Nos. 20-1530, 20-1531, 20-1778, 20-1780

IN THE **Supreme Court of the United States**

WEST VIRGINIA, ET AL., *Petitioners*,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*,

THE NORTH AMERICAN COAL CORPORATION, *Petitioners*,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*,

WESTMORELAND MINING HOLDINGS LLC, *Petitioner*,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*,

NORTH DAKOTA, *Petitioner*,
v.
ENVIRONMENTAL PROTECTION AGENCY, ET AL., *Respondents*.

On Writs of Certiorari to the United States Court of Appeals for the D.C. Circuit

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

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The National Federation of Independent Business Small Business Legal Center (NFIB SBLC) is a nonprofit, public-interest law firm, established to provide legal resources and be the voice for small businesses in the nation's courts. NFIB is the nation's leading small business association, representing members in Washington and all fifty state capitals. Founded in 1943 as a nonprofit, nonpartisan

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[1] Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certify that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. To fulfill its role as the voice for small business, the NFIB SBLC frequently files amicus briefs in cases that affect small businesses.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The EPA does not have the vast authority the D.C. Circuit purported to give it. When the EPA promulgated the Clean Power Plan (CPP), it created significant federalism issues by requiring broad changes to the energy industry at the state level. It coerced States to comply with the EPA's guidelines by creating implementation plans that would cripple state energy programs if left unchecked. The CPP also violated separation-of-powers principles by encroaching on powers granted to the legislative branch. The EPA needed clear authorization from Congress before it could impose such economically and politically significant regulations on the energy industry. For these reasons, among others, the EPA correctly repealed the CPP as an improper exercise of regulatory power unauthorized by statute. But the D.C. Circuit stunningly held that the EPA could not so limit itself.

If left in place, that decision will have dire consequences for America's small businesses. In addition to causing thousands of job losses in the electricity, coal, and natural gas sectors, initial studies projected that the CPP would raise wholesale electricity's cost by hundreds of billions of dollars. But

the Biden Administration now intends to employ EPA's new-found authority to go further. If allowed to stand, the D.C. Circuit's view of EPA's authority will allow the government to subordinate important concerns to "the single overarching goal of shifting the generation of electricity to zero- or low-carbon resources." Westmoreland Pet. 21-22. That single-mindedness coupled with novel agency power will drive up energy costs and harm small businesses.

Energy costs are already one of the largest expenses for most small businesses in America. America's small businesses spend roughly $60 billion on energy each year. *See* Energy Star, *Small Businesses: An Overview of Energy Use and Energy Efficiency Opportunities*, bit.ly/3pYjKGq. Regulations that increase energy costs will impact the bottom line for nearly all of the nation's small employers—many of whom have already endured unprecedented challenges throughout the COVID-19 pandemic. Now, more than ever, small businesses cannot afford such drastic price increases. The Court should reverse the decision below.

ARGUMENT

I. The Clean Power Plan repeal was necessary because it violated principles of federalism codified in the Clean Air Act.

The authority to regulate power traditionally has been reserved to the States. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-06 (1983) (explaining the States' traditional role in regulating energy). Although the federal government has controlled interstate rates

and transmissions, issues such as the "[n]eed for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Id.* at 205.

Recognizing the States' traditional role in this area, Congress struck a necessary balance between federal and state regulation in Section 111 of the Clean Air Act. Although Section 111 contemplates "standards of performance" for both new and existing sources of power, it divides this standards-setting responsibility between the States and the federal government. The federal government takes a primary role in regulating new sources under Section 111(b), which requires the EPA to establish nationally applicable "standards of performance" for new sources. 42 U.S.C. § 7411(b)(1)(B) ("[T]he Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources ... [and] shall promulgate ... such standards ... as he deems appropriate."). For existing sources, on the other hand, the States take the lead. Section 111(d) allows the EPA to issue only regulations that "establish a procedure ... under which each State shall submit ... a plan which [] establishes standards of performance for any existing source." 42 U.S.C. § 7411(d)(1). Only in those "cases where the State fails to submit a satisfactory plan" may the EPA "prescribe a plan for a State." 42 U.S.C. § 7411(d)(2)(A). In other words, Section 111(d) allows States substantial flexibility in achieving CO_2 emissions reductions and addressing the economic interests of their utilities in the most cost-effective, investment-promoting manner.

