

## SECTION 111 OF THE CLEAN AIR ACT AND BEYOND IN THE AFTERMATH OF *WEST VIRGINIA V. EPA*

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In *West Virginia v. EPA*, the Supreme Court dealt a harsh blow to the Environmental Protection Agency's (EPA) ability to address climate change. The Court held that the Agency lacked authority under § 111 of the Clean Air Act to consider the availability of renewable energy in establishing greenhouse gas (GHG) emission limits for existing power plants. While this decision will have near-term ramifications for EPA as it revises the power plant standards, the deeper doctrinal implications of *West Virginia* are equally important. In this article, we address four aspects of the case that may resonate more broadly. First, we argue that *West Virginia*'s holding should only constrain EPA's § 111 rulemaking authority if all three of the following conditions are met: the rule imposes direct (rather than indirect) restraints on source operation; it applies to existing (rather than new or modified) sources; and it implicates the major questions doctrine (MQD). Second, we assert that *West Virginia*'s development of the MQD will require lower courts to formulate clear guardrails to avoid baseless rule challenges, which are already proliferating throughout the country. Third, we highlight critical

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errors in the Court's reasoning, which lower courts must avoid repeating even while adhering to the case's central holding. Finally, we emphasize aspects of *West Virginia* that solidify EPA's Clean Air Act authority.

## INTRODUCTION

The Supreme Court's decision June 2022 in *West Virginia v. EPA* was the most significant climate-related case the country has seen in at least a decade.<sup>1</sup> It was also one of the most anticipated and analyzed Supreme Court opinions from the 2021–2022 term, garnering widespread coverage in both legal and mainstream publications across the country.<sup>2</sup> Much of the *West Virginia* commentary has focused on the holding's implications for U.S. efforts to reduce its GHG emissions and thus comply with its international climate obligations. Much discussion has also centered around the case's implications for administrative authority more broadly, asking whether and to what extent the decision could weaken federal agencies' power to safeguard public health, safety, and welfare.<sup>3</sup> Observers have also noted industry and state litigants' swift efforts to wield *West Virginia* as a powerful deregulatory cudgel in the courtroom.<sup>4</sup>

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1. *West Virginia v. EPA*, 142 S. Ct. 2587, 2587 (2022).

2. See, e.g., Kimberly Wehle, *The Supreme Court's Extreme Power Grab*, THE ATLANTIC (July 19, 2022), <https://www.theatlantic.com/ideas/archive/2022/07/west-virginia-v-epa-scotus-decision/670556/>; Bill McKibben, *The Supreme Court Tries to Overrule the Climate*, THE NEW YORKER (June 30, 2022); <https://www.newyorker.com/news/daily-comment/the-supreme-court-tries-to-overrule-the-climate>; David Wallace-Wells, *The Supreme Court's E.P.A. Decision Is More Gloom Than Doom*, N.Y. TIMES (July 1, 2022), <https://www.nytimes.com/2022/07/01/opinion/environment/supreme-court-climate-change-west-virginia-epa.html>; Ed Kilgore, *Supreme Court Ends Term by Sabotaging Fight Against Climate Change*, N.Y. MAG. (June 30, 2022), <https://nymag.com/intelligencer/2022/06/supreme-court-sabotages-epa-fight-against-climate-change.html>; Maxine Joselow, *The Supreme Court's EPA ruling was the beginning of something bigger*, WASH. POST (July 6, 2022), <https://www.washingtonpost.com/politics/2022/07/06/supreme-court-epa-ruling-was-beginning-something-bigger/>; Nicole Cantello, *After court ruling, administration must give EPA a modified plan to fight emissions*, THE HILL (July 17, 2022), <https://thehill.com/opinion/congress-blog/3563423-after-court-ruling-administration-must-give-epa-a-modified-plan-to-fight-emissions/>.

3. See, e.g., David Freeman Engstrom and John E. Priddy, *West Virginia v. EPA and the Future of the Administrative State*, STAN. L. SCH. BLOGS (July 6, 2022), <https://law.stanford.edu/2022/07/06/west-virginia-v-epa-and-the-future-of-the-administrative-state/>; Philip A. Wallace, *Will West Virginia v. EPA cripple regulators? Not if Congress steps up*, BROOKINGS (July 1, 2022), <https://www.brookings.edu/research/will-west-virginia-v-epa-cripple-regulators-not-if-congress-steps-up/>; *West Virginia v. EPA: What This Means for Federal Agency Rulemaking Going Forward*, BAKERHOSTETLER (Aug. 12, 2022), <https://www.bakerlaw.com/alerts/west-virginia-v-epa-what-this-means-federal-agency-rulemaking-going-forward>; Jennifer Danis et al., *Power to the Supreme Court: West Virginia v. EPA will have far-reaching consequences for administrative agencies*, NISKANEN CTR. (July 21, 2022), <https://www.niskanencenter.org/power-to-the-supreme-court-west-virginia-v-epa-will-have-far-reaching-consequences-for-administrative-agencies/>.

4. See, e.g., Ellie Borst, *Supreme Court climate ruling ignites deregulatory challenges*, GREENWIRE (Aug. 16, 2022) (noting the increase in court filings citing the MQD since *West Virginia*),

Each of these issues is of major interest to practitioners, regulators, and legal scholars who work on environmental and especially Clean Air Act matters, as well as to anyone who cares about preserving the ability of federal agencies to adequately protect the public. For decades, Sierra Club—whom we represent—has been at the forefront of litigation pushing for strong carbon dioxide (CO<sub>2</sub>) standards for power plants.<sup>5</sup> *West Virginia* delivered a bitter blow to our interests, as it significantly contracted the scope of EPA’s authority to reduce GHG emissions from fossil-fuel-fired power plants under § 111 of the Clean Air Act: the Agency’s primary regulatory vehicle for ensuring GHG reductions from large stationary sources of air pollution.<sup>6</sup> As a result, it will be considerably more difficult—and more expensive—for EPA to meaningfully curb climate pollution from existing fossil-fuel-fired power plants.

Specifically, *West Virginia* eliminated from EPA’s § 111 toolkit the cheapest and most efficient means of achieving emission reductions at existing units: a grid-level shifting of electricity generation away from higher-emitting facilities, like coal plants, and toward lower- or zero-emitting resources, like wind and solar units. This approach originated years earlier with the Obama-era Clean Power Plan (CPP), issued in October 2015.<sup>7</sup> The CPP was a complex § 111(d) regulation that established CO<sub>2</sub> standards for existing fossil-fuel-fired power plants.<sup>8</sup> The rule’s emission reduction targets were premised largely on new renewable energy generators’ ability to displace electricity that would otherwise have been produced by existing coal and gas units.<sup>9</sup> To achieve compliance, regulated coal and gas plants were obligated to acquire a certain quantity of tradeable credits reflecting new wind or solar generation.<sup>10</sup> Alternatively, states were given the option of adopting statewide CO<sub>2</sub> emission caps for their entire fleet of existing fossil-fuel units and then allowing units to comply by buying and selling emission allowances with one another.<sup>11</sup>

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<https://subscriber.politicopro.com/article/eenews/2022/08/16/supreme-court-climate-ruling-ignites-deregulatory-challenges-00050786>.

5. Sierra Club’s efforts to secure CO<sub>2</sub> emission reductions from power plants vis section 111 standards date back to 2002, when we sent formal notice to the Department of Justice of our intent to sue EPA over a lack of such standards. The following year, we initiated the noticed action in *Save Our Children’s Earth Found. v. EPA*, No. 03-cv-00770-CW (N.D. Cal. Feb. 21, 2003).

6. 42 U.S.C. § 7411(d).

7. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015).

8. *Id.*

9. *Id.* at 64,709, 64,803–11.

10. *Id.* at 64,709, 64,733–35.

11. *Id.* at 64,733. In this context, an “allowance” referred to an exchangeable accounting instrument that represents one unit of permissible CO<sub>2</sub> emissions in a specified period by the fossil plant that owns it. *See* 80 Fed. Reg. at 64,959. By contrast, an “emission rate credit” (or simply “credit”) referred

Industry parties and a coalition of state governments led by West Virginia brought suit as soon as the CPP was finalized. The parties argued (among many other things) that EPA’s § 111(d) authority did not permit it to link the stringency of sources’ emission reduction obligations to measures that cannot be applied to or at individual sources themselves.<sup>12</sup> According to this view, EPA could require coal and gas plants to produce electricity at a lower level of carbon intensity based on technology installed or actions taken at the units themselves; but EPA could not force them to subsidize other plants, like wind and solar units, to displace their own generation.<sup>13</sup> While the D.C. Circuit rejected the petitioners’ request for a stay of the rule pending litigation,<sup>14</sup> the Supreme Court granted it in February 2016 on the so-called “shadow docket,”<sup>15</sup> suspending the rule’s legal effect.<sup>16</sup> And although briefing and oral arguments proceeded at the D.C. Circuit in the months that followed, the court placed the litigation in abeyance in 2017 at the request of the newly installed Trump Administration without reaching a decision on the merits.<sup>17</sup> After EPA issued a rule in 2019 repealing the CPP on the same legal theory advanced by industry and the West Virginia coalition,<sup>18</sup> the court dismissed the litigation as moot.<sup>19</sup>

With the roles now swapped, many of the same parties who had defended the CPP in court—including Sierra Club—now initiated new litigation against EPA for its repeal of that regulation, which the Agency replaced with the toothless (and ironically titled) Affordable Clean Energy rule.<sup>20</sup> Unlike in the CPP litigation, the D.C. Circuit ruled on the merits of the repeal rule

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to an exchangeable accounting instrument that represents one unit of non-emitting electricity produced by a new wind or solar resource. By acquiring a credit, a fossil plant could, on paper, reduce the rate at which it emitted CO<sub>2</sub> per each unit of electrical output. *Id.* at 64,960, 64,949. Although the plant’s *actual* emission rate would have remained unchanged, the fact that it had to acquire renewable credits in order to achieve a mathematically adjusted emission rate was intended to drive further growth of renewable generation and, in turn, reduce fossil generation on the whole.

12. See, e.g., State Pet’rs’ Mot. for a Stay and for Expedited Consideration of Pet. for Review, 6–12, State of W. Virginia v. EPA, No. 15-1363 and consolidated cases (D.C. Cir. Oct. 23, 2015).

13. *Id.*

14. Order, State of W. Virginia v. EPA, No. 15-1363 and consolidated cases (D.C. Cir. Jan 21, 2016).

15. The “shadow docket” refers to the Court’s process for issuing expedited rulings outside of its normal proceedings, usually without full briefing, oral arguments, or written decisions.

16. Order in Pending Case, State of W. Virginia v. EPA, No. 15A773 (U.S. Feb. 9, 2016).

17. Order (*en banc*), State of W. Virginia v. EPA, No. 15-1363 and consolidated cases (D.C. Cir. Apr. 28, 2017).

18. Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019).

19. Order (*en banc*), State of W. Virginia v. EPA, No. 15-1363 and consolidated cases (D.C. Cir. Sept. 17, 2019).

20. See, e.g., Pet. for Review, Am. Lung Ass’n v. EPA, 985 F.3d 914 (D.C. Cir. 2021), *rev’d and remanded sub nom.* West Virginia v. EPA, 142 S. Ct. 2587 (2022).

before another change in administrations took place.<sup>21</sup> The court held in a 2-to-1 decision that the Trump EPA had misinterpreted § 111(d) as allowing it only to consider emission reduction measures that could be implemented to or at individual sources.<sup>22</sup> As such (the court reasoned), the statute did not categorically prohibit the generation-shifting approach EPA had adopted in the CPP.<sup>23</sup> The Supreme Court subsequently granted certiorari and reversed the D.C. Circuit panel, holding that “the [generation-shifting approach] identified by EPA in the CPP was [not] within the authority granted to the Agency in § 111(d) of the Clean Air Act.”<sup>24</sup>

Much of the post-*West Virginia* commentary has focused on what options EPA has left for controlling CO<sub>2</sub> emissions from the electric power sector—the nation’s largest stationary source of GHG emissions and second-largest source overall after the transportation sector. As of this publication, the Agency is expected to issue a new § 111 proposal for power plants’ CO<sub>2</sub> emissions imminently. Many have speculated as to whether EPA will look to emission reduction measures such as carbon capture and sequestration, co-firing natural gas at coal plants, aggressive efficiency upgrades, or other strategies to serve as a foundation for a new rule.<sup>25</sup> These are undoubtedly crucial concerns, and how EPA resolves them could materially affect our nation’s progress towards achieving its ambitious GHG reduction goals.

