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New Education Reality Show Streaming: Keeping Up with the Regulators

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Supplemental Materials

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Joseph develops guidance and builds systems to simplify compliance and improve response, so we can invest in prevention. A nationally recognized expert on Title IX, the Clery Act, campus climate surveys, and state laws covering violence and harassment, he twice testified before the U.S. Senate (Armed Services, 2019; Health, Education, Labor, and Pensions, 2016), drafted legislation and regulations including New York's groundbreaking Education Law Article 129-b, and regularly provides guidance and regularly provides guidance and analysis for national associations and institutions across the country. He is the author of over 85 articles and book chapters, regularly presents at conferences and on campuses, and has led development of innovations that are in use at institutions collectively serving millions of students. Joe is a graduate of SUNY Oswego, has a Masters of Public Policy from the University at Albany and a law degree from Cornell Law School. He received the First Decade Award from NACUA, the Unsung Hero Award from the One Love Foundation, the Straight But Not Narrow Award from the Pride Center of the Capital Region, and was selected by City and State in 2020 as one of the 40 Under 40.

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The Department of Education Releases Proposed Changes to Title IX Athletics Regulations, Addressing Transgender Athletes: Updates and First-Look Analysis

Andrea Stagg & Joseph Storch | April 7, 2023

On Thursday, April 6, 2023, the Department of Education issued a fact sheet on its proposed change to Title IX Regulations on students' eligibility for athletic teams. The fact sheet includes a link to an unofficial version of the Proposed Rule, which as of this writing has not been published in the Federal Register.

In Brief

So, what are the big changes here? The proposed change to the existing regulations is a single subsection added to 106.41(b), to read as follows:

"If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied."

What *doesn't* this mean? This doesn't mean that at every level of competition, every school must allow every Transgender student-athlete to participate and compete on a team that is consistent with their gender identity.

What *does* it mean? Schools must not use a one-size-fits-all approach when adopting and applying, as the Department states in the fact sheet, "sex-related eligibility criteria."

Consider the sport, level of competition, and the grade or education level. Ask: what are the important educational objectives, and do these criteria substantially relate to achieving those objectives? If the answer is yes, find a way to minimize harm to students whose opportunities to participate will be limited or denied.

Some Analysis of the Proposed Rule

The Department recognized that this is a challenging area and that there are different opinions and approaches proposed by state and local organizations, athletic organizations, experts and commentators, and even international athletic governing bodies. The Department reasons that the patchwork application, developed amidst uncertainty as to the application of Title IX is unhelpful, inconsistent, and can be harmful to students seeking to participate in athletics. The Department notes specifically that the current system often does not consider the needs and abilities of Intersex students and that Transgender students not allowed to participate in athletics consistent with their gender identity do not have a viable option of participating in athletics inconsistent with that identity—even if it is consistent with their biological sex as assigned at birth.

The Department has initially identified two areas that are eligible for consideration as substantially related to the achievement of an important educational objective: preventing injury and promoting fairness in competition. This analysis must be conducted for each sport and at each level of play and can't simply be subjected to bright-line bans. However, even identifying an area eligible for such consideration is only part of the analysis. The decision on participation must be one that minimizes harm to students seeking to participate—by adopting or applying alternatives that achieve the important educational objective in a less harmful way.

Blanket requirements that students undergo physical examinations, medical testing, or treatment, or requiring them to show a birth certificate, driver's license, or passport to participate may not meet this standard of minimizing harm. The Department states that "communicating or codifying disapproval of a student or a student's gender identity," or a pretext for such, is not an important educational objective.

The Preamble notes that Transgender students seeking to participate in athletics are comparatively rare and affirms that schools may continue to offer male and female athletic teams consistent with current Regulations so long as selection is based on competitive skill or based on whether or not it is a contact sport. Criteria such as academic minimum requirements, and related standards, that are firmly unrelated to sex or gender are not implicated by the current or new Regulatory approach. This new provision of the Regulations is only activated when sex-related criteria are applied that would limit or deny eligibility to participate in athletics consistent with gender identity. For most sports and most institutions, this is not an issue they will regularly address.

Critically, the Preamble discourages broad-brush approaches that assume competitive differences in Transgender girls and women, based on generalizations or categorical exclusions or limitations. Rather, recipients of federal funds (and their athletic associations) should look to the nature of the sport in question, the level of competition, and the grade level of the students. Broad-brush approaches, therefore, may not meet the standard of an approach aimed at minimizing harm and may be found to be pretextual.

The Department draws distinctions between elementary school competition and secondary and post-secondary competition. Interestingly, the distinctions are not drawn based on civil rights factors, but on how the schools in these sectors have organized their athletic competitions to date. Finding that elementary schools more often use a no-cut or full participation approach to filling athletic teams, the Department reasons it would be hard to justify prohibiting student participation in athletics consistent with their gender identity. In high schools and colleges, however, the Department notes the approach, to be analyzed on a sport-by-sport basis, makes significant distinctions based on athletic ability and competitiveness in fielding athletic teams. This is not the case for all sports, but the Department reasons that a high school or college level approach in a specific sport or sports may be different and may allow for distinctions that would not be acceptable at the elementary school level.

The Department, in noting that this will be a rare occurrence, does not call for regular, broad-based training, but rather training conducted on an ad-hoc basis, as the issue arises. Of note, the Rule would appear from the Preamble to apply to intramural and club athletics alongside intercollegiate and interscholastic athletics.

The Proposed Rule

This new section is just 81 words, but the Preamble to the Proposed Rule runs 115 pages in this unofficial publication. The first 25 pages are an introduction and the procedural history of separate athletic opportunities, and how it has evolved. The next 40 pages discuss the proposed change to the Regulations in detail. The Regulatory Impact Analysis takes up the remaining 45 pages leading up to the actual proposed change—the paragraph above, proposed § 106.41(b)(2).

Next Steps and Additional Resources

Once the Proposed Rule is officially published in the Federal Register, the comment period will be open for at least 30 days. Then, the Department of Education will

consider the submitted comments and address them in the Final Rule, including in its preamble.

Below please find a list of general and specific areas that the Department has identified for comment as well as a tracked changes in the Proposed Rule. Grand River Solutions experts will be eagerly awaiting any updates from the Department of Education on these athletics regulations and will share them with you.

The Department of Education Fact Sheet is here.
The unofficial Proposed Rule is here.
The current Regulations are here.

Tracked Changes to the Existing Regulations Based on the Proposed Rule

- **106.41 Athletics.**

(a)***General.*** No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b)***Separate teams.***
(1)Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(2)If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of

an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

(c)***Equal opportunity.*** A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1)Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2)The provision of equipment and supplies;

(3)Scheduling of games and practice time;

(4)Travel and per diem allowance;

(5)Opportunity to receive coaching and academic tutoring;

(6)Assignment and compensation of coaches and tutors;

(7)Provision of locker rooms, practice and competitive facilities;

(8)Provision of medical and training facilities and services;

(9)Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d)***Adjustment period.*** A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post-secondary school level shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

General and Specific Requests for Comments

The Department of Education included six directed questions to seek specific feedback through the comments, including the following, which are paraphrased:

- What educational objectives are important enough to justify using sex-related eligibility criteria that limit participation?
- How can schools minimize the harms to students who are kept from participating or competing based on sex-related eligibility criteria?
- How, if at all, should the permissibility of particular sex-related eligibility criteria differ depending on the sport, level of competition, grade or education level, or other considerations?
- Are sex-related eligibility criteria ever appropriate in the earlier grades?

The Department is also seeking specific comments in the following areas:

- The impact of the Proposed Rule on two-year institutions of higher education.
- Whether there are any sex-related eligibility criteria that can comply with the standards established in the Rule in the elementary school context and, if so, what criteria may comply.
- The extent to which state athletic associations are likely to engage in a review of policies and the timeline for such a review.
- The extent to which athletic associations (such as the NCAA, NAIA, NJCAA, NCCAA, etc.) are likely to engage in a review of policies and the timeline for such a review.
- Identifying high-quality data sources on higher education athletic team offerings, intramural and club sports, and time estimates for complying with the Proposed Rule.
- Assistance in analyzing how the policy changes made by one athletic association will contribute to policy revisions by other associations.
- Assistance in analyzing whether blanket rules implemented by associations may impact schools that do not accept federal funds.
- Assistance in analyzing time burdens in later years once the Rule is finalized (including policy re-review and training).
- Assistance in understanding the impact of structures and requirements (public comments, shared governance, membership votes) would have on an implementation timetable.
- How to make the Proposed Regulations easier to read and understand (formatting, language, technical jargon).
- The impact of the Regulations on federalism principles and the burden on small entities covered by the Regulatory Flexibility Act.
- Whether the Rule would require transmission of information that other federal agencies or authorities make available.
- Any alternative approaches to the subject other than the one that the Department has selected in the Proposed Rule.

Federal Climate Survey Could Be Counterproductive

Joseph Storch | July 18, 2022

While campus-level climate surveys are important, a new national survey mandated by Congress could undermine the goal of creating safer campuses, Joseph Storch writes.

The angel's in the idea; the devil's in the details. In its recently passed 2022 federal omnibus spending legislation, Congress charged the Department of Education with developing a national climate survey asking students about their experiences with domestic violence, dating violence, sexual assault, sexual harassment and stalking, and overseeing the administration of this survey every two years to students at all colleges and universities that accept federal funds. Despite its enormous scope—a biennial survey of tens of millions of students at thousands of colleges and universities—the new requirement has received scant attention in the popular and higher education press, and the Education Department has made no announcements yet about how it intends to comply.