The CPP upended Congress's careful delineation of authority. It set aggressive performance standards for new coal-fired facilities, modified and reconstructed coal-fired facilities, and new gas-fired facilities. *See* Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,512-13 (Oct. 23, 2015) (setting a standard of 1,400 lbs CO_2/MWh-g for new coal-fired facilities, 1,800 to 2,000 lbs CO_2/MWh-g for modified and reconstructed coal-fired facilities, and 1,000 lbs CO_2/MWh-g for gas-fired facilities). The EPA purported to do this under Section 111(b). Relatedly, instead of "establish[ing] a procedure" for States to submit their own plans "establish[ing] standards of performance for any existing source," the CPP set a uniform standard for every State. The EPA purported to do this under Section 111(d). Although the CPP said that its uniform performance standards for States were mere "guidelines," the CPP in effect barred States from imposing emissions standards that were less stringent than the CPP's specified national performance rates. 80 Fed. Reg. 64,870 ("Consideration of facility-specific factors and in particular, remaining useful life, does not justify a state making further adjustments to the performance rates ... that the guidelines define for affected [units] in a state and that must be achieved by the state plan."). In other words, the States had no role in setting their own "standards of performance"; they were instead left to implement the "standards of performance" that the EPA mandates.

This elimination of the States' role marked a sharp departure from the EPA's longstanding approach. In

1975, the EPA issued regulations establishing the procedure by which States submit their own standards of performance under Section 111(d). Those regulations provided that the EPA would issue an "emission guideline" that "reflects the application of the best system of emission reduction." *See* 40 C.F.R. § 60.22(a), (b)(5). But that "guideline" was just that. States could issue less stringent standards by demonstrating impossibility, unreasonable cost, or "other factors specific to the facility (or class of facilities) that make application of a less stringent standard or final compliance time significantly more reasonable." *Id.* § 60.24(f)(3). The "emission guideline," as the EPA explained, was not "a legally enforceable national emission standard." Standards of Performance for New Stationary Sources, 40 Fed. Reg. 53,340, 53,341 (Nov. 17, 1975). The EPA upended this longstanding position with the CPP, however, by issuing exactly that—a national standard.

The EPA correctly reverted to its theretofore longstanding approach in 2019 by repealing the CPP. Among other things, the EPA determined that the CPP "significantly exceeded" the agency's authority and recognized a "notable absence of a valid limiting principle." 84 Fed. Reg. 32,529-23. Lack of some limiting principle left the EPA free to eat away at the flexibility afforded States under Section 111. Repeal was thus necessary, especially in light of the EPA's role in cooperative federalism.

Courts around the country have long recognized this important role. The Clean Air Act gives States the first crack at setting standards for existing sources. For new sources, the EPA acts as the minimum

standard-setter, leaving States with discretion as to implementation. *See Bell v. Cheswick Generating Station*, 734 F.3d 188, 190 (3d Cir. 2013) ("[The Clean Air Act] employs a 'cooperative federalism' structure under which the federal government develops baseline standards that the States individually implement and enforce.") (citation omitted); *Luminant Generation Co., LLC v. United States EPA*, 675 F.3d 917, 932 (5th Cir. 2012) ("[A] cooperative federalism regime [] affords sweeping discretion to the states to develop implementation plans and assigns to the EPA the narrow task of ensuring that a state plan meets the minimum requirements of the Act."); *see also Salt Lake Cty. v. Volkswagen Grp. Of Am., Inc.*, 959 F.3d 1201, 1225 (9th Cir. 2020).