In this article, however, we focus on the broader doctrinal implications of *West Virginia* rather than its immediate impact on EPA’s regulatory choices for existing power plants. The decision raises a host of critical questions: is the generation-shifting approach that the Court jettisoned in *West Virginia* so specific to the electric power sector that the decision has little implication for other source categories? Or will the decision affect EPA’s regulatory approaches in other sectors, like petroleum refineries, aluminum and glass production, and the oil and gas industry? Looking beyond § 111, will the Court’s decision—which, according to Justice Kagan’s dissent, “announce[d] the arrival of the ‘major questions doctrine,’”<sup>26</sup>—open the floodgates for industry litigants to bring major questions challenges to public health, safety, and welfare regulations? If so, how might those efforts be opposed? Will lower courts repeat the serious

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21. Am. Lung Ass’n, 985 F.3d at 958.

22. *Id.*

23. *Id.*

24. *West Virginia*, 142 S. Ct. at 2615–16.

25. See e.g., Dana Nuccitelli, *What’s Next After Supreme Court’s Climate Ruling?*, YALE CLIMATE CONNECTIONS (July 11, 2022), <https://yaleclimateconnections.org/2022/07/whats-next-after-supreme-courts-climate-ruling/>; Lesley Clark, *Supreme Court Restricts EPA’s Ability to Go Big on Climate*, E&E NEWS: CLIMATEWIRE (July 1, 2022), <https://www.eenews.net/articles/supreme-court-restricts-epas-ability-to-go-big-on-climate/> (depicting different options that EPA could pursue in the wake of *West Virginia*).

26. *West Virginia*, 142 S. Ct. 2633–34 (Kagan, J., dissenting).

flaws in *West Virginia*'s reasoning, or will they find ways to adhere to its core holding (as they must) while avoiding replication of its logical errors? Finally, does *West Virginia* carry any positive implications for the environment and public health?

While the full ramifications of *West Virginia v. EPA* will unfold over the course of years, an early post-decisional assessment of the case is nevertheless appropriate. This is particularly true given that opponents of strong agency authority are already working—aggressively—to weaponize *West Virginia* against public health, safety, and welfare regulations.<sup>27</sup> In response, we propose four principles that, both individually and together, provide a bulwark against the most damaging interpretations of the Court's decision:

1. *West Virginia's* holding should apply only to Clean Air Act rules that meet all three of the following conditions: the rule imposes direct (rather than indirect) restraints on source operation, it applies to existing (rather than new or modified) units, and implicates the MQD;
2. Clear doctrinal guardrails are necessary to prevent overly broad application of the MQD as described in *West Virginia*;
3. The Court's reasoning in *West Virginia* exhibits significant errors, which lower courts must avoid even while adhering to the case's central holding; and
4. Aspects of *West Virginia* reiterate or solidify EPA's Clean Air Act authority and should be emphasized where relevant.

As we elaborate on these points below, we hope to offer litigators, regulators, and scholars who work on these issues an effective framework for understanding *West Virginia*. Our rubric acknowledges the reality of the decision while at the same time preserving robust agency authority to safeguard the public interest against the many challenges we face as a society.

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27. See *infra* Part II (discussing the increase in cases citing the MQD).

I. *WEST VIRGINIA* SHOULD BE UNDERSTOOD TO APPLY ONLY TO REGULATIONS THAT IMPOSE DIRECT RESTRAINTS ON UNIT OUTPUT, THAT AFFECT EXISTING SOURCES, AND THAT RAISE MAJOR QUESTIONS.

Many headlines on *West Virginia* announced that the Court limited EPA's authority to curtail power plant CO<sub>2</sub> emissions.<sup>28</sup> This is certainly true: as discussed above, the Court rejected the regulatory approach EPA adopted in the CPP,<sup>29</sup> which based CO<sub>2</sub> emission targets for existing coal and gas plants primarily on the ability of new renewable resources to displace a portion of electricity generated by fossil fuel plants.<sup>30</sup> However, as we argue in this section, *West Virginia* only concerned existing source regulations under § 111(d) and should not be interpreted to curtail EPA's authority under § 111(b) to set standards for new or modified sources. Nevertheless, proponents of deregulation will very likely seek to extend *West Virginia's* holding to the § 111(b) context and deploy it in fights against new source standards, especially those that reflect zero-emission technologies. A careful reading of the *West Virginia* opinion, the textual differences between § 111(b) and § 111(d), and long-standing precedent from lower courts all indicate that the Court's holding applies only to existing power plants. As such, *West Virginia* should not restrain EPA from using § 111(b) to phase out obsolete technologies in favor of new (and in some cases non-emitting) alternatives.

First, a quick review of the statute is in order. To reiterate, § 111 is the Clean Air Act program governing standards of performance for stationary sources of air pollution.<sup>31</sup> *West Virginia* provides a fairly detailed history and description of this program,<sup>32</sup> and we think it best to limit our discussion here to the provision's major points. First, for any listed source category, EPA must issue standards of performance—that is, limits on individual sources' emissions of air pollution—for all new and modified sources within the category.<sup>33</sup> Once EPA issues new source standards for a category, it must issue emission guidelines for existing sources within that category, but only as to pollutants (such as CO<sub>2</sub>) not covered under § 110's national ambient air quality standards program or under § 112's hazardous air pollutants program.<sup>34</sup>

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28. *See supra* note 2.

29. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,661, 64,662 (Oct. 23, 2015).

30. *See id.* at 64,795–64,811 (explaining how the regulations target existing coal and gas plants by setting targets based on the ability of renewable energy to replace part of the electricity production generated by fossil fuel plants).

31. 42 U.S.C. § 7411.

32. *West Virginia v. EPA*, 142 S. Ct. 2587, 2600–02 (2022).

33. 42 U.S.C. § 7411(b)(1)(B).

34. *Id.* § 7411(d)(1).

Like its new source standards, EPA's existing source guidelines must establish emission limits for covered units. Unlike new source standards, however, which apply directly to affected sources, EPA's emission guidelines apply only indirectly. States are first given an opportunity to develop plans that translate the guidelines' emission reduction targets into performance standards enforceable against existing sources within their borders.<sup>35</sup> While EPA retains authority to disapprove of state plans it deems unsatisfactory,<sup>36</sup> the Agency may not enforce the emission guidelines themselves against sources. However, for sources in states that choose not to participate in the program, EPA will issue a federal plan establishing enforceable standards of performance.<sup>37</sup>

Both EPA's new source performance standards and its emission guidelines must reflect "the degree of emission limitation achievable through the application of the best system of emission reduction [BSER] which (taking into account the cost of achieving such reduction and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated."<sup>38</sup> As the Court noted in *West Virginia*, the numerical target for emission reductions, and thus the Agency's selection of the BSER, "may be different for new and existing plants."<sup>39</sup>

In light of this statutory background, we now turn back to *West Virginia* itself. Notably, in deciding the case, the Court did not settle the primary statutory debate at issue both in the briefing before it and in the D.C. Circuit's decision: whether § 111 impliedly constrained EPA's selection of the BSER to measures that can be physically applied "at" and "to" each individual source.<sup>40</sup> In the context of power plant regulations, this debate was characterized as inside-the-fence vs. outside-the-fence pollution control measures. Inside-the-fence measures refer to bolt-on pollution controls, like scrubbers, as well as other on-site emission reduction measures. Outside-the-fence measures, by contrast, describe a CPP-style generation-shifting approach, which relied in some manner upon the interconnected nature of the power grid as a whole rather than pollution control methods that could be isolated to individual units.

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35. *Id.*

36. *Id.* § 7411(d)(2)(A).

37. *Id.* § 7411(d)(2)(A)–(B).

38. *Id.* § 7411(a)(1).

39. *West Virginia v. EPA*, 142 S. Ct. 2587, 2599 (2022).

40. *See, e.g.*, Br. for Pet'rs, 31–44, *West Virginia*, 142 S. Ct. 2587 (2022); Br. for the Fed. Resp'ts, 1, 24–44, *West Virginia*, 142 S. Ct. 2587 (2022); Br. of Non-Gov. Org. and Trade Ass'n. Resp'ts, 32–41, *West Virginia*, 142 S. Ct. 2587 (2022) [hereinafter Br. of NGOs] (No. 20-1530); Am. Lung Ass'n. v. EPA, 985 F.3d 914, 945–46 (D.C. Cir. 2021).



Near the end of the majority opinion, Chief Justice Roberts takes pains to point out that the Court has “no occasion to decide whether the statutory phrase ‘system of emission reduction’ refers exclusively to measures that improve the pollution performance of individual sources, such that all other actions are ineligible to qualify as the BSER.”<sup>41</sup> Rather, he asserts that “the only interpretive question before us . . . is more narrow: whether the [BSER] identified by EPA in the Clean Power Plan was within the authority granted to the Agency in § 111(d) of the Clean Air Act. For the reasons given, the answer is no.”<sup>42</sup> This maneuver by the Court leads away from a broader interpretation of the text of § 111 and toward the peculiar details of the CPP. Based on those details, can we glean any more generalized principles as to the kinds of regulatory approaches that the Court would permit or not permit under § 111?

We can, in fact, do so by reviewing the precise language the Court used in reaching its decision. The Court describes “building blocks” 2 and 3 of the CPP—the two major components of the rule’s BSER—as “generation shifting from higher-emitting to lower-emitting producers of electricity.”<sup>43</sup> Plant operators could achieve this shift by any of three avenues: (1) “reducing the regulated plant’s own production of electricity”; (2) “build[ing] a new natural gas plant, wind farm, or solar installation, or invest[ing] in someone else’s existing facility and then increas[ing] generation there”; or (3) “purchas[ing] emission allowances or credits as part of a cap-and-trade regime.”<sup>44</sup> The Court opined that the CPP’s approach would allow EPA to set the cap “wherever the agency sees fit” based on its determination of a “reasonable” amount of shift.<sup>45</sup> By contrast, under other credit-trading schemes, the emission cap reflected “the application of particular controls”<sup>46</sup> and/or “some scientific, objective criterion.”<sup>47</sup> The court thus distinguished between (on the one hand) a CPP-style rule that “simply announce[s] what the market share of coal, natural gas, wind, and solar must be, and then requir[es] plants to reduce operations or subsidize their competitors to get there,” and (on the other) “a rule that may end up causing an *incidental* loss of coal’s market share.”<sup>48</sup>

The clearest general directive we might derive from this discussion is this: EPA’s choice of the “best system” may not include measures requiring direct reductions in the operation of existing sources of pollution that are

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41. West Virginia, 142 S. Ct. at 2615 (emphasis omitted).

42. *Id.* at 2615–16.

43. *Id.* at 2603 (quoting 80 Fed. Reg. 64,512 (Sept. 20, 2016)).

44. *Id.*

45. *Id.* at 2593.

46. *Id.* at 2610.

47. *Id.* at 2615.

48. *Id.* at 2613 n.4 (emphasis added).

premised on increased operation of cleaner competing sources. Two limiting factors in this holding quickly emerge. The first and clearest of these is the distinction between measures that directly limit affected sources' levels of production and those that do so "incidental[ly]." <sup>49</sup> The *West Virginia* majority highlights this distinction in footnote 4, responding to the dissent's objection that "EPA is always controlling the mix of energy sources under [§] 111 because all of the Agency's rules impose some costs on regulated plants, and therefore (all else equal) cause those plants to lose some share of the electricity market."<sup>50</sup> *West Virginia* does not, then, restrict EPA from selecting BSER measures that damage the competitive standing of affected sources, so long as those measures are not direct restraints on the sources' output and otherwise satisfy § 111's factors.

Consider, for instance, a BSER measure that required major equipment upgrades at existing coal-fired power plants after a certain number of years, and that these upgrades entailed reasonable but non-trivial capital expenditures. Suppose, further, that most such units operated at very low profit margins and that even modest increases in capital costs made those plants uneconomic compared to other kinds of electricity generators, such that state utility regulators were unlikely to permit plant owners to recover those costs through increased electricity rates. As a result, EPA's regulation might force those units into retirement, not by directly mandating closure but by requiring control costs that pushed them into the red. Because those retirements were the incidental result of a measure geared toward cleaner source operation, nothing in *West Virginia* should be interpreted to proscribe this approach, or to limit EPA to issuing only minimally protective standards for facilities that are just teetering on the edge of economic viability due to competition from cleaner and cheaper facilities.