As someone who has worked on the delivery of and public policy surrounding climate surveys for many years, my sense is that if done well, a national survey could provide significant additional information on the impact of harassment and violence on college students. But that lofty goal comes at the end of a road filled with steep challenges. As proposed, the survey could lead to low response rates, confidentiality concerns and questions about the accuracy of data. Instead of rich, meaningful data, institutions will end up with one more compliance obligation laced with bureaucratic challenges and an inappropriate comparison tool based on weak data. And they will lose ground on the important and expanding work of conducting meaningful climate surveys that can drive change and increase safety.

Consider the scale and frequency of the federal survey project—the survey could reach 20 million students at well over 5,000 colleges and universities every other year. Only the U.S. Census is larger, and the Census requires more than 4,000 employees at the Census Bureau to successfully implement every 10 years.

But while it is “free” for Congress to legislate and require the Education Department to create and administer this survey, the legislation did not contain an appropriation, so it appears the department may have to create it without additional funds (or seek funds separately). Not only will this be expensive for the Education Department, but there are likely to be substantial financial and operational implications for colleges and universities—and especially so for smaller institutions with less bandwidth and research infrastructure. These costs will depend, in large part, on what path the Education Department ultimately takes to comply with the new law.

Length Is the Enemy of Completion

Climate surveys have been an incredible force for higher education’s understanding of the impact of sexual and interpersonal violence on college and university students. With larger and more representative sample sizes, we can make more granular findings regarding the different experiences of students of different races, ages, gender identities, sexual orientations and beyond. Unfortunately, the large number of topics listed in the legislation will make the survey very lengthy. The challenges of implementing it accurately, confidentially and efficiently are so fraught that we are less likely to obtain deeper insights of student experience than current climate surveys achieve.

In climate surveys, length is the enemy of completion. The longer we make a survey, the more students will close the window at some point. Worse, attrition is not evenly distributed. Students working multiple jobs and those with kids and other obligations are less likely to complete—or even begin—longer surveys.

Unfortunately, Congress has mandated the Education Department survey students on a large number of subjects, potentially leading to the longest climate survey ever given. This kitchen-sink approach to climate surveys could lead to interesting questions that very few people will bother to answer.

Confidentiality and Statistical (In)Significance

Even if we could somehow keep the length of the survey short, the specific questions mandated about whether students reported incidents of sexual and interpersonal violence and the detailed questions about whether investigations were undertaken and the specific outcomes of those investigations may yield results that compromise the survey taker’s confidentiality. The legislation seems to picture most institutions as medium

to large liberal arts colleges with dozens or hundreds of reports and investigations annually. But the law covers all colleges and universities that accept federal funds. This includes thousands of community colleges, technical colleges, trade schools, proprietary institutions and others. Institutions are different, and those that serve students taking classes part-time while working full-time (and, for some, parenting), simply have different reporting and investigation profiles than those with thousands or tens of thousands of students living in residence halls or local apartments and taking courses full-time. When an institution has but a handful of reports, the specificity of the required questions in the law will mean that respondents who experienced violence and harassment can be identified.

Economists warn of the law of small numbers, where we overestimate our ability to generalize from small samples. Humans do this all the time, guessing an athlete's result in this upcoming play based on how they did the prior three times, assuming that the way someone acts is representative of a larger group or assuming the outcome of an election based on a few people they talk to. Needless to say, small samples are generally not representative of larger populations, and we make these guesses at our peril. For the vast majority of institutions that do not conduct dozens or hundreds of investigations of harassment and assault per year, the experiences of a handful of respondents to a climate survey may not be representative of the actual experiences of students. In addition to the risk of identifying the respondents, the variability in the data—both longitudinally across years at the institution, and latitudinally, compared to other colleges and universities—is simply not statistically meaningful at small numbers.

Not Another Top 10 List!

Frankly, the most troubling aspect of this legislation is the assumption that a survey, long intended to measure and improve at the granular institutional level, can instead be yet one more point of comparison between similar and disparate institutions, a tool that consumers can use to select a college as "safe." When the idea of such a survey was first floated years ago, my suggestion to Senate and House staff was to task the U.S. Census Bureau with surveying thousands of college students across the country to gain a deeper understanding of the experience of narrower and narrower identity groups. The Census Bureau conducts such surveys of different parts of the population all the time and has the ability and knowledge to help policy makers understand the experience of traditional and post-traditional-aged college students of different gender identities, races and beyond.

But that idea was cast aside in favor of what we will now have: a lengthy, one-size-fits-all, comparative survey distributed to millions of students at very different institutions. It isn't clear that understanding the varied experiences of our college and university students (generally and specifically) is the intent of this new survey. Rather, following in the path of the Clery Act crime-reporting requirements, the plain language intention of the legislation is comparative—to allow consumers (our students) to be able to pull up a Joseph Storch database (such as the College Scorecard referenced in the legislation) and compare the climate survey statistics of various institutions when choosing a college.

This will inevitably lead to U.S. News & World Report–style ratings and listicles offered by the reputable and questionable alike. Clickbait "articles" about "safest college in America" or "most dangerous college in Oklahoma" are inevitable, even though it will often be statistically irresponsible to make such comparisons. These inevitable comparators will hold enormous sway. Which is better—a college with few disclosures where students report low trust in the institution to appropriately respond to violence or harassment or one with a high number of reports but higher levels of trust that reports are addressed appropriately? Unfortunately, some website algorithm or social media influencer will decide.

While the legislation tasks the Education Department with ensuring, "to the maximum extent practicable, that an adequate, random, and representative sample size of students" enrolled at any given institution completes the survey, there appears to be no plan in the legislation to limit the published data to instances where the sample sizes could yield statistically significant findings. It is not scientifically appropriate (or useful) to try to compare institutions whose responses are not significant, and many thousands of institutions have few or no reports or investigations in a given year.

The effort to move to comparisons and shopping tools on prevalence of sexual and interpersonal violence will detract from the efforts to understand prevalence at an institutional level, identify ways to address it through meaningful changes and understand the experiences of narrower groups of students who share an identity. In pretending that we can compare institutional safety (or worse, provide the inevitable restaurant-style A, B and C grades to campuses based on what will generally be small, unrepresentative samples) we will do what we often, tragically, do—take a complex area in which experts work decades to find meaningful public health–style approaches to seemingly intractable challenges, and replace those approaches with buzzy, quick-hit analyses.

Climate surveys are important. Done well, they can provide insights into student and employee experiences that are more accurate than simply counting reports to law enforcement or the institution (since so few violations are reported). Surveys are at their best when they are short, tied to meaningful actions that an institution can take and aimed at determining experiences so we can make those communities safer. Surveys are at their weakest when they are long, complicated, not tied to specific actions, motivated by bureaucratic compliance obligations and used to foster meaningless comparisons that drive clicks but fail to drive change.

Taking Stock of the Survey: Advantages and Challenges of a National Climate Survey by the U.S. Department of Education

Joseph Storch | May 4, 2022

A National Climate Survey Requirement

The 2022 federal Omnibus legislation[1] included a new requirement that the U.S. Department of Education (the Department) develop and administer a climate survey of college student experiences with domestic violence, dating violence, sexual assault, sexual harassment, and stalking at all colleges and universities that accept federal funds.

This lofty goal may prove challenging, how-ever. The actual timeline of the development and administration of the survey is unclear. The Department must assemble specialists to research, develop the survey, provide an opportunity for institutions to add customized questions to the survey, create or purchase a tool to collect or assist institutions in collecting millions of responses, analyze the results, pro-duce individualized data sets to each institution, and produce a national report. Consider the scale and frequency of the fed-eral survey project.

The Department's campus climate survey promises to become the second largest survey conducted by the federal government—reaching 20 million students at well over 5,000 colleges and universities every other year. Only the U.S. Census is larger, and the Census requires more than 4,000 employees at the Census Bureau to successfully implement every ten years. Furthermore, the Omnibus legislation requires the Department to create a substantial report by 2024 (and every two years thereafter) on the data collected by the survey.

Members of Congress have considered different forms of a national climate survey for many years. However, this provision became public merely days before the House and Senate passed the legislation and the President signed it into law. Reaching the lofty goal may require a considerable amount of funding, personnel, and detailed planning, both at the Department and at individual institutions.

[1] Unless otherwise stated, all references are to Consolidated Appropriations Act, H.R. 2471, 117 Cong. §1507 [2022]).

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What Does the Omnibus Legislation Require?

The Department, working with experts, "shall develop, design, and make available through a secure and accessible online portal, a standard-ized online survey tool regarding postsecondary student experiences with domestic violence, dating violence, sexual assault, sexual harass- ment, and stalking."

The following discussion includes key take- aways and analysis of different provisions.

DEVELOPING THE SURVEY

To develop the survey tool, the Department must work with interdisciplinary experts and fed- eral agencies including the Justice Department, Centers for Disease Control and Prevention, Health and Human Services, and experts in survey development, prevalence, higher edu- cation, and victim services.

TAKEAWAYS

The Department must develop a structure and process to work with stakeholders. It may proceed in a manner equivalent to negotiated rulemaking based on stakeholder and agency consensus. Alternatively, internal or external experts may be assigned to develop the survey and then circulate a draft to the required groups for review and comment before finalizing. Note that, unlike the 2013 Violence Against Women Act (VAWA) amendments to the Clery Act, which used VAWA Reauthorization to make changes to the Higher Education Act (HEA), this requirement appears to sit firmly in VAWA, not HEA, and applies to all colleges and universities that accept federal funds (not just Title IV funds). Therefore, the negotiated rulemaking required under the HEA likely does not apply. Regardless, many voices will be heard in the process.

Some will have strong opinions about the appropriateness and effectiveness of specific questions, language choice, length and comprehensiveness of the survey, topics covered, and whether (and how) to ask if the survey respondent has committed any of these viola- tions. Reasonable minds will differ, and these differing opinions will require discussion and (hopefully) consensus.