The CPP's national standard for existing sources upended the traditional "balance between federal and state power'" without a clear statement from Congress. *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021); *see also Will v. Michigan Dept. of State Police*, 491 U.S. 58, 65 (1989). But this Court will not authorize a "serious reallocation" of authority between the federal government and the States by Congress "[a]bsent a clear statement of that purpose." *Bond v. United States*, 572 U.S. 844, 866 (2014). Congress provided no such clear statement here, as the EPA recognized when in repealed the CPP.

In sum, the Clean Air Act balanced federal and State sovereignty interests by giving States the opportunity to self-regulate in accordance with federal goals—using direct federal regulation only as a "Plan B" if the States fail to act. The CPP abandoned that

congressionally-mandated balance by setting targets for individual States that force them to overhaul their energy markets and regulatory structures to reach the EPA's air quality targets. The EPA's repeal of the CPP was thus necessary. Indeed, as Judge Walker pointed out in dissent, the EPA "was required to repeal" it. App. 165a. The repeal returned the regulatory landscape to the correct balance struck by Congress. The D.C. Circuit's decision has once again upset that balance. The Court should reverse the decision below.

II. The Clean Power Plan repeal was necessary because it violated separation of powers principles.

A. The Clean Power Plan required a clear authorization from Congress to be valid.

Well aware of the dangers from consolidation of power into the hands of one branch of government, the Framers created a tripartite system with separate and distinct powers. Art. I, § 1 ("All *legislative* Powers herein granted shall be vested in a Congress[.]"); Art. II, § 1 ("The *executive* Power shall be vested in a President[.]"); Art. III, § 1 ("The *judicial* power ... shall be vested in one supreme Court, and ... inferior Courts[.]"). This was done to defend against "the very definition of tyranny." The Federalist No. 47 (James Madison). This separation of powers serves as "the absolutely central guarantee of a just Government." *Morrison v. Olson*, 487 U.S. 654, 697 (1988) (Scalia, J., dissenting). To accomplish that goal, Article I's Vesting Clause expressly forbids the President from exercising legislative powers. And this Court has "completely refute[d] the claim that the President may act as a lawmaker in the absence of a delegation of

authority or mandate from Congress." *Indep. Meat Packers Ass'n v. Butz*, 526 F.2d 228, 235 (8th Cir. 1975) (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 587-89 (1952)).

This Court has indicated that it will be especially vigilant in guarding that line in "extraordinary cases" where "there may be reason to hesitate before concluding that Congress has intended … an implicit delegation." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). When an agency claims to discover a long hidden statutory power to regulate, the Court "typically greet[s] its announcement with a measure of skepticism." *Util. Air Regulatory Grp v. EPA*, 573 U.S. 302, 324 (2014). Congress "does not … hide elephants in mouseholes." *Whitman v. Am. Trucking Assocs.*, 531 U.S. 457, 468 (2001) (citing *Brown & Williamson*, 529 U.S. at 159-60). As a result, if the issue affects "a significant portion of the American economy," *Brown & Williamson*, 529 U.S. at 159, involves "billions of dollars in spending each year," or affects "millions of people," *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015), then there must be a clear statement from Congress that an agency has the authority to regulate it. *Util. Air Regulatory Grp*, 573 U.S. at 324 (citing *Brown & Williamson*, 529 U.S. at 159). This is true "regardless of how serious the problem an administrative agency seeks to address." *Brown & Williamson*, 529 U.S. at 125 (internal quotation omitted). Agencies may not exercise their authority "in a manner that is inconsistent with the administrative structure that Congress enacted into law." *Id.*