A second limiting principle apparent in *West Virginia* is that the decision only extends to existing source emission guidelines issued under § 111(d), and not new source performance standards issued under § 111(b). Of course, the CPP only concerned existing sources,<sup>51</sup> and so the Court had no occasion to address new source standards in its decision. The very concept of generation shifting makes little sense outside the context of existing sources: the only units that can "shift" or "reduce" their generation are those that already exist. The regulatory impacts the Court cited—plants ceasing to generate electricity, units reducing their productive output compared to prior

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49. *Id.*

50. *Id.*

51. Carbon Polluting Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units; Final Rule, 80 Fed. Reg. 64,661, 64,663 (Oct. 23, 2015) (the CPP "establish[es] . . . GHG emission guidelines for existing power plants").

operation, dozens of coal plants retiring<sup>52</sup>—are things that can only happen at existing sources; units that do not yet exist cannot cease generating, reduce their generation relative to an earlier time, or retire. It is not surprising, then, that the Court mentions § 111(b) only three times in the majority opinion—and only when describing the basic mechanics of the statute—whereas it cites § 111(d) 21 times.<sup>53</sup> Nor is it surprising that the Court frequently refers to “existing” units when characterizing the rule and/or describing its legal infirmities, at times expressly contrasting the CPP with EPA’s GHG standards for new power plants.<sup>54</sup>

This contrast between new and existing source standards is apparent in the language and structure of § 111 itself. The text of this provision reveals Congress’s particular concern with pollution from new sources and its assumption that such sources would be subject to more stringent controls than existing sources. First, § 111(b)(1)(B) requires EPA to issue new source standards within one year of listing a new source category,<sup>55</sup> whereas § 111(d) permits the Agency to regulate existing sources only in categories that are already subject to new source controls.<sup>56</sup> Second, § 111(b) does not limit the kinds of pollutants that EPA may or must address in new source standards,<sup>57</sup> while § 111(d) permits the Agency to issue existing source emission guidelines only for pollutants that are neither criteria pollutants (regulated under §§ 108–110) nor hazardous air pollutants (regulated under § 112).<sup>58</sup>

Third, under the statute, EPA directly issues and administers standards of performance for new sources.<sup>59</sup> On the other hand, the Agency only indirectly regulates existing sources through its emission guidelines, which designate the BSER and the level of pollution control that the source must achieve.<sup>60</sup> States, not EPA, are primarily responsible for issuing and administering plans that include directly enforceable standards of

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52. West Virginia, 142 S. Ct. at 2603–12.

53. See generally *id.* at 2599–2616 (noting that the Court only mentions § 111(b) when describing the function of the statute, whereas the Court mentions § 111(d) much more freely).

54. See, e.g., *id.* at 2602–03 (“The BSER that the Agency selected for existing coal-fired power plants, however, was quite different from the BSER it had chosen for new sources.”); *id.* at 2604 (The Clean Power Plan’s emission limits were “so strict that no existing coal plant would have been able to achieve them without engaging in” generation-shifting); *id.* (“Indeed, the emissions limit the Clean Power Plan established for existing power plants was actually stricter than the cap imposed by the simultaneously published standards for new plants.”); *id.* (“The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar.”); *id.* at 2612 n.3 (“Section 111(d) empowers EPA to guide States in establishing standards of performance for existing sources, not to direct existing sources to effectively cease to exist.”).

55. 42 U.S.C. § 7411(b)(1)(B).

56. *Id.* § 7411(d)(1).

57. *Id.* § 7411(b)(1)(B).

58. *Id.* § 7411(d)(1).

59. *Id.* § 7411(b)(1)(B).

60. *Id.* § 7411(d)(1).

performance. Finally, in exercising oversight over those state plans, EPA must “permit the State in applying a standard of performance to any particular source under a plan . . . to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”<sup>61</sup> Section 111(b) provides no such leeway for new source standards.

Congress recognized that new sources can generally control their emissions with greater facility and at a lower cost compared to existing sources and designed the § 111 program accordingly. Long-standing case law from the D.C. Circuit—which *West Virginia* did not question—bears this out. In *Portland Cement Association v. Ruckelshaus*, the court rejected an industry argument that “any [source] now in existence [must] be able to meet the proposed standards” for new sources.<sup>62</sup> Instead, the court held that § 111(b) “looks toward what may fairly be projected for the regulated future, rather than the state of the art at present, since it is addressed to standards for new plants—old stationary source pollution being controlled through other regulatory authority.”<sup>63</sup> In fact, as the court in *Ruckelshaus* observed, the Senate Report accompanying the Clean Air Act Amendments establishing § 111 “made clear that [Congress] did not intend” that new source BSER technology already “be in actual routine use somewhere,” only that it be available for installation in new plants.<sup>64</sup>

To extend the holding of *West Virginia* to the new source context would ignore these crucial distinctions. Nevertheless, proponents of deregulation may argue that even while *West Virginia* formally addressed § 111(d), the Court was fundamentally concerned with EPA’s efforts to overhaul an entire industrial sector. Under this view, *West Virginia* should be understood to prohibit EPA from “directing . . . [certain kinds of] sources to cease to exist,”<sup>65</sup> even prospectively through a new source rule. In other words, EPA may require that new units within a given source category operate as cleanly as possible going forward but cannot outright prohibit any fundamental method of production from a listed category. For instance, EPA could not set a CO<sub>2</sub> standard for new power plants that only units other than coal plants could achieve.

Once again, the language of the Clean Air Act forecloses this position. Although the statute does not include a specific definition for “best system

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61. *Id.*

62. 486 F.2d 375, 391 (D.C. Cir. 1973).

63. *Portland Cement Ass’n. v. Ruckelshaus*, 486 F.2d 375, 391 (D.C. Cir. 1973); *see also* *Lignite Energy Council v. EPA*, 198 F.3d 930, 934 (D.C. Cir. 1999) (quoting *Portland Cement Association* on this point).

64. *Id.* (quoting S. Rep. No. 9-1196, 91st Cong., 2d Sess. 16 (1970)).

65. *West Virginia v. EPA*, 142 S. Ct. 2587, 2612 n.3 (2022).

of emission reduction,” § 111(a)(7) defines “technological system of continuous emission reduction”<sup>66</sup>—a term that applies to EPA’s standards in certain specified circumstances and is narrower in scope than BSER,<sup>67</sup> as it includes additional qualifying terms.<sup>68</sup> The definition provides that this kind of “system” means, among other things, “a technological process for production or operation by any source which is inherently low-polluting or nonpolluting.”<sup>69</sup> There can be little doubt, then, that Congress contemplated § 111 standards for new sources that reflect certain industrial processes while banning others. *West Virginia* limited the extent to which EPA may rely on the availability of cleaner generation in determining the quantity of CO<sub>2</sub> emission reductions required from the fleet of existing fossil-fuel-fired power plants. Yet nothing in the decision forecloses EPA from effectively requiring the use of cleaner (or even non-emitting) processes for new sources going forward, and thus functionally prohibiting the use of older and higher-emitting processes to generate the same industrial output. Any argument to the contrary would be difficult to square with the Clean Air Act text quoted above.

On multiple occasions, the D.C. Circuit has upheld § 111(b) rules that functionally banned certain types of facilities or operational practices at new sources in favor of environmentally superior alternatives. In *Portland Cement Association v. EPA*, the court upheld nitrogen oxide (NO<sub>x</sub>) standards for new Portland cement manufacturers that would have effectively prohibited the construction or modification of certain kinds of plants (long wet and long dry kilns) because of the increasing availability of an environmentally superior kind of plant (preheater/precalciner kilns).<sup>70</sup> And in *New York v. Reilly*, the court went further still, remanding EPA’s new source standards for municipal waste incinerators as arbitrary and capricious because the Agency had not properly considered an outright ban on the combustion of lead-acid vehicle batteries as a means of reducing emissions.<sup>71</sup>

Similarly, for decades, EPA’s sulfur dioxide (SO<sub>2</sub>) standards for primary copper smelters have effectively banned the construction of new reverberatory copper smelting facilities in most circumstances in favor of

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66. 42 U.S.C. § 7411(a)(7).

67. *See, e.g., id.* § 7411(h) (specifying that the best technological system of continuous emission governs EPA’s design, equipment, work practice, or operational standards when standards of performance are not feasible).

68. In her dissent, Justice Kagan argued that the term “best technological system of continuous emission reduction” includes “technological” limits that the term BSER does not. Specifically, the BSER does not include specific references to “technological” *See, e.g., West Virginia*, 142 S. Ct. at 2631–32 (Kagan, J., dissenting) (noting that although the majority opinion suggests that the BSER must be “technological” in nature under most circumstances, it does not definitively resolve this question).

69. 42 U.S.C. § 7411(a)(7)(A) (emphasis added).

70. *Portland Cement Ass’n v. EPA*, 665 F.3d 177, 190 (D.C. Cir. 2011).

71. *New York v. Reilly*, 969 F.2d 1147, 1153 (D.C. Cir. 1992).

lower-emitting flash and electric copper smelting processes.<sup>72</sup> More recently, the Agency required the use of new zero-emitting pneumatic controllers at oil and gas processing plants, barring new gas-driven devices at these sites.<sup>73</sup> Both EPA and the courts have thus long understood that the Agency is not limited to controlling new source pollution through bolt-on technology to reduce stack emissions at industrial facilities. Rather, EPA may fundamentally prohibit certain types of facilities or practices altogether if superior methods exist and otherwise meet the statutory criteria. Thus, when the majority expresses doubt in *West Virginia's* footnote 3 that EPA might have authority to “simply require[e] coal plants to become natural gas plants,”<sup>74</sup> its skepticism should be read to extend no further than the nation’s fleet of existing power plants.

As a third limiting principle, *West Virginia's* restraints on EPA’s § 111 authority should apply only to regulations that implicate major questions concerns. Throughout the opinion, the Court insists repeatedly that “extraordinary cases . . . call for a different approach” to statutory interpretation,<sup>75</sup> requiring “clear congressional authorization” to uphold the power the Agency has asserted.<sup>76</sup> Yet merely “ordinary case[s]” merit no such heightened standard of review.<sup>77</sup> The Court’s analysis of CPP-style generation shifting simply has no bearing on rules that do not carry “vast economic and political significance”<sup>78</sup> or otherwise involve a “transformative expansion [of an agency’s] regulatory authority.”<sup>79</sup>

Because the *West Virginia* majority considered the case before it to be “extraordinary,” its opinion ignored the intricate grammatical and technical arguments on the proper interpretation of § 111 that were presented in the briefing. It focused instead on the “narrow” question of whether clear congressional authorization existed for the CPP’s selection of generation shifting as an element of the BSER for existing power plants.<sup>80</sup> In the Court’s view, the rule carried tremendous economic and political ramifications and represented a transformative expansion of EPA’s power beyond its area of expertise, thus meriting a different and heightened standard of review.

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72. Standards of Performance for New Primary Copper, Zinc, and Lead Smelters, 41 Fed. Reg. 2333–34 (Jan. 15, 1976); 40 C.F.R. § 60.163(a).

73. Oil and Natural Gas Sector: Emission Standards for New, Reconstructed, and Modified Sources, 81 Fed. Reg. 35,824, 35,849 (June 3, 2016); 40 C.F.R. § 60.5390a(b)(1).

74. *West Virginia v. EPA*, 142 S. Ct. 2587, 2612 n.3 (2022).

75. *Id.* at 2608 (cleaned up).

76. *Id.* at 2609 (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

77. *Id.* at 2605, 2608 (cleaned up).

78. *Id.* at 2605.

79. *Id.* at 2610 (cleaned up).

80. *Id.* at 2615–16.

A § 111(d) rule not having transformative consequences—even one requiring existing regulated entities to operate less frequently or to be replaced with cleaner alternatives—would require a different set of interpretive tools, which the Court explicitly avoided in *West Virginia*. For this reason, the Court declined to decide whether the “best system” under § 111(d) refers “*exclusively* to measures that improve the pollution performance of individual sources,” which the Court considered “an interpretive question that is not at issue” in the case.<sup>81</sup> Accordingly, § 111(d) regulations not presenting a major question simply do not implicate the concerns raised in *West Virginia*, even if they directly restrain fundamental industrial processes or practices at existing sources.