One challenge in group development of a survey is the "kitchen sink" approach to question inclu- sion, which may produce a long survey that runs counter to the legislation's goals. For example, Expert A and Expert B each feel strongly about different questions that test a similar area. Rather than choosing one or the other, some draft- ing committees historically chose to include both questions; perhaps to keep the peace and because there is generally not a financial cost to adding additional questions. In fact, in some cases there are advantages to testing the same topic in different ways to determine if responses are consistent. However, when we rinse and repeat for each topic, you end up with a very long instrument, and that will not be ideal for this purpose. As discussed below, a "kitchen sink" approach poses challenges that may conflict with the legislation's goals.

SURVEY TOPICS

The legislation outlines general survey topics, including:

- Optional demographic reporting;
- Prevalence of domestic violence, dating violence, sexual assault, stalking and sexual harassment;
- Student knowledge of institution policies and procedures;
- For disclosed incidents:

1. Whether incidents were reported;
2. To whom;
3. Whether there was a referral to law enforcement;
4. Whether an investigation occurred and the length and final resolution of the investigation;
5. Whether force, incapacitation, or coercion was used;
6. Whether the accused was a student at the institution;
7. Whether the survey taker reported the incident to law enforcement, and why they chose to report or not report; and
8. The impact on the survey takers' education (including lower grades, dropped classes, leaves of absence and financial consequences).

- The impact and effectiveness of prevention and awareness programs as well as complaint processes;
- Attitudes towards violence and harassment, and the willingness of bystanders to intervene; and
- Other questions added by the Department of Education.

TAKEAWAYS

The mandated topics appear drawn from a review of existing surveys and state laws governing climate surveys and each topic will likely include several questions.

The legislation has firmly adopted a “kitchen sink” approach to required survey topics leading to what may be a very long instrument, perhaps the longest climate survey to date. That comprehensiveness will come at a cost. Length of survey is the enemy of completion, especially for survey participants who may have demanding work and familial obligations. It is easy and may feel costless for policymakers to require testing of many areas, and in a perfect world, a national sample for each question is valuable. The students who are being asked to voluntarily complete the survey, however, may be deterred by a long instrument. Compounding the problem, students will not be equally likely to complete a long survey. Residential students who do not work full time and are not taking care of children will have more time to complete a long survey than commuting students who are balancing full-time work (sometimes multiple jobs), children, and other obligations. Length will also compound inequitable completion rates on the basis of other identities, meaning we will not have a fully representative sample.

The topics seem best pegged to a four-year liberal arts institution with mostly tradition- al-aged students. The Department, however, will have to create a survey that makes sense for all types of institutions. Questions about experiences at residence halls or Greek-letter organizations will feel out of place at community colleges and trade schools that are not residential. Questions about experiences on campus are not appropriate for students who take classes solely online (or at institutions that do not maintain a physical campus). The Department will either have to create a very vague survey that technically fits all institution types, or create various surveys that can be used for different institution types. Either way, this will take work and careful consideration.

Another challenge will be capturing impact and effectiveness of prevention, awareness programs, and complaint processes. Institutions use a variety of prevention programs, bystander intervention programs, and awareness programs, and the Department (through the since withdrawn Clery Act Handbook), said colleges could meet the VAWA/Clery Act prevention require- ments using programs that are “tailored to your institution’s community and the needs of your stu- dents and employees” and could be those shown to be effective through research or “promising practices that have been assessed… for value, effectiveness, or outcome but not yet subjected to scientific review.” The Department may need to afford flexibility for institutions to modify the prescribed questions to account for differences in nomenclature, programs, and policy or process at each institution. Some interventions are evidence-based, others evidence-informed, and still others are promising but untested. There is no catalog of all programs offered at all institutions, so this question may need to be customized by institution.

Similarly, different institutions use different terms for defining violations, the process used to respond to sexual and interpersonal violence and harassment, even including the document that students must follow (Code of Conduct, Honor Code) and what the responsible offices are called (Conduct Office, Judicial Affairs, Student Rights and Responsibilities, Community Standards), and such questions may likewise need customization to be meaningful to survey respondents.

Finally, the questions about whether an investigation occurred and the length and final resolution of that investigation will clearly identify the survey taker at the large number of institutions that have one or two reports (and fewer investigations) per year. The Department will have to determine how to ask these questions while maintaining the confidentiality of the survey respondent (see the section below on administration). At these institutions (which may be the majority of all colleges and universities), the economics "law of small numbers" should caution against trying to read major differences in response and effectiveness as the very small number of cases for which responses are received may not be representative of how the institution would respond in other matters.

CUSTOMIZING QUESTIONS

The Department will give colleges and universities the opportunity, at no cost, to request custom questions in addition to the standard questions developed by the Department, and the Department must review and approve these questions before they are added.

TAKEAWAYS

This provision is a significant undertaking and will require time and resources. The Department may have to conduct rulemaking or develop a process to address considerations.

- What will be the process and the timeline for submitting customized questions?
- What standards will be used for reviewing and accepting or rejecting a question?
- Will there be an appeal for custom questions that are rejected?
- What will happen if a question from Institution A is accepted by one reviewer, while a substantively similar or identical question from Institution B is rejected by a different reviewer?
- How many custom questions may an institution submit for consideration?
- How will the Department respond to questions that are not scientifically valid, even if of interest to the institution?
- What will the Department do if an institution submits a question that they may be interested in (and perhaps even scientifically valid), but that the Department (in this Administration or a future one) finds to be controversial or politically unpalatable?

Institutions may collectively submit tens of thousands of custom questions and the Department will have to organize, review, and respond in a uniform way. Once accepted, the questions will have to be entered into the Department's survey tool and reviewed for formatting and accessibility. This process may repeat every other year as institutions seek inclusion of new or different questions, and potentially removal of approved questions.

ACCESSIBILITY

The Department's survey tool must be accessible to individuals with disabilities.

TAKEAWAYS —
This is a best practice and likely required by other federal accessibility laws, some of which the Department enforces. The Department will have to consider specifically how the survey will be made accessible for those with differing abilities, especially as technology changes.

INTERSECTION WITH THE CLERY ACT

The responses to the survey will be confidential and are not to be included in Clery Act statistics or provided in a way that can identify the person.

TAKEAWAYS ——
It is a standard practice for these anonymous results to not be included in the Clery Act report, and it is good that the legislative language makes this principle crystal clear. Recent research may lead to additional insights on Clery Act reporting when compared to a larger set of climate survey data, and help institutions better understand actual prevalence based on a comparison of Clery Act and climate survey data.

ADMINISTERING THE SURVEY

Beyond developing the national survey tool, the Department must also build an infrastructure for the survey to be administered to students at every college and university that accepts federal funds. Notably, the bill does not specify whether it must be administered to all students (census) or to a sample (though a census survey may provide a better chance of having a representative sample complete the survey). Survey administration must occur no later than one year after the survey is available, and the survey must be conducted every two years.

Who Administers the Survey?

The bill uses slightly different language to describe the task for the Department. In 1507(a), the Department must "make available through a secure and accessible online portal, a standardized online survey tool..." In 1507(d), the Department, in concert with other agencies, "shall develop a mechanism by which institutions of higher education may...administer [and] modify" the survey tool." In that same section, it says that "each institution of higher education that receives Federal educational assistance shall administer the survey tool developed." So it is not perfectly clear exactly how the roles will be divided between the Department and institutions. There are at least three main possible paths to compliance:

1. Centralized administration
2. Distributed institutional link
3. Distributed tool with data upload

There are significant pros and cons to each potential approach, and below we lay out specific challenges that can apply to individual approaches or to all three.

1

Centralized Administration

In a centralized administration, the Department would create a single tool, require institu- tions to provide it with contact information for students, and distribute the survey to all, or a representative sample, with a unique link for each survey respondent. An example of this type of approach is the SUNY climate survey, where each campus sent student contact information to the system, and the system conducted the survey for all students (disclaimer, the author served as Principal Investigator for the SUNY survey). This will likely yield the most valid data, though it is the most complicated and expensive.

2

Distributed Institutional Link

In a distributed institutional link, the department would not collect names and email addresses from campuses, and would instead send each institution a different link that could be shared with students. All students would receive the same link, and data would be received by the Department. The institution would receive aggregate data from the Department and would not know which of its students have used the link (or if any students have taken the survey more than once). This would be the least secure approach and could result in skewed data and challenges determin- ing the representativeness of the sample.

3

Distributed Tool with Data Upload

In a distributed tool, the Department would create a tool equivalent to an unedit- able (but customized for each institution) Qualtrics or Survey Monkey survey, and institu- tions would populate it with contact information and send it to students. This could be a single link or individualized links (though that could reveal who has taken the survey and their responses at low num- bers). The institution would have to upload results to the Department via a data input tool (as they do with Clery data). This may be the easiest path but is also problematic for campus implementation and confidentiality of responses.

Validity of Data

If the Department uses a distributed institutional link, there will be questions about representativeness of sample and validity of data. Since anyone can access the link (and it can be forwarded to non-students), it is possible for those with strong feelings to take the survey more than once. The institution and Department will have limited tools to stop this (and will also have to address the possibility of bots filling out the survey). A centralized administration or distributed tool with personalized links will likely lead to more valid data, though it may be far more complex and expensive to administer and will face many of the challenges laid out below. The less controls there are on who takes the survey (especially with a very long instrument), the less reliable the data, the more questionable the representativeness of the data, and the less meaningful the "apples to apples" comparisons between institutions will be.