In the CPP, however, the EPA attempted to reduce carbon dioxide emissions by regulating coal-fired facilities out of existence. Purporting to "shift[]" electric generation from fossil-fuel power plants to alternative sources, 80 Fed. Reg. 64,726, the CPP set more aggressive performance rates for existing coal-fired and gas-fired facilities than it set for new facilities—notwithstanding that existing facilities cannot retrofit to achieve the same efficiency as new ones. *Compare* 40 C.F.R. pt. 60, subpt. UUUU, tbl 1 (setting rates of 1,305 lbs CO_2/MWh for existing coal-fired facilities and 771lbs CO_2/MWh for existing gas-fired facilities), *with* 40 C.F.R. pt. 60, subpt. TTTT, tbl 1 (setting a rate of 1,400 lb CO_2/MWh for newly constructed steam generating units and integrated gasification combined cycles). In other words, the EPA based the performance standard for new facilities on the best available technology, which is unattainable for existing facilities, and then set the standard for existing facilities *even higher*. By definition, then, existing facilities could not comply with the CPP's standard. That scheme would force States to shift to other types of power to comply with CPP and to keep up with preexisting demand levels.

This shift was intentional. As the Obama Administration admitted, the CPP was meant to "aggressive[ly] transform[] … the domestic energy industry." Joby Warrick, White House set to adopt sweeping curbs on carbon pollution, Wash. Post (Aug. 1, 2015), wapo.st/31HW0Oz. And it would accomplish that goal by decimating the coal industry. Coal remains the most affordable source of power and provides about one third of the country's electricity. *See generally* Rocky Mountain Coal Institute, *Fast*

Facts About Coal, bit.ly/31Jnq6k. If the CPP had remained in place, the EPA's own analysis showed that coal-fired generating capacity would be roughly halved by 2030. *See* Clean Power Plan, Regulatory Impact Analysis, at 2-3, 3-24, 3-31 (noting a reduction from 336,000 MW in 2012 to 183,000 in 2030); *see also* Sam Batkins, *EPA's Greenhouse Gas Regulation Expects Coal Generation to Decline 48 Percent*, American Action Forum (Aug. 4, 2015), bit.ly/31O1eYU.

This would have significantly raised residential electricity rates, reduced domestic coal production 32% by 2025, and cost over $8 billion a year. *See* U.S. Energy Information Administration, Analysis of the Impacts of the Clean Power Plan, at 18, 41-42 (May 2015), bit.ly/3ICslXR, Batkins, *supra*. An industry analysis of the CPP determined that the total increased energy costs to consumers could reach $214 billion. *EPA's Clean Power Plan An Economic Impact Analysis*, NMA, 4, bit.ly/31FwBVC. And the cost to replace lost powerplant capacity could reach $64 billion. *Id.* at 6. The EPA can effect a change of this magnitude only with clear authorization from Congress. *See, e.g.*, *Util. Air Regulatory Grp.*, 573 U.S. at 324.

B. Congress did not grant the EPA authority to enact the Clean Power Plan.

The CPP's extraordinary transformation of a massive and vital industry had no clear authorization from Congress, necessitating its repeal. To start, by redefining the statutory term "standard of performance," the CPP purported to set emission standards for existing energy technologies. 80 Fed.

Reg. 64780. But such a characterization undersold the stakes. The standards set by the CPP were impossible for coal facilities to meet under current technologies. Thus, the likely impact of the CPP was for the coal facilities to "shut down[], in which case it would achieve a zero emission rate." 80 Fed. Reg. 647080, n. 590. Such a drastic policy consequence had no basis in the statute. A major rule like the CPP required clear authorization from Congress, which the EPA lacks. *Util. Air Reg. Grp*, 573 U.S. at 324 (quoting *Brown & Williamson Tobacco*, 529 U.S. at 160).