## II. CLEAR LIMITING PRINCIPLES ARE NECESSARY TO REIN IN THE MAJOR QUESTIONS DOCTRINE AND PREVENT ITS ABUSE.

Beyond its implications for § 111, *West Virginia* concerns a critical threshold issue: when should the MQD apply in the first instance? Here, we must set aside questions of whether the doctrine is justified in “replac[ing] normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules,” as Justice Kagan notes in her scathing dissent.<sup>82</sup> As Sierra Club attorneys, we certainly agree with Justice Kagan: we see no reasoned basis for courts to apply a heightened standard of review to agency actions that are “just too new and too big a deal.”<sup>83</sup> Doing so poses a sharply asymmetric risk of toppling agency actions that move in a pro-regulatory rather than deregulatory direction.<sup>84</sup> The MQD threatens the very concerns that are central to Sierra Club’s organizational mission, and the MQD’s emergence is one of the most troubling aspects of the Roberts Court’s recent tenure.

Nevertheless, the stark reality is that the MQD not only exists but is gaining significance—the Court having deployed it three times in the last term alone.<sup>85</sup> Nor can we put much stock in the proposal offered by Professors Michael Coenen and Seth Davis, which would make the MQD

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81. *Id.* at 2615.

82. *Id.* at 2634 (Kagan, J., dissenting).

83. Thus far, eight Supreme Court cases have appeared to involve some permutation of the MQD: *West Virginia* itself, *MCI Telecommunications Corporation v. AT&T*, 512 U.S. 218 (1994), *FDA v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120 (2000), *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006), *Utility Air Regulatory Group v. EPA*, 573 U.S. 302 (2014), *King v. Burwell*, 576 U.S. 473 (2015), *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S. Ct. 2485 (2021) (*per curiam*), and *National Federation of Independent Businesses v. OSHA*, 142 S. Ct. 661 (2022) (*per curiam*). Of these eight, only *MCI Telecommunications* involved a challenge to an agency action that increased rather than decreased regulation. As for the remaining seven cases, the Court struck down the challenged action, in whole or in part, in every one except *Burwell*.

84. *West Virginia*, 142 S. Ct. at 2628 (Kagan, J., dissenting).

85. *West Virginia*, 142 S. Ct. at 2587; *Ala. Ass’n. of Realtors*, 141 S. Ct. at 2485; *Nat’l Fed’n of Indep. Bus.*, 142 S. Ct. at 661.

“the exclusive province of the Supreme Court” while prohibiting its application by lower federal courts.<sup>86</sup> While this idea is certainly appealing in theory, it is unlikely that circuit judges who are skeptical of agency authority would decline to use this powerful jurisprudential tool that the Supreme Court has handed to them. For their part, circuit judges who are more sympathetic to agency power would be equally reluctant to disregard MQD claims raised in litigation, lest they unilaterally cede this field of law to their more conservative colleagues.<sup>87</sup>

In any event, the MQD express has already departed the station with alarming dispatch. In the months since *West Virginia* was announced, industry lawyers have been papering federal court dockets with filings that assert outlandish MQD challenges against discretely targeted, garden-variety agency actions. The first month after the decision alone saw a flurry of such claims. For instance, on July 5, 2022, attorneys for a religious organization cited the case in a 28(j) letter to the 11th Circuit claiming that the MQD prohibited the Drug Enforcement Agency from making a factual inquiry into the sincerity of the group’s asserted sacramental interest in using the psychoactive brewed drink ayahuasca.<sup>88</sup> Attorneys representing the Racing Enthusiasts and Suppliers Coalition submitted a similar letter to the D.C. Circuit on July 12. That letter argued that EPA rules prohibiting owners from tampering with motor vehicle emission control systems ran afoul of the MQD insofar as it applied to cars that had been modified for amateur racing purposes.<sup>89</sup>

On July 22, attorneys for various trade groups asserted in a D.C. Circuit reply brief that an EPA rule prohibiting the use of non-recyclable containers for hydrofluorocarbons involved a claim of “unheralded power” on EPA’s part and was thus barred under *West Virginia*.<sup>90</sup> And in a July 29 reply brief submitted to the Fifth Circuit, restaurant industry attorneys cited *West Virginia* in challenging a Department of Labor guidance document that restricted employers from claiming “tip credit” (and thus paying below the

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86. Michael Coenen & Seth Davis, *Minor Courts, Major Questions*, 70 Vand. L. Rev. 777, 814–15, 820 (2017).

87. See Kent Barnetta & Christopher J. Walker III, *Short-Circuiting the New Major Questions Doctrine*, 70 VAND. L. REV. EN BANC 147, 154 (2017) (saluting the “creativity of Coenen and Davis’s proposal” but responding that “one should not so easily dismiss the benefits of further percolation [of the doctrine] in the lower courts,” as “[t]he circuit courts serve as jurisprudential laboratories for developing (or even jettisoning) legal rules and standards.”).

88. Notice of Supplemental Authority, *Soul Quest Church of Mother Earth v. Garland*, No. 20-13983 (11th Cir. July 5, 2022).

89. Notice of Supplemental Authority, *Racing Enthusiasts and Suppliers Coal. v. EPA*, No. 16-1447 (D.C. Cir. July 12, 2022). This case was dismissed on August 12 for lack of jurisdiction. Opinion, *Racing Enthusiasts and Suppliers Coal.*, No. 16-1447 (D.C. Cir. Aug. 12, 2022).

90. Pet’rs’ Final Reply Br. at 2, 4, 12, *Heating, Air-Conditioning, & Refrigeration Distrib. Int’l v. EPA*, No. 21-1251 (D.C. Cir. July 22, 2022).



federal minimum wage) for more than 20% of tipped employees' time spent on untipped activities.<sup>91</sup> These four examples reveal a clear and deeply troubling pattern: opponents of public health and safety regulations are attempting to use the MQD as a bludgeon to attack any regulation that they see as burdening their clients in some manner, no matter how narrowly applicable the regulation might be or how squarely it might fit within the agency's field of expertise. Sturdy precedential barricades in the lower courts are badly needed to protect against this onslaught and limit the scope of the MQD to the greatest extent possible.

Unfortunately, the Court's uneven MQD jurisprudence complicates this task, as there is no clear throughline linking together all the Court's MQD cases. Certainly, *West Virginia* identifies various factors that have appeared in previous MQD cases, citing rules that: assert "extravagant statutory power over the national economy";<sup>92</sup> reflect a "transformative expansion in [an agency's] regulatory authority"; rely on "long-extant" statutes or "ancillary provision[s]" of law; establish a "regulatory program that Congress had conspicuously and repeatedly declined to enact itself"; and have "been the subject of an earnest and profound debate across the country."<sup>93</sup> But these are merely descriptions of what the Court has done in different cases in the past, with no one factor dominating and no clear standard emerging.

Consider, for instance, *MCI Telecommunications v. AT&T*, in which the Court struck down a Federal Communications Commission regulation that removed tariff-filing obligations for nondominant telephone carriers.<sup>94</sup> The regulation was enacted pursuant to the Commission's authority under the Communications Act to "modify any requirement" for a regulated entity.<sup>95</sup> The Court subjected this regulation to MQD treatment (or at least a nascent form of it), even though it did not touch on issues of "profound" moral or political debate or concern a policy that Congress had "conspicuously" declined to enact.<sup>96</sup> In *FDA v. Brown & Williamson*, the Court invoked the MQD in rejecting the Food and Drug Administration's (FDA) authority to regulate tobacco products under the Food, Drug, and Cosmetics Act.<sup>97</sup> While that policy appeared to contradict a clear and affirmative legislative program enacted by Congress,<sup>98</sup> and would ostensibly have required the FDA to ban

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91. Appellants' Reply Br. at 12–16, *Restaurant Law Ctr. v. U.S. Dep't of Lab.*, No. 22-50145 (5th Cir. July 29, 2022).

92. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022) (citing *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

93. *Id.* at 2610, 2614.

94. *MCI Telecomm. Corp. v. AT&T*, 512 U.S. 218, 227 (1994).

95. *Id.*

96. *West Virginia*, 142 S. Ct. at 2614.

97. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160–61 (2000).

98. *Id.* at 137–39.

a product used daily by a large number of Americans,<sup>99</sup> the FDA did not seek authority in a merely ancillary or obscure statutory provision.<sup>100</sup>

*Gonzales v. Oregon*, in turn, relied on the MQD to reject the Department of Justice's (DOJ) authority under the Controlled Substances Act to nullify state laws authorizing physician-assisted suicide.<sup>101</sup> The DOJ's action certainly implicated a highly controversial political issue,<sup>102</sup> but did not involve an attempt by the Department to gain "extravagant statutory power over the national economy" only one state's laws were implicated, and the action did not emerge from a "little-used [statutory] backwater."<sup>103</sup> And the Internal Revenue Service (IRS) regulations at issue in *King v. Burwell* addressed issues of major economic and political import,<sup>104</sup> but implemented a regulatory program—the Affordable Care Act—that Congress had conspicuously *intended*.

While the majority claims in *West Virginia* that "scholars and jurists have recognized the common threads between those decisions,"<sup>105</sup> many *more* legal scholars have noted "the incoherence resulting from the inconsistent application of the major questions doctrine."<sup>106</sup> As Justice Kagan laments in the dissent, the MQD's applicability prong is essentially "some panoply of factors"<sup>107</sup> pointing toward "a big new thing"<sup>108</sup> implemented by a federal agency. The majority opinion in *West Virginia* provides no further instruction as to how lower courts might extract a consistent, unifying principle from this jumble of indicia. Instead, it points toward what Justice Scalia once derided as "that test most beloved by a court unwilling to be held to rules

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99. *Id.* at 137.

100. Under the Food, Drug, and Cosmetics Act, 21 U.S.C. §§ 301-399i, the FDA oversees more than 20,000 prescription drug products and over 6,700 different medical device product categories. FDA, *Fact Sheet: FDA at a Glance*, <https://www.fda.gov/media/143704/download> (last visited Feb. 16, 2023).

101. *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006).

102. *Id.* at 249.

103. *West Virginia v. EPA*, 142 S. Ct. 2587, 2613 (2022).

104. *King v. Burwell*, 576 U.S. 473, 485–86 (2015).

105. *West Virginia*, 142 S. Ct. at 2609.

106. Shany Winder, *Extraordinary Policymaking Powers of the Executive Branch: A New Approach*, 37 VA. ENV'T L.J. 207, 240 (2019); see also Ilan Wurman, *The Specification Power*, 168 U. PA. L. REV. 689, 730 (2020) (referring to "the incoherence of the major questions cases"); Joshua S. Sellers, "Major Questions" Moderation, 87 GEO. WASH. L. REV. 930, 946 (2019) ("All told, the inconsistent application of the [MQD] undermines its legitimacy."); Marla D. Tortorice, *Nondelegation and the Major Questions Doctrine: Displacing Interpretive Power*, 67 BUFF. L. REV. 1075, 1104–05 (2019) (the MQD's "inconsistencies could signal that the major questions doctrine is merely a smokescreen for policy judgments by the Court, which necessarily results in an enhancement of the Court's own interpretive power.").

107. *West Virginia*, 142 S. Ct. at 2634 (Kagan, J., dissenting).

108. *Id.* at 2638.

(and most feared by litigants who want to know what to expect): th'ol' 'totality of the circumstances' test."<sup>109</sup>

Without clear guardrails in place to avoid overapplication of the MQD, the doctrine threatens to kneecap federal administrative agencies and overextend judicial power beyond any reasonable limit. To avoid that outcome, we propose several limiting principles that resonate with many of the Court's prior MQD decisions—particularly the most recent ones. These principles would help curb the kind of grossly unrestrained MQD arguments that we have seen since *West Virginia* was decided. The points we discuss should by no means be thought of as an exhaustive list of limitations for the doctrine's application; indeed, strong arguments can and probably should be made for several others. Those we focus on here are simply ones that we consider particularly salient considering the arguments that have percolated in the courts of appeals in the immediate aftermath of *West Virginia*.

