausible as a matter of announced EPA policy,[4] any fair reading of the deci-

[4] It strains credulity to believe a Presidential Administration that has publicly committed to "a carbon pollution-free power sector by 2035," *see* David Vetter, "Biden Commits U.S. To Halving Greenhouse Gas Emissions By 2030," *Forbes* (Apr. 22, 2021) might choose to regulate parsimoniously now that it has been

sion below requires new standards to be *more* stringent than the ACE rule's at-the-source limits. *See* Pet.App.68a, Pet.App.90a (forbidding EPA from concluding that generation-shifting, and even efforts to offset rather than reduce emissions, exceed its authority); Pet.App.51a (finding that generation-shifting achieves far greater emission reductions than controls physically confined at or to the source). And the scope of EPA's Section 111(d) authority implicates not just power plants, but nearly all U.S. industry, from landfills to agriculture.[5]

EPA's revolving door on Section 111(d) counsels for review, not delay. The other side of EPA's "wait-and-see" approach is uncertainty and deferral of the issues presented in this petition until the next round of Section 111(d) regulations, all based on the deeply flawed decision below, followed by the possibility of a new Administration and yet another trip around the merry-go-round, further delaying any potential solutions actually within EPA's authority. There is no reason to postpone review until EPA promulgates a *third* rule regulating coal-fired power plants under Section 111(d), further pressuring industry investment decisions which must be made many years in advance.

---

directed to exercise discretion unhinged from any at-the-source limitation.

[5] *See, e.g.*, Letter from Institute for Policy Integrity, "Petition for Rulemakings and Call for Information under Section 115, Title VI, Section 111, and Title II of the Clean Air Act to Regulate Greenhouse Gas Emissions," Feb. 19, 2013, https://www.epa.gov/sites/default/files/documents/policy_integrity_omnibus_ghg_petition_under_caa.pdf (accessed 08/23/2021).

EPA's sole non-merits argument on the Section 112 Exclusion fares no better. EPA suggests (at 32–33) that the Court defer review until the conclusion of litigation concerning a Trump-era EPA rule that rescinded EPA's finding that Section 112 regulation of coal fired power plants was appropriate and necessary, but left intact EPA's Section 112 regulation of power plants. EPA did not, of course, make this argument below despite the co-pendency of those cases. And EPA neglects to inform this Court that *it has requested that the D.C. Circuit delay that litigation as well*, pending consideration of a new rule which EPA represents could replace the appropriate and necessary finding, potentially mooting that litigation. *See* Corrected Unopposed Motion to Hold the Consolidated Cases in Abeyance, *Am. Acad. of Pediatrics, et al v. Regan*, No 20-1221 (D.C. Cir. Feb. 16, 2021). EPA seeks to have its cake and eat it too. EPA's regulations of coal-fired power plants under Section 112 have been in place for a decade and speculation that (after yet another rulemaking, litigation, and potential untold further changes in EPA position) this situation could change is not reason to avoid review.

Finally, Respondents argue that reduced carbon dioxide emissions from the power sector—partly the result of investment decisions influenced by the potential need to comply with the two prior Section 111(d) rules—counsel against review. NGO BIO.3–4. Respondents' calls for delay mirror the *Michigan v. EPA* playbook (Pet.4-5 n.4), where EPA's Fabian tactics ensured implementation of a multi-billion-dollar rule notwithstanding this Court's finding that it was arbitrary and capricious. The fact that EPA's successive regulations pressured conformity with the past CPP

and ACE rules is not a reason EPA should be allowed to present yet another rule to drive industry investment decisions before this Court can review the statutory scope of EPA's authority, something that no further factual development could effect.

II. Review Is Required To Enforce the Limits on EPA's Authority the Court Below Mistakenly Discarded

No Respondent argues that the issues in this decade-long "super bowl" of climate litigation lack sufficient importance to merit this Court's review. Instead, Respondents attempt to defend the decision below on the merits, but their inability to square its holdings with the statute and this Court's precedents only confirm that the court below badly erred in shrugging off all limits on EPA's regulatory authority.

A. EPA's Section 112 Regulations Bar Double-Regulation Under Section 111(d)

A. Tellingly, not a single Respondent responds to Westmoreland's textual argument that the single instance of the word "pollutant" controls both EPA's authority under Section 111(d) and the Section 112 Exclusion, such that the provision cannot be read both to authorize regulation of non-HAPs without also prohibiting regulation of such non-HAPs emitted by Section 112-regulated sources. A single instance of a single word cannot bear two disparate meanings, and the holding of the court below that it does here is obviously wrong. Rather than defend that novel interpretative move, Respondents recycle the lower court's points on statutory history and policy, underscoring

the extent to which EPA's interpretation depends on overriding the statute's clear text.