The CPP contravened Congress's attempts to ensure that the coal industry remains viable. In the 1990 Amendments to the Clean Air Act, Congress provided billions in funding for "clean coal technology." 42 U.S.C. § 7651n. That was incompatible with the CPP's goal of eliminating coal plants altogether. In the Energy Policy Act of 2005, Congress again affirmed its commitment to studying coal among our country's energy sources. 42 U.S.C. § 15961. Additionally, Congress has a longstanding tax policy of providing subsidies for coal energy. *See* Proposed Rule, Standards of Performance for Greenhouse Gas Emissions From New Stationary Sources: Electric Utility Generating Units, 79 Fed. Reg. 1,430, 1478 (Jan. 8, 2014) (noting the tax benefits for coal exploration and development). And as recently as 2017, Congress overruled agency rules that would have limited coal mining. 82 Fed. Reg. 54924 (nullifying a coal-restrictive regulatory rule).

Moreover, the EPA promulgated the CPP in the face of specific refusal by Congress to enact legislation for CO_2 reduction programs. Because an existing coal-

fired facility could not comply with the CPP's performance standards, it had only the option to "shut[] down, in which case it would achieve a zero emission rate." 80 Fed. Reg. 647080, n. 590. Save that result, the CPP set up a type of cap-and-trade program that would allow only some coal-fired facilities to remain operational. The EPA had explained, for example, that "one of the things an affected [facility] can do to achieve its emission limit" under the CPP "is to buy a credit or an allowance from another affected [facility] that has over-complied." 80 Fed. Reg. 64,733. An affected facility could acquire such an allowance by "invest[ing] in actions at facilities owned by others[] in exchange for rate-based emission credits" that offset the original facility's own higher emission rates. *Id.*; *see also id.* ("Trading provides an affected EGU other options besides direct implementation of emission reduction measures in its own facility or an affiliated facility when lower-cost emission reduction opportunities exist elsewhere."); *see also* 40 C.F.R. § 60.5790(c)(1).

But Congress had declined to take up consideration of similar programs. In fact, only after Congress failed to act on a similar cap-and-trade program did the EPA move forward with the CPP. *See, e.g.*, Clean Energy Jobs & American Power Act, S. 1733, 111th Cong. (2009) (rejecting cap-and-trade); S. Cong. Res. 8, S. Amend. 646, 113th Cong. (2013) (rejecting carbon tax). The agency's argument that *failed legislative proposals* demonstrate congressional intent for *agency action* strains credulity. This Court has rejected similar attempts in the past. *See Brown & Williamson*, 529 U.S. at 147-155 (outlining why

Congress rejecting similar proposals establishes the agency does not have authority to implement its own).

The CPP has an additional statutory infirmity. During the CPP repeal, the EPA recognized that "regulation of the nation's generation mix itself is not within the Agency's authority." Proposed Repeal, 82 Fed. Reg. 48,042. This was because Congress provided that "[r]egulation of the energy sector qua energy sector is generally undertaken by the Federal Energy Regulatory Commission (FERC)" in conjunction with the States to regulate energy markets—not the EPA. *Id. See, e.g.*, 16 U.S.C. § 824. The EPA correctly recognized that "the Federal Power Act ... establishe[d] long-recognized regulatory authority for the FERC over electric utilities engaged in interstate commerce." *See* Proposed Repeal, 82 Fed. Reg. 48,042. But in its original efforts to promulgate the CPP, EPA had, in contrast, relied on the incorrect claim that its jurisdiction overlapped with FERC.

These concerns ultimately raise separation of powers problems because, outside of any congressional authorization, the EPA gave to itself the authority to write and enforce extraordinarily broad rules—conflating the domains of the executive and legislative branches. If, as the EPA claims, the statutory phrase "standard of performance" can mean instituting a system to trade "rate-based emission credits" or requiring States and facilities to substitute one mode of energy for another, then the Clean Air Act's provisions lack a limiting principle. The EPA's attempt to broaden its authority under the Clean Air Act, through the CPP, cannot stand within our established constitutional order. When a problem

affects a significant portion of the American economy, requiring tradeoffs and a balancing of group interests, the responsibility to act must lay at the feet of Congress. Allowing unelected bureaucrats to fix such problems strips the American people of their power to hold officials accountable and contravenes our republican form of government.