**First**, courts should not apply the MQD where an agency is operating within its core area of expertise. This does not mean that an agency's action is automatically lawful in such instances, nor that regulatory actions that extend beyond the agency's normal practice area necessarily *do* require an MQD analysis. But as a categorical matter, where an agency is operating within its fundamental sphere of competence, courts should review the action according to traditional rules of statutory interpretation, rather than the MQD's exacting demand for evidence of clear congressional intent. At the very least, courts should apply a strong presumption against MQD applicability under these circumstances.

This approach squares with previous MQD cases (including all three of those decided in 2022) in which the Court faulted agencies for veering sharply outside their traditional lanes. In *Alabama Association of Realtors v. DHHS*, the Court suggested that the Centers for Disease Control and Prevention was effectively performing the role of a national housing authority rather than a public health agency in issuing a nationwide eviction moratorium.<sup>110</sup> In *National Federation of Independent Business v. Department of Labor*, the Court criticized the Occupational Safety and Health Administration for attempting to combat a general public health crisis rather than a workplace-specific issue.<sup>111</sup> And in *West Virginia*, the Court

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109. *United States v. Mead Corp.*, 533 U.S. 218, 241 (2001) (Scalia, J., dissenting). Credit for this particular citation goes to Jay Duffy, Litigation Director of Clean Air Task Force.

110. *Ala. Ass'n of Realtors v. Dept. of Health and Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) ("It is hard to see what measures this interpretation would place outside the CDC's reach . . . . Could the CDC, for example, mandate free grocery delivery to the homes of the sick or vulnerable? Require manufacturers to provide free computers to enable people to work from home? Order telecommunications companies to provide free high-speed Internet service to facilitate remote work?").

111. *Nat'l Fed'n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 665–66 (2022).

(however questionably)<sup>112</sup> described EPA as taking on the role of a national energy czar rather than an environmental regulator.<sup>113</sup> This fact also played a significant role in earlier cases such as *Gonzales* (which described the Attorney General as acting “beyond his expertise” in concluding that the use of drugs for physician-assisted suicide was not a “legitimate medical purpose”)<sup>114</sup> and *Burwell* (which noted that the IRS “has no expertise in crafting health insurance policy of this sort” in deciding to apply MQD principles).<sup>115</sup>

The idea that the MQD should not apply when an agency is acting within its core competency also carries strong intuitive appeal. Courts have long recognized that “historical familiarity and policymaking expertise account in the first instance for the presumption that Congress delegates interpretive lawmaking power to the agency rather than to the reviewing court.”<sup>116</sup> Under the familiar *Chevron* doctrine, courts are expected to *defer* to agencies’ reasonable interpretations of ambiguous statutory language,<sup>117</sup> primarily because agencies have technical expertise on matters within their regulatory domain in a way that courts do not.<sup>118</sup> Setting aside controversies regarding the future of *Chevron*, it should not be difficult to conclude that the MQD’s *heightened* standard of review is inappropriate where the agency possesses expertise over the subject matter at hand.

**Second**, courts should not apply the MQD merely because an agency has done something new and different from what it has previously done or has asserted regulatory authority over some activity for the first time. One of the primary reasons that Congress grants agencies rulemaking authority in the first place is their “ability . . . to respond flexibly to changing conditions.”<sup>119</sup> As Judge Easterbrook has perceptively observed:

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112. As discussed in the following section, the Clean Power Plan actually trailed far behind market forces in terms of achieving a grid-level shift of energy resources, to such a degree that the Trump Administration determined that the rule would have had *no* measurable impacts on electricity generation.

113. *West Virginia v. EPA*, 142 S. Ct. 2587, 2612 (2022) (“EPA itself admitted when requesting special funding [for the Clean Power Plan], ‘Understand[ing] and project[ing] system-wide . . . trends in areas such as electricity transmission, distribution, and storage’ requires ‘technical and policy expertise *not* traditionally needed in EPA regulatory development.”) (internal citation omitted) (emphasis in original).

114. *Gonzales v. Oregon*, 546 U.S. 253, 266–67 (2006).

115. *King v. Burwell*, 576 U.S. 473, 486 (2015).

116. *Martin v. OSHA*, 499 U.S. 144, 152–53 (1991).

117. *Chevron v. NRDC*, 467 U.S. 837, 842–45 (1984).

118. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651–52 (1990) (“This practical agency expertise is one of the principal justifications behind *Chevron* deference.”) (emphasis added).

119. David Epstein & Sharyn O’Halloran, *The Nondelegation Doctrine and the Separation of Powers: A Political Science Approach*, 20 CARDOZO L. REV. 947, 954 (1999).

[o]ften statutes delegate comprehensive powers to agencies, and the meaning of the law is that agencies shall solve novel problems as they arise. Solutions may involve complex and unanticipated adjustments. Courts can be more confident that power has been delegated than that any particular exercise is “right.” Deference to the agency’s conclusion follows naturally from such a determination, for what Congress wanted to obtain is the judgment of the agency—Congress delegates precisely because it cannot foresee and resolve all problems.<sup>120</sup>

To reflexively balk at an agency’s decision to regulate some previously unrestrained activity would thus contravene not just administrative agencies’ fundamental purpose, but also “the meaning of the law” itself in many cases.<sup>121</sup> Again, this does not mean that courts must necessarily uphold the challenged agency action in such circumstances. In order to apply the MQD’s much more rigorous standard of review, however, courts should demand evidence of a truly dramatic and qualitative expansion of agency authority compared to anything it has ever claimed in the past. For example, the mere fact that EPA has endeavored to regulate non-recyclable hydrofluorocarbon containers for the first time should not qualify as “a sweeping expansion of EPA’s regulatory authority,” as refrigerant trade groups have recently argued.<sup>122</sup>

On this point, it is helpful to compare *Massachusetts v. EPA* with *Utility Air Regulatory Group v. EPA (UARG)*,<sup>123</sup> both of which concerned EPA’s authority to control GHG pollution under the Clean Air Act. In *Massachusetts*, the Court held that the Act’s statute-wide definition of “air pollutant” in § 302(g)<sup>124</sup> encompasses GHGs such as CO<sub>2</sub>, and that EPA had erred in determining otherwise when it declined to issue GHG standards for mobile sources under § 202(a)(1) of the statute.<sup>125</sup> This interpretation of the Act certainly required the Agency to do something new and different. Unlike the conventional air pollutants that EPA had previously regulated, GHGs do not jeopardize human health and welfare primarily through inhalation, but by trapping heat in the earth’s atmosphere and thus driving global climate change. But even while the Agency had never previously covered GHG emissions under the statute, the Court rejected MQD-style arguments based

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120. *Chicago Mercantile Exch. v. SEC*, 883 F.2d 537, 547 (7th Cir. 1989).

121. *Id.*

122. Pet’rs’ Final Reply Br., *supra* note 90, at 3.

123. *Massachusetts v. EPA*, 549 U.S. 497, 497 (2007); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 307 (2014).

124. 42 U.S.C. 7602(g).

125. *Massachusetts*, 549 U.S. at 528–34.

on *Brown & Williamson* that EPA and its *amici* had asserted.<sup>126</sup> Instead, the Court held that:

while the Congresses that drafted § 202(a)(1) might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete. The broad language of § 202(a)(1) reflects an intentional effort to confer the flexibility necessary to forestall such obsolescence.<sup>127</sup>

By contrast, *UARG* concerned EPA’s authority to regulate GHGs in the specific context of the Clean Air Act’s Prevention of Significant Deterioration (PSD) and Title V programs. PSD and Title V impose certain federal permitting obligations for new or modified “major” sources, defined as those emitting “any air pollutant” in quantities above 100 or 250 tons per year, depending on the source category (in the case of PSD), or 100 tons per year (in the case of Title V).<sup>128</sup> Unlike conventional pollutants such as NO<sub>x</sub> or SO<sub>2</sub>, for which 100 or 250 tons per year reflects a scientifically reasonable threshold for significance with respect to individual sources, emissions of CO<sub>2</sub> occur on a vastly greater scale. In 2021, for instance, a single coal-fired electric generating unit—General James M. Gavin Power Plant’s Unit 1—emitted more tons of CO<sub>2</sub> than the tons of NO<sub>x</sub> emitted by all sources in the country combined for that year.<sup>129</sup>

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126. See, e.g., Br. for Fed. Resp’t, 21–28, *Massachusetts*, 549 U.S. at 497 (citing *FDA v. Brown & Williamson*, 529 U.S. 120, 160–61 (2000) extensively and referring to “the enormous potential economic and political consequences of regulating in this area”); Br. for *Amicus Curiae* Pacific Legal Found. in Support of the EPA, 10, *Massachusetts*, 549 U.S. at 497 (“It is highly unlikely, therefore, that Congress would have intended to leave an issue of such magnitude to a general provision of the Clean Air Act that was never designed to address global concerns and without an express statement that the provision should be so broadly applied.”).

127. *Massachusetts*, 549 U.S. at 532.

128. 42 U.S.C. §§ 7479(1) (defining “major emitting facility” in the PSD context as those emitting above 100 tons per year of any of 27 listed categories of “air pollutants” and above 250 tons per year for all other sources of any other air pollutant), 7661(2)(B) (linking the definition of “major stationary source” in the Title V context to “the one found “in section 7602 of this title”), and 7602(j) (defining “major stationary source” and “major emitting facility” as “any stationary facility or source of air pollutants which directly emits, or has the potential to emit, one hundred tons per year or more of any air pollutant.”).

129. Compare EPA, *Clean Air Markets Program Data*, <https://campd.epa.gov/data/custom-data-download> (last visited Sept. 19, 2022) (results of data query for 2021 power plant emissions showing 8,077,531 short tons of CO<sub>2</sub> emitted by General James M. Gavin unit 1) with EPA, *National Emissions Inventory—Air Pollutant Emissions Trends Data* (.xlsx file titled National Tier 1 CAPS Trends), [https://www.epa.gov/sites/default/files/2021-03/national\\_tier1\\_caps.xlsx](https://www.epa.gov/sites/default/files/2021-03/national_tier1_caps.xlsx) (last accessed Aug. 4, 2022) (showing 7,710,000 short tons of total NO<sub>x</sub> emissions in the United States in 2021).

For PSD purposes, EPA interpreted “any air pollutant” to include GHGs based on the Court’s broad reading of “air pollutant” in *Massachusetts*. Had EPA required all new or modified sources of CO<sub>2</sub> that exceeded the statutory threshold to obtain PSD permits, the number of sources required to obtain preconstruction permits would have increased from 800 to nearly 82,000. With respect to Title V operating permits, the number of affected sources would have increased from fewer than 15,000 to over 6 million. For both programs, “the great majority” of these newly covered entities (including “retail stores, offices, apartment buildings, shopping centers, schools, and churches”) would have had no experience with air permitting of any kind.<sup>130</sup> Unsurprisingly, EPA had no intention of regulating the great majority of those sources. To avoid that outcome, the Agency finalized what it called the “Tailoring Rule,” which established emission thresholds of 75,000–100,000 tons per year of GHGs before a source triggered PSD and Title V obligations.<sup>131</sup>

On review, the Court rejected EPA’s interpretation of “any air pollutant” to include GHGs and struck down the Tailoring Rule as inconsistent with the Clean Air Act. The Court concluded that EPA had laid claim to a vastly expanded regulatory landscape, which it held to be impermissible despite the Agency’s efforts to voluntarily rein in its own authority. Finding that this “radical[] transform[ation]” of the PSD and Title V programs would “render them unworkable as written,” the Court rejected EPA’s interpretation under MQD principles.<sup>132</sup> The Court *did*, however, uphold EPA’s authority to require GHG emission controls at sources already subject to PSD permitting requirements due to their emissions of other pollutants such as NO<sub>x</sub> and SO<sub>2</sub>.<sup>133</sup> This approach, the Court found, would not cause “such a dramatic expansion of agency authority” and was “not so disastrously unworkable . . . as to convince us that EPA’s interpretation is unreasonable,” in contrast to the Agency’s interpretation of the PSD and Title V triggering provisions.<sup>134</sup>

Read in conjunction with *Massachusetts*, *UARG* suggests a very high tripwire for MQD consideration. The agency authority under review cannot merely be a “new and big” way of dealing with a “new and big problem[].”<sup>135</sup> Instead, it must entail a kind of tectonic rupture in the agency’s operations and practices under the statute in question, one that threatens to be “disastrously unworkable,” “unadministrable,” or “unrecognizable to the

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130. *Util. Air Regul. Grp. v. EPA*, 573 U.S. 322, 328 (2014).