Privacy and Security

If conducting the survey centrally or by distributed link, to protect the survey and its responses, the Department will have to build or buy multiple servers and backups and deploy state-of-the-art security systems. The Department will also have to develop this database while conforming to the requirement in the

If conducting the survey centrally or by distributed link, to protect the survey and its responses, the Department will have to build or buy multiple servers and backups and deploy state-of-the-art security systems. The Department will also have to develop this database while conforming to the requirement in
the Higher Education Act (added in the 2008 Higher Education Opportunity Act) not to develop, implement, or maintain "a Federal database of personally identifiable information on individuals receiving" financial aid (with exceptions for programs that pre-dated 2008 and programs necessary for operating Title II, IV, or VII of the Higher Education Act). 20 U.S.C. §1015c (2008). If the Department uses a distributed tool model, it will have to build a system to collect data from institutions, similar to the Clery Act data that is uploaded each fall, and including a vast range of data points, where a miskey could lead to a very different survey result. The Department may wish to build in some type of automated uploading in its tool to prevent the type of errors that have been found with manual Clery Act data uploading.

Using any of the approaches, the Department will have to take steps to guard against fraud and spam emails that attempt to drive students to a fake website to collect data.

This is, of course, a concern for all surveys and one that institutions take seriously. This survey, however, will include tens of millions of students, and may become a gigantic target for fraud, spam, and phishing attacks. At the same time, the Department will have to develop or procure state-of-the-art data security systems, especially considering the sensitivity of the data, and the potential for blackmail of survey takers. Other federal agencies have been breached, even for some of the most sensitive data, and the Department will have to have a nearly flawless approach to ensure trust in the tool by future student survey respondents. It is noted again that the nature of the required detailed process questions will mean that at the vast number of institutions with a handful of reports, the survey respondent who answers questions about the length and outcome of an investigation, alongside other details, will be identifiable.

Resources for Students Who Are Taking the Survey

One other aspect of being trauma informed when conducting a survey is providing the survey respondents with contact information for a service provider, available anytime, to speak to while taking the survey. While the Department can potentially use a national hotline, it would be far better to allow customization for each institution to list a campus, local, or state hotline. This may seem like a minor detail to some but will be a critical trauma-informed best practice for a survey that will ask personal, difficult questions (especially for those who have been directly impacted by harassment or violence). If the Department cannot customize the surveys and a national hotline is chosen, the Department should carefully work in coordination with them, as they might not be otherwise staffed or funded for an influx of outreach when potentially tens of millions of students receive this survey for the first time.

Considerations for International and Traveling Students

Some of the students taking the survey will be international students and others will be born domestically but studying abroad when the survey is offered. The Department (and individual institutions) may need to consider the effect of privacy and data security laws in other nations for students completing the survey outside the United States. The Department may conclude that the United States, as a sovereign, is not bound by laws such as GDPR if it conducts the survey centrally. That immunity, however, may not prove helpful for colleges and universities, if the survey uses either distributed model. This may require some consideration, especially given the data's sensitivity and the additional protections other countries have for the collection and transfer of such data.

Communications and Timing

If centrally administered, the Department will need to ensure that it collects accurate email addresses for all students, as some colleges and universities do not provide email addresses and many students do not use their institutional email address as their primary form of contact. Not only will every college and university need to "whitelist" the Department of Education email address to ensure that climate survey emails are not marked as spam, every private email provider and internet service provider will have to do so as well, lest a large percentage of notifications never reach their intended recipient. If the path chosen is a distributed link or distributed tool, each institution will have to ensure that its survey email addresses are whitelisted, since sending so many of the same email to all students (especially using certain terms) may be flagged as spam.

Particularly for students who have experienced violence and do not wish to see additional references to the survey topics, the Department should ensure a process to allow students to opt out of additional notifications and reminders. Whether the survey is conducted centrally or distributed, there will be different challenges in this sphere, and a survey built under a law that emphasizes a "trauma-informed approach" to "avoid re-traumatization" must empower students to determine if they no longer wish to be reminded to participate. If centralized, the Department will need to provide a way for institutions to update lists of students who have enrolled and withdrawn from classwork after the institution submits its contact list to the Department.

Who is a Student?

As part of this process, the Department must define who is a student eligible to receive the survey. Would students on leave, on suspension, interning but taking no classes, or ABD for a doctoral degree be included for the survey, if the survey is given in a semester in which they are not actively taking classes? What about high school students taking college classes? Or students who are enrolled in multiple colleges (who might receive multiple survey requests)? Is this just for full-time students or also part-time students? What about non-degree or non-credit students? What cutoffs will apply? Will students who are under the age of 18 receive the survey (many climate surveys are addressed only to those 18 and over and are not sent to those in high school who are taking college credits). The Department may have to engage in some rulemaking or policy decisions to establish these standards.

Administering the survey every other year matches what New York State (the first state to require such a climate survey) and several other states have chosen and is especially important at community colleges where a longer timeframe between surveys may miss an entire cohort of students. Two years is a good balance to try to reduce survey fatigue while collecting useful data that can measure change, though it differs from the timelines in other states.

Along with defining how often the survey is administered, the Department will have to establish a field period, meaning the amount of time in which the survey is open for responses. The Bureau of Justice Statistics recommends at least 57 days for the field period, which can be a challenge since not all institutions use the same academic calendar and for some, a longer field period may exceed the length of programs that may only be a few weeks or months long. The administration will either be simultaneous for all students or at different times/semesters based on institution. Scientifically, simultaneous implementation (with a uniform field period) is better, as institution numbers may differ from fall to spring to summer, leading to some challenges in "comparing apples to apples." Every institution accepting federal funds does not follow the fall/spring academic calendar, and those different schedules must be accounted for. The Department will have to decide if all surveys will be administered simultaneously or if it will use a calendar year approach and an institution can conduct its survey anytime in that biennial year.

Questions Abound! More Questions for the Department to Consider Include:

- Will the survey be made available in more than one language? If so, which ones (noting that there are institutions that accept federal funds for which English is a second language for all or most students)?
- Will the survey be optimized for desktop computers, tablets, and mobile devices?
- Will the Department offer a paper and pencil version for students at institutions that do not provide email addresses or use computers, such as certain religious institutions?
- If some students take the survey on paper, how will confidentiality be protected when returning the forms and how will the data be input in the system?
- If a decentralized tool is used, how will the Department protect the confidentiality of respondents at very small institutions with few incidents, where the responses to the large number of survey questions can lead to the identification of survey respondents before data is uploaded to the Department?

ENSURING A REPRESENTATIVE SAMPLE

The Department must require that each insti- tution "to the maximum extent practicable" "ensures" that "an adequate, random, and representative sample size of students" (as determined by the Secretary of Education) who are enrolled complete the survey.

TAKEAWAYS ——

What is "an adequate, random, and representative sample size" for such a survey? This is likely to be the most controversial element of this legislation and the one that will need the most consideration from the Department, hopefully with input from the higher education community. The Department will have to establish definitions for what it means by "adequate, random, and representative" and what "maximum extent practicable" means. They will likely have to create numerical percentage standards for institutions to strive towards and, if centralized administration or a decentralized link, the Department will have to determine how and on what cadence to communicate this shortfall to institutions while the survey is open. If the Department goes the route of a decentralized link, there is no real way of knowing who has taken the survey, who more than once, and even whether individuals outside of the institution take the survey, potentially skewing the results.

Further, the longer the survey is (and, based on the required elements, this survey will be very long), the harder it becomes to obtain a representative sample, and the institution-level data as well as the national data may be unrepresentative of the experiences of student populations. The Department may wish to consider the makeup of the student population and whether an institution may achieve its participation goals through incentives (more on this below). The student population makeup may impact reaching the goal of "to the maximum extent practicable." For instance, whether the institution is primarily made up of traditional-aged, on campus students or is a program for non-traditional students taking courses part-time while working (and parenting) full-time, the institution may have an easier or harder time reaching its goals. It is also unclear what, if any, penalties there are for not reaching this goal, whether those penalties may be appealed (as penalties assessed under the Higher Education Act are), and what the process is for making such a determination (as noted earlier, this survey requirement does not appear to be part of Title IV of the HEA, for which violations can result in fines or reductions in funds).

A critical challenge will be that the legislation appears to prevent the Department from telling institutions who has and who has not participated. If this is the case, on a centrally conducted or distributed link approach, it will be difficult to impossible for institutions to improve participation and the representativeness of those participating. For instance, if female identifying students are participating at 30% and male identifying students at 5%, having this information can allow for targeted outreach to male identifying students to raise their participation to the maximum extent practicable; not having this information can lead to additional outreach to all students, but it would not be improving representativeness of the sample.

NATIONAL REPORT

The Department must create a national report that includes institution-specific data, and each institution must publish its campus-specific results on its website.

TAKEAWAYS ——

The Department will need to establish standards for the thousands of data reports it will create for institutions. For one thing, it will have to determine the minimal size of a data sample to display content (such as at least ten responses before a result can be shared), to preserve privacy. For another, the Department must decide, after what will likely be significant discussion, what the report will look like, and how it will be formatted in a way that is accessible to all students, including students with disabilities, and useful for campus-level reports. The Department will have to decide at what participation percentage number (or how far the sample strays from representing the institution's population) it will withhold an institution's survey results for not having data that is representative, and determine what to post in such a report.

If the Department uses a centralized administration or distributed institutional link, it will have to decide whether institutions will receive raw data, for which they can conduct their own additional analysis, or simply the Department's standard report. If through a distributed tool, the Department will have to decide what level of access the institution will have to that raw data, before data is uploaded to the Department. Whichever path it takes, it will need a process for this data to be transferred securely.

INCENTIVIZING PARTICIPATION

One other consideration is how we incentivize students to participate in a long survey that asks about sensitive and personal topics. We know from research that incentives are effective in raising participation rates.