There can be no doubt then, as Members of Congress have explained, that the CPP "usurps th[e] essential policy-setting role of Congress by impos[ing] significant economic burdens on States and the nation to address climate change in EPA's prescribed way without achieving measurably significant climate benefits. This is not a policy choice that EPA is allowed to make." Brief for Members of Congress as Amicus Curiae at 23, *West Virginia v. EPA*, 15-1363 (2016). Because the CPP brought "about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization," it has violated the "clear statement" rule. *See Util. Air Regulatory Grp.*, 573 U.S. at 324 (quoting *Brown & Williamson*, 529 U.S. at 159). The CPP's repeal, on the other hand, "ha[d] the advantage of not implicating this doctrine." 82 Fed. Reg. 48,042.

III. If allowed to stand, the decision below will wreak havoc on small businesses.

Affirming the EPA's claimed authority to issue cumbersome, federally-mandated energy regulations will wreak havoc on America's small businesses. In addition to causing thousands of job losses in the electricity, coal, and natural gas sectors, initial studies projected that the CPP would raise wholesale electricity's cost by $214 *billion*. *See EPA's Clean*

Power Plan: An Economic Impact Analysis, Nat'l Mining Ass'n, at 2 (Nov. 13, 2015); Westmoreland Pet. 21-22. But the Biden Administration now intends to employ EPA's new-found authority to go further. *See e.g.*, Executive Order No. 14,008, 86 Fed. Reg. 7619 (Jan. 27, 2021) (promising to "reduce[] climate pollution in every sector of the economy"). If allowed to stand, the D.C. Circuit's view of EPA's authority will let the government subordinate important concerns to "the single overarching goal of shifting the generation of electricity to zero- or low-carbon resources." Westmoreland Pet. 21-22. That single-mindedness coupled with novel agency power will drive up energy costs and harm small businesses.

Energy costs are already one of the largest expenses for America's small businesses. For nearly 70 percent of small businesses, energy is a top five cost. *See* NFIB Research Found., *NFIB National Small Business Poll* (2006), bit.ly/3GtHoBc. For 35 percent of small businesses, it's a top three cost. *Id.* Indeed, the EPA's Energy Star program estimates that American small businesses spend roughly $60 billion on energy each year. *See* Energy Star, *Small Businesses: An Overview of Energy Use and Energy Efficiency Opportunities*, bit.ly/3pYjKGq. As a result, regulations that increase energy costs will impact the bottom line for nearly all of the nation's small employers—many of whom have already endured unprecedented challenges throughout the COVID-19 pandemic. *See, e.g.,* Ruth Simon, *Covid-19's Toll on U.S. Business? 200,000 Extra Closures in Pandemic's First Year*, Wall St. J. (Apr. 16, 2021), on.wsj.com/33fI5Q6. Now, more than ever, small businesses cannot afford significant price increases.

Energy costs are already soaring. The Consumer Price Index, generated by the U.S. Bureau of Labor Statistics, recently reported that energy prices rose 33 percent over the last 12 months. *See* U.S. Bureau of Labor Statistics, *Consumer prices increase 6.2 percent for the year-end*, bit.ly/3seNiCt. And those price increases are taking a toll on small businesses.

Small business owners are increasingly worried about the rising cost of energy. NFIB surveys small business owners every four years about problems facing their businesses. Owners ranked most problems in the 2020 survey as they did in 2016—except one. *See* NFIB Research Found., *Small Business Problems & Priorities* (2020), bit.ly/3dL8O9k. When ranking problems in order of importance, the "cost of natural gas, propane, gasoline, diesel, fuel oil" jumped 15 positions—ranking 34th in 2016 and 19th in 2020. *Id.* at 4. This represented the largest delta from 2016 to 2020. *Id.* at 13. For most small business owners, energy costs top myriad other issues including health and safety regulations, poor sales, cash flow, unemployment compensation, mandatory family or sick leave, cybercrime, and interest rates. *Id.* at 9-11.