131. Prevention of Significant Deterioration and Title V Greenhouse Gas Tailoring Rule, 75 Fed. Reg. 31,514 (June 3, 2010).

132. *Util. Air Regul. Grp.*, 573 U.S. at 320, 324.

133. *Id.* at 331.

134. *Id.* at 332.

135. *West Virginia v. EPA*, 142 S. Ct. 2587, 2628 (2022) (Kagan, J., dissenting).

Congress” that granted the agency its statutory power.<sup>136</sup> In the absence of an extra-statutory Tailoring Rule, a Clean Air Act interpretation imposing PSD and Title V permitting obligations on many thousands or millions of previously unregulated sources meets this threshold. Asserting *general* Clean Air Act authority to regulate GHGs in response to new information about the threat of climate change, or requiring GHG emission reductions at sources already subject to PSD obligations, does not.

*Third*, agency actions should not merit MQD consideration solely based on their regulatory price tag, on the fact that they apply to an entire industry, or because the regulated industry itself is big. In and of themselves, regulatory compliance costs say little to nothing about what a rule’s real-world impacts might be, and yet industry litigants frequently warn courts of dire consequences (if not outright societal collapse!) resulting from what in reality are standard-issue regulatory costs. Similarly, the size of the regulated industry and the percentage of affected firms within that industry have no inherent connection to the kinds of deep, wide-ranging disturbances to the social fabric that the Court has described (if not always correctly or cogently) in previous major questions cases. If these considerations were relevant to an MQD analysis, then agencies could only regulate minor industries, or only discrete segments of industries, without triggering the doctrine’s more demanding standard of review. Courts must require evidence of a far deeper disruption resulting from a regulation than its sticker price.

This is particularly important in light of the proliferation of MQD claims following in *West Virginia’s* wake, which rely heavily—if not entirely—on regulatory compliance costs. Consider the arguments made recently before the Fifth Circuit by industry attorneys in *Restaurant Law Center v. Department of Labor*.<sup>137</sup> In advancing MQD arguments, appellants characterized the Department of Labor’s revived “80/20” rule for tipped workers as:

a sweeping regulation that covers almost every business in the restaurant and foodservice industry, which is a major segment of the U.S. economy employing 14.7 million people (10% of the U.S. workforce). The Texas Restaurant Association alone represents members who operate in Texas’ \$70 billion restaurant and food service industry and employ 1.3 million people (12% of the state’s employment). No one, including the Department, disputes that private businesses will bear an enormous cost (\$186 million per year at a minimum) to comply with this new regulation. Indeed, the

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136. *Util. Air Regul. Grp.*, 573 U.S. at 332, 312.

137. Appellants’ Reply Br., *supra* note 91, at 1–16.



requirements of the Final Rule are so onerous that many employers have reluctantly abandoned using the tip credit altogether, which has increased their labor costs and wiped out already-thin profit margins.<sup>138</sup>

In other words, the 80/20 rule is “major”—and thus inherently suspect—because it will affect most companies operating in a large industry, raise their operating costs, and cut into their profit margins, perhaps rendering unprofitable some unspecified number of struggling companies. This breathless description could realistically apply to the vast majority of federal regulations. In *West Virginia*, the majority distinguished between “ordinary” cases, in which the traditional tools of statutory interpretation apply, and “extraordinary” cases, which merit MQD review.<sup>139</sup> While *West Virginia* may have offered little guidance toward drawing that crucial distinction, appellants’ claims in *Restaurant Law Center*, if accepted, would obliterate it altogether.

The specific facts of *Restaurant Law Center* underscore this very point. Appellants there cavil that the 80/20 rule would cost businesses approximately \$186 million per year.<sup>140</sup> This may sound “vast” from the standpoint of a single individual, family, or small business, but quite a bit less so given that the U.S. restaurant industry earned approximately \$800 billion in sales in 2021.<sup>141</sup> Under no reasonable vision of the MQD can a regulation whose annual costs amount to 0.02% of the regulated industry’s annual revenues qualify as an assertion of “unheralded regulatory power over a significant portion of the American economy.”<sup>142</sup>

Nor should compliance costs that extend even into the billions of dollars trigger the MQD without further evidence of societal disruption. In his *West Virginia* concurrence, Justice Gorsuch—joined only by Justice Alito—suggests that rules requiring “billions of dollars in spending by private persons or entities” should automatically trigger MQD analysis.<sup>143</sup> Yet against the backdrop of a nearly \$25 trillion U.S. gross domestic product (GDP),<sup>144</sup> regulatory costs on this scale often go unnoticed by consumers. For instance, EPA anticipates that its recent supplemental proposal to expand methane and volatile organic compound (VOC) standards for the oil and gas

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138. *Id.* at 15–16.

139. *West Virginia*, 142 S. Ct. at 2608.

140. Appellants’ Reply Br., *supra* note 91, at 15.

141. *National Statistics*, NAT’L REST. ASS’N, <https://restaurant.org/research-and-media/research/industry-statistics/national-statistics/> (last visited Sept. 22, 2022).

142. *West Virginia*, 142 S. Ct. at 2608 (quoting *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014)).

143. *Id.* at 2621 (Gorsuch, J., concurring).

144. *Gross Domestic Product*, FEDERAL RESERVE BANK OF ST. LOUIS-FRED, <https://fred.stlouisfed.org/series/GDP> (last visited Sept. 22, 2022).

sector would impose net compliance costs on industry of approximately \$12–14 billion cumulatively through 2035.<sup>145</sup> Yet EPA projects that these costs would increase domestic oil prices by no more than 0–10 cents per barrel through 2035 and domestic natural gas prices by 0–7 cents per thousand cubic feet.<sup>146</sup> We estimate that this would raise a typical U.S. household’s direct spending on oil, natural gas, and electricity in a given year by as little as nothing and no more than approximately \$9–11, an increase of at most 0.1–0.2%.<sup>147</sup> And EPA’s projections do not even account for the substantial net benefits of this rule, which EPA projects will outstrip net compliance costs by a three- to fourfold factor solely on the basis of monetized climate benefits.<sup>148</sup>

The proposed oil and gas rules demonstrate not only how inappropriate Justice Gorsuch’s bright-line, price-tag test would be for MQD applicability, but just how poorly equipped judges are in general to discern broad economic, political, and sociological impacts from hard regulatory statistics. This fact casts the MQD in a rather dim light, suggesting that it functions primarily as an “abstract exercise in political science detached from the ordinary role of courts as interpreters of controlling legal texts,” as one commenter aptly noted.<sup>149</sup> But while we cannot erase the doctrine itself at this point, the limiting principles we discuss above should go a long way toward filtering out many or most of the frivolous MQD challenges that opponents of regulations are guaranteed to bring in the future (and have already been asserting since *West Virginia*).

### III. COURTS MUST AVOID REPEATING WEST VIRGINIA’S LOGICAL FLAWS EVEN WHILE ADHERING TO ITS CORE HOLDING.

Among the most frustrating aspects of *West Virginia* for those of us who supported EPA’s position in that case were the Court’s frequent lapses in

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145. EPA, REGULATORY IMPACT ANALYSIS OF THE SUPPLEMENTAL PROPOSAL FOR THE STANDARDS OF PERFORMANCE FOR NEW, RECONSTRUCTED, AND MODIFIED SOURCES AND EMISSIONS GUIDELINES FOR EXISTING SOURCES: OIL AND NATURAL GAS SECTOR CLIMATE REVIEW, 14 (Nov. 2022), <https://www.epa.gov/system/files/documents/2022-12/Supplemental-proposal-ria-oil-and-gas-nsp-eg-climate-review-updated.pdf>. In this context, “net compliance costs” means the costs that owners and operators must expend to comply with the rule minus the additional revenues generated by sale of conserved gas.

146. *Id.* at 102.

147. This result is meant to reflect the oil and gas spending that directly affects typical households in a given year, including: oil and gas for home heating, hot water, and cooking; oil for gasoline consumed in light-duty vehicles; and gas used to generate electricity consumed by the residential sector. The full calculations are on file with the authors.

148. EPA, *supra* note 145, at 14.

149. Tom Merrill, *West Virginia v. EPA: An Advisory Opinion?*, THE VOLOKH CONSPIRACY (July 25, 2022), <https://reason.com/volokh/2022/07/25/west-virginia-v-epa-an-advisory-opinion/>.

reasoning—many of which Justice Kagan exposed in her dissent. At multiple junctures throughout the opinion, the Court disregarded its own precedent, failed to address counterarguments, cited incorrect facts, or simply ignored difficult points raised in the briefing. Furthermore, there remains a real risk that advocates of deregulation will transmogrify these errors into new legal principles in future cases in order to achieve their desired outcomes. The direct environmental outcome of *West Virginia*, as well as its aggressive application of MQD principles, are troubling enough; for litigants to further erode agency authority by way of the opinion’s shortcomings would compound the problem considerably.

Judges in future cases must avoid repeating these mistakes. Of course, we do not suggest that lower courts should somehow ignore or downplay *West Virginia* on account of these flaws; the case is binding law. There are, however, long-standing and sensible legal principles established in prior Supreme Court cases that remain good law and must therefore be applied.

Two concrete examples are instructive. The first concerns unenacted legislation as a factor in statutory interpretation. In *West Virginia*, the majority considered it relevant that “Congress . . . has consistently rejected proposals to amend the Clean Air Act to create such a program” as the CPP, citing the Waxman–Markey and Kerry–Boxer bills from 2009 as evidence.<sup>150</sup> It further claimed that Congress “declined to enact similar measures, such as a carbon tax,” by citing two Obama-era legislative proposals.<sup>151</sup> The majority concluded that “the fact that the same basic scheme EPA adopted has been the subject of an earnest and profound debate across the country . . . makes the oblique form of the claimed delegation all the more suspect.”<sup>152</sup>

Yet as Justice Kagan objected, the Court has “time and again” taken the exact opposite stance on the relevance of proposed (and more specifically failed) legislation to questions of statutory interpretation.<sup>153</sup> As early as 1947, the Court in *United States v. United Mine Workers of America* declined to interpret the Norris–LaGuardia Act in light of post-enactment legislative history, stating that “[w]e fail to see how the remarks of these Senators in 1943 can serve to change the legislative intent of Congress expressed in 1932.”<sup>154</sup> The Court frequently reiterated this point in the ensuing years, holding, for example in *United States v. Price* that “the views of a subsequent

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150. *West Virginia v. EPA*, 142 S. Ct. 2587, 2614 (2022) (citing American Clean Energy and Security Act of 2009, H.R. 2454, 111th Cong., 1st Sess. (2009); Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., 1st Sess. (2009)).

151. *West Virginia*, 142 S. Ct. at 2614 (citing Climate Protection Act of 2013, S. 332, 113th Cong., 1st Sess.; Save our Climate Act of 2011, H.R. 3242, 112th Cong., 1st Sess.).

152. *West Virginia*, 142 S. Ct. at 2614 (quoting *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006)) (internal quotation marks omitted).

153. *West Virginia*, 142 S. Ct. at 2641 (Kagan J., dissenting).

154. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 282 (1947).

Congress form a hazardous basis for inferring the intent of an earlier one.”<sup>155</sup> Similarly, in *Pension Benefit Guaranty Corporation v. LTV Corporation*, the Court noted that “[i]t is a particularly dangerous ground on which to rest an interpretation of a prior statute when it concerns, as it does here, a proposal that does not become law.”<sup>156</sup>

As the Court further explained in *LTV*, “[c]ongressional inaction lacks ‘persuasive significance’ because ‘several equally tenable inferences’ may be drawn from such inaction, ‘including the inference that the existing legislation already incorporated the offered change.’”<sup>157</sup> As recently as 2020, a six-justice majority in *Bostock v. Clayton County* insisted that “speculation about why a later Congress declined to adopt new legislation offers a ‘particularly dangerous’ basis on which to rest an interpretation of an existing law a different and earlier Congress did adopt.”<sup>158</sup> *Bostock* further reiterated Justice Scalia’s admonition that “[a]rguments based on subsequent legislative history . . . should not be taken seriously, not even in a footnote.”<sup>159</sup> In relying on legislative proposals from 2009–2013 to interpret statutory language passed in 1970, the *West Virginia* majority simply ignored over seven decades of precedent.