Given the potential cost, it's hard to imagine that the federal government will be able to fund meaningful incentives for those who complete the survey, and if centralized or via a distributed link, this may be technically impracticable. If the Department uses a decentralized tool, it will have to determine whether to allow institutions to incentivize student participation and, if so, what the standards are (for instance, very high cost incentives may be seen as coercive, as students will not feel truly free not to take the survey), what system will be used to create and award the incentives, and how that can be done in a way that maintains the confidentiality of those who complete the survey (for instance, the survey completion page could lead to a separate incentive survey that cuts ties with the underlying data). The lack of incentives could impact student participation and result in data that does not represent the true student experience. At the same time, unequal distribution of incentives among institutions may lead to skewed results—particularly between resourced and under-resourced institutions—and detract from the legislative intent to have "apples to apples" type comparisons between institutions.

Conclusion

A national climate survey is a noteworthy goal with the potential to produce an unmatched level of data on the prevalence of campus vio- lence and harassment and build significant policy knowledge in the field. At the same time, this legislative approach presents significant implementation challenges for the Department as well as the thousands of institutions that accept federal funds. The Department, in following this law, may find itself with a long survey, inequitable levels of access, and low response rates, particularly at certain institutions and among certain groups. Reaching the goal will require a considerable amount of fund- ing, personnel, and detailed planning, both at the Department and at individual institutions. Despite the tremendous scope of this survey, this legislation was not subject to hearings and did not go through the standard process of obtaining feedback from all stakeholders, mean- ing that some of these questions will have to be answered at the agency level.

Although it is only a few pages among thousands of pages in the Omnibus bill, a national climate survey is not a ministerial requirement for the Department. It will be a major lift to plan, develop, and implement, and one that may require significant funds. With surveys, sometimes trying to "have it all" leads us to far less than what a more limited policy approach may yield. Whatever happens, we can "count" on one thing—the next few years will be very interesting—stay tuned.

CHIPS and Science Act Includes Efforts to STEM Sexual Harassment

Joseph Storch | August 24, 2022

CHIPS Act of 2022

Recent legislation includes significant policy changes relating to sexual harassment for funding recipients in the STEM fields. This legislation also includes tens of millions of dollars of funding available to educational institutions and not-for-profits to address compliance, response, and prevention.

This significant change is part of the recently enacted CHIPS Act of 2022 (CHIPS), Subtitle D- Combating Sexual Harassment in Science (CHIPS at pages 700-714). Subtitle D points to a new direction in how the federal government and its funding recipients in higher education will combat sexual harassment in the STEM fields. Moving from the current patchwork of approaches built into contracts and grants, the CHIPS Act will create a uniform reporting structure for categories of misconduct. It also creates new opportunities to research innovative approaches for preventing and responding to sexual harassment in scientific fields. Questions remain about how these rules will be implemented in higher education. This article points to several challenges and offers suggestions for policymakers, as well as preliminary steps that institutions should take now to prepare, as various provisions come into effect over the next few years.

MOVING AWAY FROM A PATCHWORK OF SOLUTIONS?

During the last half-decade, federal agencies including the National Science Foundation, National Institutes of Health, and the National Aeronautics and Space Administration have issued sexual harassment reporting requirements for grant awardees, with significant differences in reporting requirements as well as inconsistencies in application and standards applied. This patchwork has not well-served institutions, nor the very students and employees these systems intended to protect.

It is no secret that many students and employees in Science, Technology, Engineering, and Math (STEM) are exposed to sexual misconduct in their work. Congress, calling harassment "pervasive" in higher education, found

that "58% of individuals in the academic workplace experience sexual harassment," (CHIPS at 700) a number that would be stunning if it were not already so well-known among those who work in educational equity. Congress also found that the impact of harassment falls harder on women and people with certain identities.

Notably, without standards set in statute, these reporting requirements have been applied to new grants awarded after the terms are finalized, as part of the contractual obligations that a recipient willingly accepts in partial exchange for the funding.[1] Without the structure of a statute or a uniform policy across agencies, recipients have had to comply with multiple approaches. At smaller institutions with few incidents in particular, it is likely that these patchwork obligations may fall through the cracks or not be well-understood or remembered by the employees charged with such reporting and updating. The CHIPS legislation recognizes that decentralized reporting approaches are inefficient and sub-optimal, and charges the executive branch with developing uniform approaches to reporting misconduct by award personnel for all federal agencies and updating the professional standards for the field (including the National Academies "On Being a Scientist" Report, CHIPS at 704).

WHITE HOUSE LED INTERAGENCY WORKING GROUP

One of the first steps required by the legislation is for the White House Office of Science and Technology Policy (OSTP) National Science and Technology Council to convene an Interagency Working Group to coordinate various federal agency efforts to prevent and respond to reports of harassment (CHIPS at 705-711). The OSTP must coordinate with a number of agencies and groups, including the Department of Education's Office for Civil Rights, to:

- Prepare an inventory of agency policies, procedures, and resources related to sex-based and sexual harassment (within 90 days of the the CHIPS enactment);
- "[D]evelop a consistent set of policy guidelines for Federal research agencies (6 months after date inventory is submitted);
- Submit a report on implementing these guidelines (within a year of the inventory being submitted and every five years thereafter); and
- "[E]ncourage and monitor efforts of [agencies] to develop or maintain and implement policies" based on the policy guidelines it develops.

[1] This piecemeal approach already changed for the NIH earlier in 2022 through the Consolidated Appropriations Act, 2022 (page 426), which gave specific authority to NIH to require recipients to report when principal investigators or key personnel are removed or otherwise disciplined for certain misconduct, including harassment and bullying.

Impact on Higher Education

Subtitle D's most practical impact on colleges and universities may be that they will only need to follow a single set of reporting requirements across funding agencies based on the coming OSTP guidelines (CHIPS at 707-709). Moving from inconsistent, or absent, reporting standards, this legislation moves towards a consistent and hopefully more efficient system for reporting in a way that conforms to FERPA and protects the privacy rights of individuals.

Recipients will have to report:

- Decisions to launch formal investigations "of sex-based and sexual harassment, including bullying, retaliation, or hostile working conditions by, or of, award personnel;"
- Administrative action related to such an allegation "that affects the ability of award personnel or their trainees to carry out the activities of the award;"
- Total number of investigations with no finding of misconduct;
- Findings of misconduct (including an institutional process that has completed appeals, determinations made in a court of law, or other disciplinary action taken);
- Annual updates for these cases.

It is not clear whether these submissions will be statistical in nature or whether (as is likely) specific information or narratives will be required for individual cases. CHIPS requires that OSTP ensure the guidelines are consistent with FERPA (CHIPS at 709).

INTERSECTION WITH EXISTING AGENCY REQUIREMENTS

INTERIM REPORTING

The legislation specifically states that recipients will not be required to "provide interim reports to Federal research agencies." While the language does not go deeper than this, this may represent a shift from the current reporting requirements of some agencies that include early and interim steps such as placement on administrative leave (NSF at 47941; NASA at 13935) in addition to final determinations. It is not clear how no "interim reports" squares with the requirement to report on decisions to "launch" formal investigations, or even what it means to "launch" an investigation and whether administrative leave is or is not reportable. It is also not yet clear whether "formal investigation" is intended to be consistent with the definition in the Title IX 2020 Regulations, or if the guidelines will use another standard.

The regulators will likely wish to be clear on what is and is not reportable (and the recipients will definitely need such guidance).

NOTIFICATION TIMELINES

Further, other aspects of the new requirements may be different than some of the current agency terms and conditions. For instance, the NSF and NASA require that reports be made within 10 business days (NSF at 47941; NASA at 13935) while NIH requires notification within 30 days (NIH May 10 Announcement). CHIPS does not specify a timeline, but we should expect that the new timeline will be uniform across all agencies.

REPORTING OF INCIDENTS BEYOND THOSE COMMITTED BY PRINCIPAL INVESTIGATORS

The CHIPS Act expands the range of employees whose misconduct must be reported to funding agencies. NASA and NSF require reports of administrative actions and final determinations of harassment committed by Principal Investigators and Co-PI's (NSF at 47941-47942; NASA at 13935-13936), while NIH requires reports of "Program Director/Principal Investigator or other Senior/Key personnel" who are "removed [from their positions] or otherwise disciplined" "due to concerns about harassment, bullying, retaliation, or hostile working conditions" (NIH May 10 Announcement). The CHIPS legislation covers "award personnel" (CHIPS at 708-709), a considerably broader group. It is not defined whether "award personnel" includes students, but reviewing other parts of this section of the legislation show that the main identified concern of Congress is the experience of students, and regulators may take that "spirit" of the legislation into account.

SCOPE OF REPORTING AND DEFINITIONS OF MISCONDUCT

The CHIPS Act also broadens the scope of incidents that must be reported to funding agencies and includes definitions of misconduct that may be more encompassing than existing federal anti-discrimination and civil rights laws, such as Title VII and Title IX.

Currently, NASA and NSF include reporting of "a conviction of a sexual offense in a criminal court of law" (NSF at 47941, NASA at 13935). The NIH requirements are silent on this issue. The CHIPS Act would require reporting "a determination of a sexual offense in a court of law" (CHIPS at 708-709) which may be inclusive of civil determinations of sex offenses as well as criminal determinations.

Also to be determined are definitions of covered conduct. NSF and NASA require reporting of sexual harassment by PI's and co-PI's as well as "other forms of harassment" which includes non-gender and non-sex based harassment that is otherwise protected under law or policy (NSF at 47941; NASA at 13935). NIH includes a broader statement about "safety and/or work environments" such as "harassment, bullying, retaliation, or hostile working conditions" without necessarily tying these to sex, gender, or other protected classes.