Swelling energy costs hurt the bottom line for small businesses, and American families are paying the price. Record levels of business owners are raising prices or plan to raise prices because of higher operational costs that include energy. *See e.g.*, Dan Eberhart, *Rising Energy Poses Big Inflationary Threat To U.S. Economy*, Forbes (Sept. 21, 2021), bit.ly/3sahXAw; Josh Mitchell, *Soaring Energy Prices Raise Concerns About U.S. Inflation, Economy*, Wall

St. J. (Oct. 10, 2021), on.wsj.com/3ytuhNE. And these trends are likely to continue throughout the next year. Small businesses will only have two options as a result—raise prices or suffer reduced earnings. Both harm end-user consumers. Burdensome, one-size-fits-all federal regulations like the Clean Power Plan and cap-and-trade style regimes will drastically increase energy costs for America's small businesses—and in turn, American families.

Small businesses cannot comply with the EPA's aggressive and unlawful regulatory edicts. These employers use energy for countless business-essential purposes. For example, the primary energy cost for 38 percent of small firms is operating vehicles. *See* NFIB Research Found., *NFIB National Small Business Poll* (2006), bit.ly/3GtHoBc. For one-third of small businesses, the primary energy expense is heating and cooling, and for one-fifth, the primary energy expense is operating equipment. *Id.* These essential expenditures are business necessities that small firms simply cannot do without.

Virtually all businesses emit at least *some* greenhouse gases and could be within the reach of federally-mandated regulations. And even if large businesses such as public utilities and large-scale manufacturers bear the initial costs of the program, they will soon pass those costs to small businesses and end-user consumers in the form of higher prices.

Beyond the regulations, cap and trade's hidden taxes will affect all businesses, even if they don't have high emissions. If small businesses with low emissions are exempt, they will still pay indirectly for the cap-and-trade system through higher taxes and higher

prices. Federally-mandated regimes like the Clean Power Plan are not feasible and will significantly raise energy-related costs and lead to considerable job loss. According to the U.S. Small Business Administration, small businesses comprise 49.2 percent of private-sector employment. *See* U.S. Small Bus. Admin., *Frequently Asked Questions* (2012), bit.ly/3dLpMV6. Thus, what hurts small business, hurts America.

Small businesses depend on energy supplies at globally competitive prices. President Biden promised that the United States would cut its emissions *in half* by the end of this decade. *See* United States of America, *Nationally Determined Contribution* 1-2 (Apr. 22, 2021), bit.ly/3EVWXkU. Even a partial delivery on this promise would devastate small businesses across the nation. Small businesses need access to reliable, affordable energy supplies to remain operative and competitive. To support small businesses after a challenging pandemic, America should be expanding its sources of energy—not restricting them.

Abandoning the Clean Power Plan will not leave the environment unprotected. Small business owners across America continue to demonstrate a diligent, sincere commitment to reducing energy use and operating in a more environmentally-mindful manner. The vast majority of small business owners agree that "reducing energy use in a cost-effective manner" is a problem worth tackling. *See* NFIB Research Found., *Small Business Problems & Priorities* (2020), bit.ly/3dL8O9k. In fact, small business owners agree that its's a top five priority. *Id.* But "setting a national energy policy designed to destroy a particular

industry" will produce serious burdens and few benefits. Westmoreland Pet. 21.

The D.C. Circuit's sprawling view of EPA's authority will allow the government to enact burdensome and costly national energy policies that will devastate small businesses. Indeed, "every regulation under the statute to follow will be shaped by this new and wildly expansive authority." West Virginia Pet. 2-3. That decision cannot stand.

CONCLUSION

For these reasons, the Court should reverse the decision below.

Respectfully submitted,

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