B. EPA falsely denies (at 31) that it previously acknowledged the House amendment to reflect Congress's intentions and the Senate amendment to be a scrivener's error. EPA conceded precisely that in the same regulatory proceeding wherein it announced its current theory that Section 111(d) authorizes regulation of sources already subject to Section 112 regulation. EPA stated: "a literal reading of [the House] amendment is that a standard of performance under section 111(d) cannot be established for any air pollutant—HAP and non-HAP—emitted from a source category regulated under section 112"; "we believe that the House sought to change the focus of section 111(d) by seeking to preclude regulation of those pollutants that are emitted from a particular source category that is actually regulated under section 112"; and "it appears that the Senate amendment to section 111(d) is a drafting error and therefore should not be considered." 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005). Nonetheless, to bolster its regulatory authority, EPA purported "to give effect to both the House and Senate amendments." *Id.* EPA's attempt to aggrandize its authority by "giving effect" to a drafting error is inconsistent with this Court's long-held refusal to do so. *E.g.*, *U.S. Nat. Bank of Ore.*, 508 U.S. 439, 462 (1993). Yet, as Judge Walker explained, there is no conflict between the amendments, and even if there were, the codified reading would prevail. Pet.App.191a, 197a.

C. Non-EPA Respondents' argument concerning Section 112(d)(7) is meritless. Section 112(d)(7) operates as a savings clause for standards that *predate* a

Section 112 rule—of which there were four at the time of the 1990 Amendments—whereas the Section 111(d)(1) source-category exclusion bars new Section 111(d) standards that *postdate* Section 112 standards. Section 112(d)(7) is also substantively inapplicable because it applies only where "a more stringent emission limitation or other applicable requirement" is "established pursuant to Section 7411" or several other programs. But ACE (as well as the replacement rule EPA has committed to issuing) is not a "more stringent emission standard," because it does not establish standards for Section 112-listed pollutants.

D. Finally, Respondents repeat the D.C. Circuit's mistaken view that Congress created Section 111 to ensure that there are "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." States BIO.26; EPA BIO.4; Pet.App.124(a) (quoting S. Rep. No. 91-1196, at 20 (1970)). This "no gap" quote did not concern Section 111(d), but only former Sections 114 and 115 of the 1970 Clean Air Act. By contrast, during the 1990 Clean Air Act Amendments, Section 111(d) was considered "some obscure, never-used section of the law." Pet.8–9.

B. EPA Lacks Authority To Restructure the Energy Sector

It speaks volumes that EPA does not attempt to defend the rationale of the court below granting it unprecedented discretion to implement emissions reductions based on factors other than on-site controls. The court held that, so long as EPA considers "cost, nonair quality health and environmental impact, and energy requirements," the Clean Air Act imposed "no limits"

on EPA's authority to reorganize the energy sector under Section 111(d). Pet.App.68a. It held that even regulations mandating demand-side activities or emission-offset measures like planting trees are within EPA authority and thus must be considered. *See* Pet.App.90a (claiming EPA "tied its own hands" by considering only measures to "reduce emissions").

Respondents' contention that the decision below "establishes no new agency powers" (Power Company BIO.20) is indefensible. Never before has a court held that EPA has discretion to set a best system of emission controls unmoored from at-the-source controls. If anything, this Court's stay counseled that EPA lacks such discretion. Pet.26. EPA's hollow assurance (at 19–20) that its newly recognized power or even obligation to reorder the energy sector is somehow limited by the requirement to consider costs ignores history. The Clean Power Plan itself demonstrates that requirements to consider factors like cost do not meaningfully restrict EPA's wide-ranging discretion to restructure entire sectors of the economy in "arguably one of the most consequential rules ever proposed by an administrative agency." Pet.App.172–77a. And if the only limits on EPA's authority are self-imposed, then there are no meaningful limits. *Cf. Whitman v. Am. Trucking Assns., Inc.*, 531 U.S. 457, 472–73 (2001) (rejecting argument that EPA may self-impose limits on its authority to avoid non-delegation concerns). The court below's *carte blanche* interpretation of the Clean Air Act demonstrates that clarification of the major questions doctrine is sorely needed.