There are a host of compelling reasons not to interpret statutes through the lens of post-enactment legislative history. As the Court noted in *LTV*, when Congress declines to enact a piece of proposed legislation, it is often difficult or impossible to identify a single clear reason as to why. More importantly, it is far from clear why the political actions of senators and representatives have any relevance to a proper interpretation of laws passed by entirely different Congresses convened years or even decades earlier (a point made in *United Mine Workers*).<sup>160</sup> Furthermore, different pieces of failed legislation may point in opposite directions. For instance, in 2016, Congress passed but failed to override a presidential veto of a bill repealing the CPP,<sup>161</sup> while in 2019, a later Congress failed to enact a bill repealing the Trump Administration’s repeal of the CPP.<sup>162</sup>

Federal judges have no particular expertise in weighing the similarities and differences between failed legislative proposals and regulatory programs implemented by agencies. *West Virginia* itself readily demonstrates this fact. The bills that the majority cites to support its assertion of the MQD were

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155. *United States v. Price*, 361 U.S. 304, 313 (1960) (citations omitted).

156. *Pension Ben. Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990).

157. *Id.* (quoting *United States v. Wise*, 370 U.S. 405, 411 (1962)).

158. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020) (citations omitted).

159. *Id.* (citing *Sullivan v. Finkelstein*, 496 U.S. 617, 632 (1990) (Scalia, J., concurring)).

160. *United States v. United Mine Workers of Am.*, 330 U.S. 258, 282 (1947).

161. S.J. Res. 24, 114th Cong. (2015) (vetoed by president).

162. S.J. Res. 53, 116th Cong. (2019) (failed in Senate on vote of 41-53).

quite dissimilar from—and much broader in scope than—the CPP. While differing in important ways, each of these legislative proposals would have imposed either a limit or a per-ton fee on GHG emissions across the *entire* U.S. economy. The CPP, on the other hand, covered only existing coal- and gas-fired power plants above 25 megawatts in capacity, and in its primary rate-based form, established neither an absolute limit nor a specified monetary fee on emissions.<sup>163</sup>

Moreover, each of the bills cited in *West Virginia* included additional programs beyond a cap-and-trade or carbon tax mechanism. For example, the Waxman–Markey legislation was a sprawling, 1,400-page bill that included five titles and close to 300 subsections.<sup>164</sup> Its provisions included (but were not nearly limited to): renewable energy and energy efficiency requirements;<sup>165</sup> a national strategy for carbon capture and sequestration;<sup>166</sup> a large-scale vehicle electrification program;<sup>167</sup> support for nuclear and advanced technologies;<sup>168</sup> revised targets for building efficiency;<sup>169</sup> lighting and appliance energy efficiency programs;<sup>170</sup> support for low-income energy efficiency projects;<sup>171</sup> green job grants;<sup>172</sup> energy refund provisions;<sup>173</sup> research directives to various federal agencies to help assess, predict, and respond to climate change;<sup>174</sup> an agricultural and forestry-related offset program;<sup>175</sup> and much more. The fact that this vast overhaul of our nation’s energy economy passed the House in 2009 but stalled in the Senate simply says nothing whatsoever about the proper interpretation of *one* provision of the 1970 Clean Air Act as it applies to *one* specific source category.

It is difficult not to conclude that the *West Virginia* majority simply got this issue wrong on both the law and the facts. Long-standing and recent precedent alike instruct that failed legislation should have no bearing on statutory interpretation, and the failed bills cited in *West Virginia* were not even analogous to the CPP. Even so, proponents of deregulation are likely to cite *West Virginia* in the future to argue that failed legislation on a particular regulatory topic casts doubt on corresponding federal agency authority on that topic. Of course, lower courts may not ignore *West Virginia* on the

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163. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,716 (Oct. 23, 2015).

164. H.R. 2454, 111th Cong. (2009).

165. *Id.* § 101.

166. *Id.* § 111.

167. *Id.* § 122.

168. *Id.* §§ 181–190.

169. *Id.* § 201.

170. *Id.* §§ 211–219.

171. *Id.* § 264.

172. *Id.* §§ 421–424A.

173. *Id.* § 431.

174. *Id.* § 451.

175. *Id.* §§ 502–511.

grounds that the Court was mistaken. They can and should, however, continue to cite the *United Mine Workers–Price–LTV–Bostock* line of cases, which provide fulsome authority against citing post-enactment legislative history and remain good law.<sup>176</sup> Even if the Court erred in *West Virginia* on this point, lower courts need not repeat its mistake, and have ample support from the Court’s own decisional history to avoid doing so.

In another salient example of *West Virginia’s* flawed reasoning, the Court incorrectly focused on the legal status of the CPP itself when the actual rule under review was the Trump Administration’s rule *repealing* the CPP. In cataloging the allegedly “transform[ative]” aspects of the CPP, the Court referred to EPA’s projections in its 2015 regulatory impact analysis.<sup>177</sup> That document concluded that the rule would “entail billions of dollars in compliance costs (to be paid in the form of higher energy prices), require the retirement of dozens of coal-fired plants, and eliminate tens of thousands of jobs across various sectors.”<sup>178</sup> The Court further referred to an Energy Information Administration study that supposedly “reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many [s]tates, and would reduce GDP by at least a trillion 2009 dollars by 2040.”<sup>179</sup> Notably, this report was not included in the Joint Appendix for either *West Virginia* or *American Lung Association v. EPA* (as the case was captioned in the D.C. Circuit), and for good reason: it concerned the *proposed* CPP from 2014, which differed from the final rule in many key aspects.<sup>180</sup>

The Court suggests that these ominous projections “were never tested, because the Clean Power Plan never went into effect.”<sup>181</sup> On the contrary, these projections *were* tested—and proven startlingly incorrect—by the fact

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176. Nor can there be any serious claim that *West Virginia* tacitly abrogated these cases, both in light of the recency of *Bostock* and the oft-cited principle that the Supreme Court “does not normally overturn, or so dramatically limit, earlier authority *sub silentio*.” *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

177. *West Virginia v. EPA*, 142 S. Ct. 2587, 2604 (2022).

178. *Id.* (citing EPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE, 3–22, 3–30, 3–33, 6–24, 6–25 (Oct. 23, 2015), [https://www3.epa.gov/ttn/ecas/docs/ria/utilities\\_ria\\_final-clean-power-plan-existing-units\\_2015-08.pdf](https://www3.epa.gov/ttn/ecas/docs/ria/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf)).

179. *West Virginia v. EPA*, 142 S. Ct. at 2604 (citing DEPT. OF ENERGY, ANALYSIS OF THE IMPACTS OF THE CLEAN POWER PLAN, 21, 63–64 (May 2015), <https://www.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerplant.pdf>).

180. To cite a few examples, whereas the final Clean Power Plan established nationally uniform, rate-based CO<sub>2</sub> emission limits applicable to individual power plants, the proposed rule’s emission rates applied to state-level generating fleets and differed from one state to the next. The final rule’s emission limits also distinguished between steam-generating plants (which usually fire coal) and combustion turbines (which usually fire gas), while the proposal offered a single combined rate for both technologies. Additionally, the proposed rule’s “best system” included a fourth “building block” based on energy efficiency, which the agency excised from the final Clean Power Plan.

181. *West Virginia*, 142 S. Ct. at 2604.

that the electric sector very quickly outpaced the CPP's emission reduction targets even in the rule's absence. Had the Court bothered to consider the findings included in the 2019 CPP repeal—the rule *actually under review*—it would have concluded that the Plan itself, if implemented from that point forward, was “not expected to produce reductions beyond the baseline in most scenarios, and thus . . . *has no costs or benefits.*”<sup>182</sup> By the end of 2019, the U.S. electric sector's annual CO<sub>2</sub> emissions had fallen to 1,770 million short tons,<sup>183</sup> about 2% below the CPP's emission targets of 1,812–1,814 million metric tons for 2030.<sup>184</sup> In other words, despite EPA's triumphalist rhetoric in 2015 surrounding the CPP and its modeling outcomes, the picture in 2019 was such that “the most likely result of implementation of the CPP would be no change in emissions and therefore no cost savings or changes in health disbenefits relative to a world without the CPP.”<sup>185</sup> Far from the “trillion 2009 dollars” in depressed GDP by 2040, the CPP would have reduced GDP by exactly zero dollars.

How a rule with no discernible real-world impacts at all could be said to have “vast economic or political consequences” certainly strains reason. But rather than wrestle with this challenging question—which the environmental respondents' and EPA's briefs both addressed,<sup>186</sup> as did Justice Kagan's dissent<sup>187</sup>—the Court chose to ignore it. Instead, it cited the outdated figures from the CPP without elaboration or explanation. Advocates of deregulation might interpret this as an indication that courts may look to the maximal *theoretical* consequences of a regulation when passing judgment on it, even when the actual administrative record before the court paints a decidedly different picture. Yet nowhere did the *West Virginia* majority suggest any new doctrine or any other coherent principle to justify the decision to support its holding with stale and debunked data.

No less in major questions cases than anywhere else, courts must continue to limit their review of agency actions to the best and most

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182. EPA, REGULATORY IMPACT ANALYSIS FOR THE REPEAL OF THE CLEAN POWER PLAN, AND THE EMISSION GUIDELINES FOR GREENHOUSE GAS EMISSIONS FROM EXISTING ELECTRIC UTILITY GENERATING UNITS, 3-7 (2019) (emphasis added), [https://www.epa.gov/sites/default/files/2019-06/documents/utilities\\_ria\\_final\\_cpp\\_repeal\\_and\\_ace\\_2019-06.pdf](https://www.epa.gov/sites/default/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf).

183. See EPA, INVENTORY OF U.S. GREENHOUSE GAS EMISSIONS AND SINKS: 1990-2020, Table 2-1 (Apr. 15, 2022), <https://www.epa.gov/system/files/documents/2022-04/us-ghg-inventory-2022-main-text.pdf> (noting the Inventory lists U.S. electric power sector emissions in 2020 at 1,606 million metric tons, which converts to 1,770 million short tons). A metric ton is defined as 1,000 kilograms, while a short (or imperial) ton is defined as 2,000 pounds. Because one kilogram corresponds to approximately 2.205 pounds, one metric ton equals approximately 1.102 short tons.

184. EPA, REGULATORY IMPACT ANALYSIS FOR THE CLEAN POWER PLAN FINAL RULE, Tables ES-2, ES-3 (Oct. 23, 2015), [https://www3.epa.gov/ttnecas1/docs/ria/utilities\\_ria\\_final-clean-power-plan-existing-units\\_2015-08.pdf](https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-clean-power-plan-existing-units_2015-08.pdf).

185. EPA, *supra* note 183, at 2-1.

186. Br. of NGOs, *supra* note 40, at 26; Br. for the Fed. Resp'ts, *supra* note 40, at 7.

187. *West Virginia v. EPA*, 142 S. Ct. 2587, 2638 (2022) (Kagan, J., dissenting).

representative data from the administrative record in the rule *actually before the court* and *actually relied on by the agency*. This is no controversial idea, but again one that stretches back at least 75 years. In the Truman-era *SEC v. Chenery Corporation*, the Court ruled that “a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.”<sup>188</sup> It is not a court’s job to cherry-pick documents from the administrative record that support its decision while ignoring other, more authoritative documents that conflict with it. By adhering to their traditional, constrained role in record review cases, courts can avoid the temptation to make up their own minds as to what the consequences of a regulation might be or conduct their analysis on theoretical (or even disproven) outcomes rather than actual ones.

#### IV. ASPECTS OF WEST VIRGINIA ACTUALLY REITERATE OR SOLIDIFY EPA’S SECTION 111 AUTHORITY.

There is no getting around the fact that *West Virginia* was and remains a bitter pill to swallow for those who support strong agency authority to protect public health, safety, and welfare. The decision will make it decidedly tougher for EPA to achieve significant CO<sub>2</sub> emission reductions from the nation’s fleet of existing coal- and gas-fired power plants at a reasonable cost. No less dismaying, *West Virginia* signals the Supreme Court’s intention to crack down on the executive branch’s regulatory authority more vigorously than it has at any point since the 1930s.<sup>189</sup> The road toward a better society is now fraught with hazards that were not there even a few years ago.