The CHIPS legislation does not precisely define the violations for which it seeks reporting, beyond pointing to "sex-based or sexual harassment, including bullying, retaliation, or hostile work environments." But definitions in current federal law and regulation already differ (compare the Title VII definition of hostile work environment to the Title IX Regulatory [p. 30574] definition of hostile work environment), and the regulators would do well to conform and be clear about standards so that institutions can consistently comply.

CLIMATE SURVEYS AND OTHER OVERSIGHT

Beyond required reporting, the legislation tasks the NSF and OSTP to "consider issuing guidelines that require or incent:"

- Recipients to assess organizational climate through climate surveys, focus groups, or exit interviews;
- Recipients publicly publishing the results of their investigations and adjudications of reportable incidents of sex-based and sexual harassment, "disaggregated by sex and, if practicable, race, ethnicity, disability status, and sexual orientation;"
- Recipients publicly publishing the number of (total) reports of sex-based and sexual harassment;
- Recipients "regularly" (a term that is undefined) assessing and improving policies, procedures, and interventions to reduce prevalence and improve reporting;
- Certification by applicants for awards that they have a code of conduct, posted publicly on their website, "for maintaining a healthy and welcoming workplace;"
- Recipients having in place policies and mechanisms to address the needs of those who are harassed (including reintegrating to the recipient); and
- Recipients working "to create a climate intolerant of sex-based and sexual harassment and that improves diversity and inclusion."

Some or (perhaps more likely given the Congressional impetus) all of these enumerated ideas may become optional or mandatory. The legislative language affords significant flexibility to the NSF and OSTP to analyze each idea, but institutions should be aware of and prepare for the possibility that these will either be mandatory or incentivized (potentially including positive notation or points in consideration of future grant awards). These are generally written vaguely, which will afford some discretion to NSF and OSTP to provide details.

Once these guidelines are promulgated (scheduled to be about 270 days after the law was enacted), federal agencies will have another 270 days to develop or maintain policies consistent with the guidelines and disseminate the policies to recipients (CHIPS at 711).

RETROACTIVITY

One question that the legislation leaves open is the retroactivity of its new reporting requirements. NSF and NASA used the award contracting process to add terms and conditions for future awards that include reporting. To the extent that such terms only bind future awards, they did not cover awards already in place. The CHIPS Act requires policy changes, backed by the weight of statute and, while it is not stated firmly whether these policies are retroactive, the language about changing policies and promulgating them to all recipients (not just as part of the terms of new awards) may mean that agencies will apply these standards prospectively and retroactively, regardless of the status or timeline of an award.

FUNDING OPPORTUNITIES

Perhaps most critical towards the long term efforts to reduce the impact of harassment and violence on STEM programs, the NSF Director can make awards (CHIPS at 702-704) to:

a. Research the factors contributing to, and consequences of sex-based and sexual harassment for STEM students, trainees, and employees, especially the impact on "racial and ethnic minority groups, disabled individuals, foreign nationals, sexual-minority individuals, and others."
b. Examine prevention and response approaches, that can reduce incidents and their impact including remediating negative impacts and "fostering respectful and inclusive climates." The legislation specifically encourages development of "innovative, evidence-based strategies, policies, and approaches to prevent and address" harassment.
c. Researching alternatives to the current power dynamic in STEM academics and research.
d. Establishing a center to coordinate and manage this work.

The legislation will require a number of studies, including a charge to the National Academies (CHIPS at 712) to assess the state of research in this space and progress made towards goals, whether prevalence is decreasing with these efforts, and where to focus future efforts at change. It also requires a study of the implementation of the law's requirements by the Government Accountability Office (CHIPS at 713).

A CALL TO ACTION

In some ways, this law is a major statement from Congress, and one that comes with funding directed specifically to addressing these persistent harms. Congress references the $500,000 cost to train a STEM Ph.D (who may leave the field due to sexual harassment, resulting in both a potential reduction of earnings for the student as well as the concomitant loss of taxes paid due to the reduced salary).

But beyond the fiscal, accounts of promising students run out of STEM careers because of sexual harassment should give us all pause. How many great discoveries have we missed out on because that inventor left the field? Many students feel they cannot report their harasser either because they are the only person or one of just a few who can supervise their specific research, because the harasser reasonably appears to have the power to convince peers not to take the student as a transfer, or because the prominence of the harasser as a rainmaker of funding makes them seem untouchable (or all of the above). Congress calls out the challenges of the current power dynamic and specifically calls for research on changing it.

This Act should be a clarion call to higher education leaders to consider other models that do not contribute to the feelings of absolute helplessness for students and early career professionals who are harassed by their superiors and do not have other options in which to continue their careers.

Congress may be signaling that if we do not affirmatively develop these alternative models, they will further regulate the field. However much impact this federal legislation may have, lasting change will come only through the commitment of higher education institutions—and especially Presidents, Provosts, and Vice Presidents of Research—to address STEM sexual harassment in a meaningful and effective manner.

Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

WEST VIRGINIA ET AL. *v.* ENVIRONMENTAL PROTECTION AGENCY ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20–1530. Argued February 28, 2022—Decided June 30, 2022*

In 2015, the Environmental Protection Agency (EPA) promulgated the Clean Power Plan rule, which addressed carbon dioxide emissions from existing coal- and natural-gas-fired power plants. For authority, the Agency cited Section 111 of the Clean Air Act, which, although known as the *New* Source Performance Standards program, also authorizes regulation of certain pollutants from *existing* sources under Section 111(d). 42 U. S. C. §7411(d). Prior to the Clean Power Plan, EPA had used Section 111(d) only a handful of times since its enactment in 1970. Under that provision, although the States set the actual enforceable rules governing existing sources (such as power plants), EPA determines the emissions limit with which they will have to comply. The Agency derives that limit by determining the "best system of emission reduction . . . that has been adequately demonstrated," or the BSER, for the kind of existing source at issue. §7411(a)(1). The limit then reflects the amount of pollution reduction "achievable through the application of" that system. *Ibid.*

In the Clean Power Plan, EPA determined that the BSER for existing coal and natural gas plants included three types of measures, which the Agency called "building blocks." 80 Fed. Reg. 64667. The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal

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*Together with No. 20–1531, *North American Coal Corp.* v. *Environmental Protection Agency et al.,* No. 20–1778, *Westmoreland Mining Holdings LLC* v. *Environmental Protection Agency et al.*, and No. 20–1780, *North Dakota* v. *Environmental Protection Agency et al.*, also on certiorari to the same court.

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more cleanly. *Id.,* at 64727. This sort of source-specific, efficiency-improving measure was similar in kind to those that EPA had previously identified as the BSER in other Section 111 rules.

Building blocks two and three were quite different, as both involved what EPA called "generation shifting" at the grid level—*i.e.,* a shift in electricity production from higher-emitting to lower-emitting producers. Building block two was a shift in generation from existing coal-fired power plants, which would make less power, to natural-gas-fired plants, which would make more. *Ibid.* This would reduce carbon dioxide emissions because natural gas plants produce less carbon dioxide per unit of electricity generated than coal plants. Building block three worked like building block two, except that the shift was from both coal and gas plants to renewables, mostly wind and solar. *Id.,* at 64729, 64748. The Agency explained that, to implement the needed shift in generation to cleaner sources, an operator could reduce the regulated plant's own production of electricity, build or invest in a new or existing natural gas plant, wind farm, or solar installation, or purchase emission allowances or credits as part of a cap-and-trade regime. *Id.,* at 64731–64732. Taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. *Id.,* at 64731.

Having decided that the BSER was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. §7411(a)(1). The Agency recognized that, in translating the BSER into an operational emissions limit, it could choose whether to require anything from a little generation shifting to a great deal. It settled on what it regarded as a "reasonable" amount of shift, which it based on modeling how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. *Id.,* at 64797–64811. The Agency ultimately projected, for instance, that it would be feasible to have coal provide 27% of national electricity generation by 2030, down from 38% in 2014. From these projected changes, EPA determined the applicable emissions performance rates, which were so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of generation shifting. The Government projected that the rule would impose billions in compliance costs, raise retail electricity prices, require the retirement of dozens of coal plants, and eliminate tens of thousands of jobs.

This Court stayed the Clean Power Plan in 2016, preventing the rule from taking effect. It was later repealed after a change in Presidential administrations. Specifically, in 2019, EPA found that the Clean

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Power Plan had exceeded the Agency's statutory authority under Section 111(d), which it interpreted to "limit[ ] the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation." 84 Fed. Reg. 32524. EPA explained that the Clean Power Plan, rather than setting the standard "based on the application of equipment and practices at the level of an individual facility," had instead based it on "a shift in the energy generation mix at the grid level," *id.,* at 32523. The Agency determined that the interpretive question raised by the Clean Power Plan fell under the major questions doctrine. Under that doctrine, it determined, a clear statement is necessary for a court to conclude that Congress intended to delegate authority "of this breadth to regulate a fundamental sector of the economy." *Id.,* at 32529. It found none. The Agency replaced the Clean Power Plan by promulgating a different Section 111(d) regulation, known as the Affordable Clean Energy (ACE) rule. *Id*., at 32532. In that rule, EPA determined that the BSER would be akin to building block one of the Clean Power Plan: a combination of equipment upgrades and operating practices that would improve facilities' heat rates. *Id.,* at 32522, 32537.

A number of States and private parties filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the Clean Power Plan and its enactment of the replacement ACE rule. The Court of Appeals consolidated the cases and held that EPA's "repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act"—namely, that generation shifting cannot be a "system of emission reduction" under Section 111. 985 F. 3d 914, 995. The court vacated the Agency's repeal of the Clean Power Plan and remanded to the Agency for further consideration. It also vacated and remanded the ACE rule for the same reason. The court's decision was followed by another change in Presidential administrations, and EPA moved the court to partially stay its mandate as to the Clean Power Plan while the Agency considered whether to promulgate a new Section 111(d) rule. No party opposed the motion, and the Court of Appeals agreed to stay its vacatur of the Agency's repeal of the Clean Power Plan.