III. Respondent NGOs' Attack on Westmoreland's Standing Is Baseless

There is no merit to Respondent NGOs' contention that Westmoreland lacks Article III Standing because it is not itself a regulated power plant. This last-ditch attempt to avoid review of the Section 112 Exclusion issue was not raised below and is joined by no other Respondent, both reflecting its error. Any Section 111(d) emission guidelines for coal-fired power plants directly regulates, and disadvantages, use of the coal that Westmoreland is engaged to provide to power plants. There is no serious question that Westmoreland has standing to challenge a rule that targets its product and business.

The Court has regularly recognized the standing of parties in Westmoreland's position. Its seminal decision in *Lujan v. Defenders of Wildlife* understood that "standing is not precluded" when "the plaintiff is not himself the object of the government action or inaction he challenges." 504 U.S. 555, 562 (1992). It is enough that a party suffer an injury directly traceable to the action being challenged, even if the injury "hinge[s] on the response of the regulated…and the response of others as well." *Id.* at 562; *see also, e.g., Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 152 (1970) (standing where changed competitive field); *Barlow v. Collins*, 397 U.S. 159, 162–63 (1970) (standing based on "opportunity" for acts of others); *Sherley v. Sebelius*, 610 F.3d 69, 72 (D.C. Cir. 2010) (standing based on benefit to economic rivals); *Motor & Equip. Mfrs. Ass'n v. Nichols*, 142 F.3d 449, 457 (D.C. Cir. 1998) (standing where decreased purchases of petitioner's products by "third

party not before the court…is fairly traceable to EPA's rulemaking").

Here, Westmoreland faces an economic injury to its marketing of coal that is fairly traceable to EPA's regulation discouraging and disadvantaging the use of that precise resource. Decl. of Jeremy Cottrell at ADD6, No. 19-1140 (D.C. Cir. Aug. 13, 2020), ECF No. 1856447, ¶8. Moreover, although Westmoreland itself is not a power-plant operator, its business is directly integrated with those who are. In particular, Westmoreland is a mine-mouth owner, operating captive mines used to feed particular power plants, such that any reduction in energy generation by those plants directly harms Westmoreland. *Id*. at ¶4.

In addition, Respondent NGOs mischaracterize Westmoreland's evidence as identifying only an "illustrative scenario" of injury. Instead, it noted the ACE rule itself stated that it would cause a decrease in coal production for power sector use in *every* future time period modeled in the ACE rule over the next 15 years. 84 Fed. Reg. 32,520, 32,562 (July 8, 2019). And while all modeled impacts in the ACE rule were based on an "illustrative policy scenario," that scenario was "designed to reflect, to the extent possible, the scope and nature of the final guidelines." *Id*. The question is not whether the CPP, ACE, or its successor will injure Westmoreland, but how much. And, of course, the Court does not "require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). Indeed, "in some instances, [the Court has] found standing based on a 'substantial risk' that the harm will occur." *Id.* (citing *Monsanto*

Co. v. Geertson Seed Farms, 561 U.S. 139, 153 (2010)). Regardless, harm is certain here.

Respondent NGOs' claim (at 14) that it is "impossible to assess any claimed impacts" until a final rule is implemented is both wrong and irrelevant. Wrong, because the "uncertainty" itself "has contributed to customer decisions not to make significant investments with a corresponding reduction in the coal demand." Cottrell Decl. at ADD6 ¶7. Irrelevant, because an injury need only be "imminent," and EPA's own modeling demonstrates the imminence of the harm. *E.g.*, 84 Fed. Reg. at 32,562. Once again, Respondents are attempting to repeat their *Michigan v. EPA* strategy of leveraging uncertainty and investor pressure to meet regulations before they become enforceable or survive judicial review. *See* Pet.5. Nor is there a redressability problem. In addition to the benefit to Westmoreland of a decision holding that EPA lacks authority to regulate the principal use of its product, clarification of the scope of EPA's authority under Section 111(d) would erase this uncertainty—detrimental to Westmoreland's business—under which coal-fired plants currently operate.

CONCLUSION

The Court should grant the petition.

Respectfully Submitted,

MARTIN T. BOOHER
JOSHUA T. WILSON
BAKERHOSTETLER LLP
2000 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 621-0200

MARK W. DELAQUIL
ANDREW M. GROSSMAN
Counsel of Record
BAKERHOSTETLER LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for Petitioner

AUGUST 2021