There are nevertheless some positive aspects of *West Virginia* that deserve our attention. The most noteworthy of these pertains to the balance of power between EPA and state governments in establishing existing sources’ substantive emission reduction obligations under § 111(d) of the Clean Air Act.<sup>190</sup> A paradigmatic example of cooperative federalism, § 111(d) grants EPA the task of selecting the “best system of emission reduction” for eligible existing sources.<sup>191</sup> The Agency then calculates the degree of emission associated with that system, which it publishes in an emission guideline document. States then issue plans, subject to EPA’s

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188. *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947).

189. *See e.g.*, *Panama Ref. Co. v. Ryan*, 293 U.S. 388 (1935) (holding that the executive may not issue regulations without a clear directive from Congress since otherwise an agency could act with uncontrolled legislative power).

190. 42 U.S.C. § 7411(d).

191. *Id.*



approval, that must be consistent with the Agency's guidelines and include standards of performance applicable to existing sources within their borders.

With the CPP, however, certain parties—particularly the state of North Dakota—began propounding the legal theory that EPA's role under § 111(d) is essentially procedural in nature. These parties further argued that the Agency's federal emission guidelines may not “dictate a minimum required level of emission reduction” for performance standards included in state plans.<sup>192</sup> Under this vision of the statute, while EPA designates the “best system,” it “cannot transform [federal] guidelines into binding emission limitations that extinguish the States' authority to establish performance standards through their Section 111(d) plans.”<sup>193</sup>

Thus (the theory goes), EPA lacks authority to approve or reject state plans based on their adherence to substantive emission reduction targets established in the Agency's guidelines. Instead, the Agency's oversight of state plans is essentially limited to procedural considerations. Under this interpretation of the law, EPA could reject a state plan if (for instance) it lacks properly enforceable standards for every affected source, but not based on the material adequacy of those standards in relation to the degree of pollution reduction required by EPA's emission guidelines. North Dakota asserted this position in litigation over both the CPP and its repeal.<sup>194</sup> Although the D.C. Circuit did not address the question in its *American Lung Association* decision, North Dakota nevertheless pressed forward with it in its briefs before the Supreme Court.<sup>195</sup> The State also recently advanced this theory in comments on EPA's proposed § 111(d) guidelines for methane emissions from existing oil and gas infrastructure.<sup>196</sup>

Like the D.C. Circuit in *American Lung Association*, the Supreme Court in *West Virginia* did not directly address this issue (and properly so, since it played no role in EPA's repeal of the CPP in 2019). Yet the Court left no doubt as to the federal–state balance of authority under § 111(d):

Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section

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192. Pet'r State of North Dakota's Mot. for Stay of EPA's Final Rule, 16, *West Virginia v. EPA*, No. 15-1363 and consolidated cases (D.C. Cir. Oct. 29, 2015).

193. Merits Br. of the Pet'r the State of North Dakota, 43, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022).

194. *Id.*; Pet'r State of North Dakota's Mot. for Stay of EPA's Final Rule, *supra* note 192, at 15–18; Final Core Legal Issues Br. of the State of North Dakota at 15–18, *Am. Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021).

195. Merits Br. of the Pet'r the State of North Dakota, *supra* note 196, at 33–47.

196. State of North Dakota, Comments on Proposed Standards of Performance for New, Reconstructed, and Modified Sources and Emissions Guidelines for Existing Sources: Oil and Natural Gas Sector Climate Review, 7–10, EPA-HQ-OAR-2021-0317-0797 (Jan. 31, 2022), [https://downloads.regulations.gov/EPA-HQ-OAR-2021-0317-0797/attachment\\_1.pdf](https://downloads.regulations.gov/EPA-HQ-OAR-2021-0317-0797/attachment_1.pdf).

111(d). The Agency, not the States, decides the amount of pollution reduction that must ultimately be achieved. It does so by again determining, as when setting the new source rules, “the best system of emission reduction . . . that has been adequately demonstrated for [existing covered] facilities.” The States then submit plans containing the emissions restrictions that they intend to adopt and enforce in order not to exceed the permissible level of pollution established by EPA.<sup>197</sup>

This language effectively extinguishes North Dakota’s fringe theory of cooperative federalism, at least as it applies to § 111(d). EPA’s guidelines must establish binding pollution limits reflective of the “best system,” and states must adhere to those limits in the performance standards they issue for existing units within their borders. And while § 111(d) gives states the authority to grant individual sources variances from EPA’s guideline limits in certain source-specific contexts,<sup>198</sup> those limits are otherwise generally applicable and mandatory.

Another environmentally beneficial aspect of *West Virginia* is that it represents the third instance since *Massachusetts v. EPA* that the Court unquestioningly applied that case’s holding that the Clean Air Act’s statute-wide definition of “air pollutant” at § 7602(g) encompasses GHGs such as CO<sub>2</sub>.<sup>199</sup> Although none of the parties to the case asked the Court to overturn *Massachusetts*, one cannot help but notice that by the time *West Virginia* was decided, only Justice Breyer remained from the *Massachusetts* majority. The current Court has telegraphed a willingness—even an eagerness—to overturn precedents that are inconsistent with its overarching legal philosophy,<sup>200</sup> and

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197. *West Virginia*, 142 S. Ct. at 2601–02 (internal citations omitted).

198. See 42 U.S.C. § 7411(d)(1) (stating “Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.”).

199. See *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (quoting *Massachusetts v. EPA*, 549 U.S. 497, 528–29 (2007) (reiterating that the Clean Air Act “‘speaks directly’ to emissions of carbon dioxide from the defendants’ plants”)); *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 331 (2014) (holding that EPA has authority to require “best available control technology” for greenhouse gas emissions at sources that whose conventional pollutant emissions trigger the statute’s Prevention of Significant Deterioration provisions).

200. See, e.g., *Dobbs v. Jackson Women’s Health Org.*, 142 S. Ct. 2228, 2242, 2261–64 (2022) (noting “*stare decisis* . . . does not compel unending adherence to [Roe v. Wade, 410 U.S. 113 (1973)]’s abuse of judicial authority” and that the Court “must be willing to reconsider and, if necessary, overrule constitutional decisions”); *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (overturning the test from *Lemon v. Kurtzman*, 403 U.S. 602, 602 (1971) to determine whether state action satisfies the First Amendment’s Establishment Clause); *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2167 (2019) (overturning *Williamson Cnty. Reg’l Planning Comm’n v. Hamilton Bank of Johnson City* and instead

several justices have urged the Court to act much more aggressively on that front.<sup>201</sup> Yet even Justices Thomas and Gorsuch, who submitted a concurring opinion in *West Virginia* advocating a much more expansive view of the MQD, said nothing to suggest an interest in revisiting *Massachusetts*. Furthermore, the Inflation Reduction Act of 2022 included numerous amendments to the Clean Air Act expressly referencing GHG emissions and defining them as “air pollutants.”<sup>202</sup> It seems safe to say, then, that *Massachusetts v. EPA* is and will remain secure, irrespective of the Court’s current makeup. *West Virginia* only cements that conclusion.

Lastly, the Court majority declined to ground its decision in either the federalism canon or the non-delegation doctrine, largely ignoring arguments on those topics asserted by the petitioners and their *amici*.<sup>203</sup> While the majority opinion did note that the MQD reflects “separation of powers principles” in addition to “a practical understanding of legislative intent,” it otherwise did not appeal to constitutional considerations.<sup>204</sup> The Court did not suggest, for instance—as Judge Walker did in his *American Lung Association* dissent<sup>205</sup>—that § 111(d) would have violated the non-delegation doctrine had it permitted (without necessarily requiring) a CPP-style generation-shifting approach. Furthermore, as noted previously, only Justice Thomas signed onto Justice Gorsuch’s concurrence, which extensively invoked constitutional principles, including the non-delegation doctrine.<sup>206</sup>

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holding that property owners must assert state-level just compensation claims before bringing federal takings claims under 42 U.S.C. § 1983).

201. *See, e.g.*, Dobbs, 142 S. Ct. at 2301 (Thomas, J., concurring) (urging the Court to “reconsider all of [its] substantive due process precedents”); Berisha v. Lawson, 141 S. Ct. 2424, 2424–25 (2021) (Thomas, J., dissenting from the denial of certiorari) (urging the Court to reconsider the “actual malice” test in *New York Times v. Sullivan*, 376 U.S. 254, 280 (1964), for determining whether defamation claims asserted by public figures are permitted under the First Amendment); *Michigan v. EPA*, 576 U.S. 743, 761–64 (2015) (Thomas, J., concurring) (suggesting the Court should reconsider the level of deference they give to agencies under *Chevron v. NRDC*, 467 U.S. 837 (1984)); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149–58 (10th Cir. 2016) (Gorsuch, J., concurring) (suggesting that the Supreme Court should reconsider *Chevron*’s deferential standard for reviewing agency interpretations of ambiguous statutory language).

202. *See* Inflation Reduction Act of 2022, Pub. L. No. 117–169 (2022), 75 Stat. 1818, §§ 60101–60108, 60111–60114, 60116, 60201, 60503, 60506 (defining greenhouse gases as air pollutants).

203. *See, e.g.*, Br. for Pet’rs, *supra* note 40, at 26–31 (raising federalism canon arguments); Br. of *Amicus Curiae* Americans for Prosperity Found. in Support of Pet’rs, 8, 10, *West Virginia v. EPA*, 142 S. Ct. 2587 (2022) (No. 20-1530) (raising extensive non-delegation arguments); Br. of *Amici Curiae* Doctors for Disaster Preparedness and Eagle Forum Educ. & Legal Def. Fund in Support of Pet’rs, 3, *West Virginia*, 142 S. Ct. at 2587 (asserting non-delegation arguments and decrying the “tyranny by edict of the administrative state”).

204. *West Virginia*, 142 S. Ct. at 2609.

205. *Am. Lung Ass’n*, 985 F.3d 914, 1002 (D.C. Cir. 2021) (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part).

206. *West Virginia*, 142 S. Ct. at 2616–17 (Gorsuch, J., concurring).

Some of the other justices in the majority may hold similar beliefs,<sup>207</sup> and may be prepared to breathe new life into the non-delegation doctrine under certain circumstances.<sup>208</sup> Yet the fact that they chose not to join Justice Gorsuch’s concurrence indicates that a majority of justices do not consider EPA’s Clean Air Act authority the right vehicle to achieve those ends.

#### CONCLUSION

It will be some time before the dust kicked up by *West Virginia v. EPA* fully settles. In the meantime, EPA continues pressing forward with the development of a revised § 111(d) rule for existing power plants. With generation-shifting and any form of direct reduced utilization off the table, the Agency must look to source-specific measures to achieve emission reductions that are commensurate with the scope of the climate crisis (or, perhaps more specifically, to the contribution of existing U.S. coal and gas plants to global climate change). It remains to be seen whether a § 111 rule that formally complies with *West Virginia*—one based on “measures that would reduce pollution by causing the regulated source[s] [themselves] to operate more cleanly”<sup>209</sup>—will nonetheless run into the buzzsaw of the major questions doctrine. Will the Court activate this interpretive methodology once again if EPA’s new rule imposes significant compliance costs on industry, or if it results in the closure or operational curtailment of too many fossil fuel units? Time will certainly tell. The principles we have laid out in this article, though, would impose a lofty threshold before a court could reject a regulation on those grounds. It is our hope that these concepts, and similar ones, begin to take root in legal decisions—both regarding § 111 and administrative law more broadly—in the months and years to come.

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207. See *Nat’l Fed’n of Indep. Bus. v. OSHA*, 142 S. Ct. 661, 667–70 (2022) (in which Justices Alito and Thomas signed onto a concurrence authored by Justice Gorsuch that closely mirrored Gorsuch’s concurrence in *West Virginia*).

208. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2130–31 (2019) (Alito, J., concurring) (declining to strike down the specific provision at issue on non-delegation grounds but affirming that “[i]f a majority of this Court were willing to reconsider the approach [to non-delegation] we have taken for the past 84 years, I would support that effort”); *id.* at 2131 (Gorsuch, J., dissenting) (joined by Chief Justice Roberts and Justice Thomas, articulating a broad understanding of the non-delegation doctrine); *U.S. Telecomm. Ass’n v. FCC*, 855 F.3d 381, 417 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of *pets. for rehearing en banc*) (elaborating on the constitutional limits of congressional delegation in the context of the FCC’s net neutrality rule).

209. *West Virginia*, 142 S. Ct. at 2610.