Held:

1. This case remains justiciable notwithstanding the Government's contention that no petitioner has Article III standing, given EPA's stated intention not to enforce the Clean Power Plan and to instead engage in new rulemaking. In considering standing to appeal, the question is whether the appellant has experienced an injury "fairly traceable to the judgment below." *Food Marketing Institute* v. *Argus Leader Media*, 588 U. S. ___, ___. If so, and a "favorable ruling" from the appellate court "would redress [that] injury," then the appellant has a cognizable Article III stake. *Ibid.* Here, the judgment below

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vacated the ACE rule and its embedded repeal of the Clean Power Plan, and accordingly purports to bring the Clean Power Plan back into legal effect. There is little question that the petitioner States are injured, since the rule requires them to more stringently regulate power plant emissions within their borders. The Government counters that EPA's current posture has mooted the prior dispute. The distinction between mootness and standing matters, however, because the Government bears the burden to establish that a once-live case has become moot. The Government's argument in this case boils down to its representation that EPA does not intend to enforce the Clean Power Plan prior to promulgating a new Section 111(d) rule. But "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1,* 551 U. S. 701, 719. Here, the Government "nowhere suggests that if this litigation is resolved in its favor it will not" reimpose emissions limits predicated on generation shifting. *Ibid.* Pp. 14–16.

2. Congress did not grant EPA in Section 111(d) of the Clean Air Act the authority to devise emissions caps based on the generation shifting approach the Agency took in the Clean Power Plan. Pp. 16–31.

(a) In devising emissions limits for power plants, EPA "determines" the BSER that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated," and then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. §7411(a)(1). The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% to 27% coal by 2030, can be the BSER within the meaning of Section 111.

Precedent teaches that there are "extraordinary cases" in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *FDA* v. *Brown & Williamson Tobacco Corp.,* 529 U. S. 120, 159–160. See, *e.g., Alabama Assn. of Realtors* v. *Department of Health and Human Servs.,* 594 U. S. ___, ___; *Utility Air Regulatory Group* v. *EPA,* 573 U. S. 302, 324; *Gonzales* v. *Oregon*, 546 U. S. 243, 267; *National Federation of Independent Business* v. *OSHA*, 595 U. S. ___, ___. Under this body of law, known as the major questions doctrine, given both separation of powers principles and a practical understanding of legislative intent, the agency must point to "clear congressional authorization" for the authority it claims. *Utility Air*, 573 U. S., at 324. Pp. 16–20.

(b) This is a major questions case. EPA claimed to discover an

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unheralded power representing a transformative expansion of its regulatory authority in the vague language of a long-extant, but rarely used, statute designed as a gap filler. That discovery allowed it to adopt a regulatory program that Congress had conspicuously declined to enact itself. Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U. S., at 160.

Prior to 2015, EPA had always set Section 111 emissions limits based on the application of measures that would reduce pollution by causing the regulated source to operate more cleanly, see, *e.g.*, 41 Fed. Reg. 48706—never by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." 80 Fed. Reg. 64726. The Government quibbles with this history, pointing to the 2005 Mercury Rule as one Section 111 rule that it says relied upon a cap-and-trade mechanism to reduce emissions. See 70 Fed. Reg. 28616. But in that regulation, EPA set the emissions limit—the "cap"—based on the use of "technologies [that could be] installed and operational on a nationwide basis" in the relevant timeframe. *Id.,* at 28620–28621. By contrast, and by design, there are no particular controls a coal plant operator can install and operate to attain the emissions limits established by the Clean Power Plan. Indeed, the Agency nodded to the novelty of its approach when it explained that it was pursuing a "broader, forward-thinking approach to the design" of Section 111 regulations that would "improve the *overall power system*," rather than the emissions performance of individual sources, by forcing a shift throughout the power grid from one type of energy source to another. 80 Fed. Reg. 64703 (emphasis added). This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.,* 512 U. S. 218, 231.

The Government attempts to downplay matters, noting that the Agency must limit the magnitude of generation shift it demands to a level that will not be "exorbitantly costly" or "threaten the reliability of the grid." Brief for Federal Respondents 42. This argument does not limit the breadth of EPA's claimed authority so much as reveal it: On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in the basic regulation of how Americans get their energy. There is little reason to think Congress did so. EPA has admitted that issues of electricity transmission, distribution, and storage are not within its traditional expertise. And this Court doubts that "Congress

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. . . intended to delegate . . . decision[s] of such economic and political significance," *i.e.,* how much coal-based generation there should be over the coming decades, to any administrative agency. *Brown & Williamson*, 529 U. S., at 160. Nor can the Court ignore that the regulatory writ EPA newly uncovered in Section 111(d) conveniently enabled it to enact a program, namely, cap-and-trade for carbon, that Congress had already considered and rejected numerous times. The importance of the policy issue and ongoing debate over its merits "makes the oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U. S., at 267–268. Pp. 20–28.

(c) Given that precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach, the Government must point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U. S., at 324. The Government can offer only EPA's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." §7411(a)(1). The word "system" shorn of all context, however, is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required. The Government points to other provisions of the Clean Air Act—specifically the Acid Rain and National Ambient Air Quality Standards (NAAQS) programs—that use the word "system" or "similar words" to describe sector-wide mechanisms for reducing pollution. But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111.

Finally, 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. It is pertinent to the Court's analysis that EPA has acted consistent with such a limitation for four decades. But the only question before the Court is more narrow: whether the "best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no. Pp. 28–31.

985 F. 3d 914, reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. GORSUCH, J., filed a concurring opinion, in which ALITO, J., joined. KAGAN, J., filed a dissenting opinion, in which BREYER and SOTOMAYOR, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

Nos. 20–1530, 20–1531, 20–1778 and 20–1780

WEST VIRGINIA, ET AL., PETITIONERS
20–1530 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE NORTH AMERICAN COAL CORPORATION, PETITIONER
20–1531 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC, PETITIONER
20–1778 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NORTH DAKOTA, PETITIONER
20–1780 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 30, 2022]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

The Clean Air Act authorizes the Environmental Protection Agency to regulate power plants by setting a "standard of performance" for their emission of certain pollutants into

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the air. 84 Stat. 1683, 42 U. S. C. §7411(a)(1). That standard may be different for new and existing plants, but in each case it must reflect the "best system of emission reduction" that the Agency has determined to be "adequately demonstrated" for the particular category. §§7411(a)(1), (b)(1), (d). For existing plants, the States then implement that requirement by issuing rules restricting emissions from sources within their borders.

Since passage of the Act 50 years ago, EPA has exercised this authority by setting performance standards based on measures that would reduce pollution by causing plants to operate more cleanly. In 2015, however, EPA issued a new rule concluding that the "best system of emission reduction" for existing coal-fired power plants included a requirement that such facilities reduce their own production of electricity, or subsidize increased generation by natural gas, wind, or solar sources.

The question before us is whether this broader conception of EPA's authority is within the power granted to it by the Clean Air Act.

I

A

The Clean Air Act establishes three main regulatory programs to control air pollution from stationary sources such as power plants. Clean Air Amendments of 1970, 84 Stat. 1676, 42 U. S. C. §7401 *et seq.* One program is the New Source Performance Standards program of Section 111, at issue here. The other two are the National Ambient Air Quality Standards (NAAQS) program, set out in Sections 108 through 110 of the Act, 42 U. S. C. §§7408–7410, and the Hazardous Air Pollutants (HAP) program, set out in Section 112, §7412. To understand the place and function of Section 111 in the statutory scheme, some background on the other two programs is in order.

The NAAQS program addresses air pollutants that "may

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reasonably be anticipated to endanger public health or welfare," and "the presence of which in the ambient air results from numerous or diverse mobile or stationary sources." §7408(a)(1). After identifying such pollutants, EPA establishes a NAAQS for each. The NAAQS represents "the maximum airborne concentration of [the] pollutant that the public health can tolerate." *Whitman* v. *American Trucking Assns.*, *Inc.*, 531 U. S. 457, 465 (2001); see §7409(b). EPA, though, does not choose which sources must reduce their pollution and by how much to meet the ambient pollution target. Instead, Section 110 of the Act leaves that task in the first instance to the States, requiring each "to submit to [EPA] a plan designed to implement and maintain such standards within its boundaries." *Train* v. *Natural Resources Defense Council*, *Inc.*, 421 U. S. 60, 65 (1975); §7410.

The second major program governing stationary sources is the HAP program. The HAP program primarily targets pollutants, other than those already covered by a NAAQS, that present "a threat of adverse human health effects," including substances known or anticipated to be "carcinogenic, mutagenic, teratogenic, neurotoxic," or otherwise "acutely or chronically toxic." §7412(b)(2).

EPA's regulatory role with respect to these toxic pollutants is different in kind from its role in administering the NAAQS program. There, EPA is generally limited to determining the maximum safe amount of covered pollutants in the air. As to each hazardous pollutant, by contrast, the Agency must promulgate emissions standards for both new and existing major sources. §7412(d)(1). Those standards must "require the maximum degree of reduction in emissions . . . that the [EPA] Administrator, taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impacts and energy requirements, determines is achievable . . . through application of measures, processes, methods, systems or techniques" of emission reduction. §7412(d)(2). In other

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words, EPA must directly require all covered sources to reduce their emissions to a certain level. And it chooses that level by determining the "maximum degree of reduction" it considers "achievable" in practice by using the best existing technologies and methods. §7412(d)(3).

Thus, in the parlance of environmental law, Section 112 directs the Agency to impose "*technology-based* standard[s] for hazardous emissions," *Alaska Dept. of Environmental Conservation* v. *EPA*, 540 U. S. 461, 485, n. 12 (2004) (emphasis added). This sort of "'technology-based' approach focuses upon the control technologies that are available to industrial entities and requires the agency to . . . ensur[e] that regulated firms adopt the appropriate cleanup technology." T. McGarity, Media-Quality, Technology, and Cost-Benefit Balancing Strategies for Health and Environmental Regulation, 46 Law & Contemp. Prob. 159, 160 (Summer 1983) (McGarity). (Such "technologies" are not limited to literal technology, such as scrubbers; "changes in the design and operation" of the facility, or "in the way that employees perform their tasks," are also available options. *Id.*, at 163, n. 18.)

The third air pollution control scheme is the New Source Performance Standards program of Section 111. §7411. That section directs EPA to list "categories of stationary sources" that it determines "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." §7411(b)(1)(A). Under Section 111(b), the Agency must then promulgate for each category "Federal standards of performance for new sources," §7411(b)(1)(B). A "standard of performance" is one that

> "reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and

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> environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." §7411(a)(1).

Thus, the statute directs EPA to (1) "determine[]," taking into account various factors, the "best system of emission reduction which . . . has been adequately demonstrated," (2) ascertain the "degree of emission limitation achievable through the application" of that system, and (3) impose an emissions limit on new stationary sources that "reflects" that amount. *Ibid.*; see also 80 Fed. Reg. 64538 (2015). Generally speaking, a source may achieve that emissions cap any way it chooses; the key is that its pollution be no more than the amount "achievable through the application of the best system of emission reduction . . . adequately demonstrated," or the BSER. §7411(a)(1); see §7411(b)(5). EPA undertakes this analysis on a pollutant-by-pollutant basis, establishing different standards of performance with respect to different pollutants emitted from the same source category. See, *e.g.*, 73 Fed. Reg. 35838 (2008); 42 Fed. Reg. 22510 (1977).

Although the thrust of Section 111 focuses on emissions limits for *new* and *modified* sources—as its title indicates—the statute also authorizes regulation of certain pollutants from *existing* sources. Under Section 111(d), once EPA "has set *new* source standards addressing emissions of a particular pollutant under . . . section 111(b)," 80 Fed. Reg. 64711, it must then address emissions of that same pollutant by existing sources—but only if they are not already regulated under the NAAQS or HAP programs. §7411(d)(1). Existing power plants, for example, emit many pollutants covered by a NAAQS or HAP standard. Section 111(d) thus "operates as a gap-filler," empowering EPA to regulate harmful emissions not already controlled under the Agency's other authorities. *American Lung Assn.* v. *EPA*, 985 F. 3d 914, 932 (CADC 2021).

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Although the States set the actual rules governing existing power plants, EPA itself still retains the primary regulatory role in Section 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." 40 CFR §60.22(b)(5) (2021); see also 80 Fed. Reg. 64664, and n. 1. 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. See §§60.23, 60.24; 42 U. S. C. §7411(d)(1).

Reflecting the ancillary nature of Section 111(d), EPA has used it only a handful of times since the enactment of the statute in 1970. See 80 Fed. Reg. 64703, and n. 275 (past regulations pertained to "four pollutants from five source categories"). For instance, the Agency has established emissions limits on acid mist from sulfuric acid production, 41 Fed. Reg. 48706 (1976) (identifying "fiber mist eliminator" technology as BSER); sulfide gases released by kraft pulp mills, 44 Fed. Reg. 29829 (1979) (determining BSER to be a combination of scrubbers, incineration, filtration systems, and temperature control); and emissions of various harmful gases from municipal landfills, 61 Fed. Reg. 9907 (1996) (setting BSER as use of a flare to combust the gases). It was thus only a slight overstatement for one of the architects of the 1990 amendments to the Clean Air Act to refer to Section 111(d) as an "obscure, never-used section of the law." Hearings on S. 300 et al. before the Subcommittee on Environmental Protection of the Senate Committee on Environment and Public Works, 100th Cong., 1st Sess., 13 (1987) (remarks of Sen. Durenberger).

B

Things changed in October 2015, when EPA promulgated

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two rules addressing carbon dioxide pollution from power plants—one for new plants under Section 111(b), the other for existing plants under Section 111(d). Both were premised on the Agency's earlier finding that carbon dioxide is an "air pollutant" that "may reasonably be anticipated to endanger public health or welfare" by causing climate change. 80 Fed. Reg. 64530. Carbon dioxide is not subject to a NAAQS and has not been listed as a toxic pollutant.

The first rule announced by EPA established federal carbon emissions limits for new power plants of two varieties: fossil-fuel-fired electric steam generating units (mostly coal fired) and natural-gas-fired stationary combustion turbines. *Id.*, at 64512. Following the statutory process set out above, the Agency determined the BSER for the two categories of sources. For steam generating units, for instance, EPA determined that the BSER was a combination of high-efficiency production processes and carbon capture technology. See 80 Fed. Reg. 64512. EPA then set the emissions limit based on the amount of carbon dioxide that a plant would emit with these technologies in place. *Id.*, at 64513.

The second rule was triggered by the first: Because EPA was now regulating carbon dioxide from *new* coal and gas plants, Section 111(d) required EPA to also address carbon emissions from *existing* coal and gas plants. See §7411(d)(1). It did so through what it called the Clean Power Plan rule.

In that rule, EPA established "final emission guidelines for states to follow in developing plans" to regulate existing power plants within their borders. *Id.*, at 64662. To arrive at the guideline limits, EPA did the same thing it does when imposing federal regulations on new sources: It identified the BSER.

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. The BSER for existing plants included three types of measures, which the Agency called

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"building blocks." *Id.*, at 64667. The first building block was "heat rate improvements" at coal-fired plants—essentially practices such plants could undertake to burn coal more efficiently. *Id.*, at 64727. But such improvements, EPA stated, would "lead to only small emission reductions," because coal-fired power plants were already operating near optimum efficiency. *Ibid.* On the Agency's view, "much larger emission reductions [were] needed from [coal-fired plants] to address climate change." *Ibid.*

So the Agency included two additional building blocks in its BSER, both of which involve what it called "generation shifting from higher-emitting to lower-emitting" producers of electricity. *Id.*, at 64728. Building block two was a shift in electricity production from existing coal-fired power plants to natural-gas-fired plants. *Ibid.* Because natural gas plants produce "typically less than half as much" carbon dioxide per unit of electricity created as coal-fired plants, the Agency explained, "this generation shift [would] reduce[ ] CO_2 emissions." *Ibid.* Building block three worked the same way, except that the shift was from both coal- and gas-fired plants to "new low- or zero-carbon generating capacity," mainly wind and solar. *Id.*, at 64729, 64748. "Most of the CO_2 controls" in the rule came from the application of building blocks two and three. *Id.*, at 64728.

The Agency identified three ways in which a regulated plant operator could implement a shift in generation to cleaner sources. *Id.*, at 64731. First, an operator could simply reduce the regulated plant's own production of electricity. Second, it could build a new natural gas plant, wind farm, or solar installation, or invest in someone else's existing facility and then increase generation there. *Ibid.* Finally, operators could purchase emission allowances or credits as part of a cap-and-trade regime. *Id.*, at 64731–64732. Under such a scheme, sources that achieve a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it

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toward their own applicable emissions caps.

EPA explained that taking any of these steps would implement a sector-wide shift in electricity production from coal to natural gas and renewables. *Id.*, at 64731. Given the integrated nature of the power grid, "adding electricity to the grid from one generator will result in the instantaneous reduction in generation from other generators," and "reductions in generation from one generator lead to the instantaneous increase in generation" by others. *Id.*, at 64769. So coal plants, whether by reducing their own production, subsidizing an increase in production by cleaner sources, or both, would cause a shift toward wind, solar, and natural gas.

Having decided that the "best system of emission reduction . . . adequately demonstrated" was one that would reduce carbon pollution mostly by moving production to cleaner sources, EPA then set about determining "the degree of emission limitation achievable through the application" of that system. 42 U. S. C. §7411(a)(1). The Agency recognized that—given the nature of generation shifting—it could choose from "a wide range of potential stringencies for the BSER." 80 Fed. Reg. 64730. Put differently, in translating the BSER into an operational emissions limit, EPA could choose whether to require anything from a little generation shifting to a great deal. The Agency settled on what it regarded as a "reasonable" amount of shift, which it based on modeling of how much more electricity both natural gas and renewable sources could supply without causing undue cost increases or reducing the overall power supply. *Id.*, at 64797–64811. Based on these changes, EPA projected that by 2030, it would be feasible to have coal provide 27% of national electricity generation, down from 38% in 2014. *Id.*, at 64665, 64694; see Dept. of Energy, U. S. Energy Information Admin., Monthly Energy Review (May 2015), Electricity Net Generation: Electric Power Sector, p. 106 (Table 7.2b).

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From these significant projected reductions in generation, EPA developed a series of complex equations to "determine the emission performance rates" that States would be required to implement. 80 Fed. Reg. 64815. The calculations resulted in numerical emissions ceilings so strict that no existing coal plant would have been able to achieve them without engaging in one of the three means of shifting generation described above. 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. Compare *id.*, at 64742, with *id.*, at 64513.

The point, after all, was to compel the transfer of power generating capacity from existing sources to wind and solar. The White House stated that the Clean Power Plan would "drive a[n] . . . aggressive transformation in the domestic energy industry." White House Fact Sheet, App. in *American Lung Assn.* v. *EPA*, No. 19–1140 etc. (CADC), p. 2076. EPA's own modeling 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. EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3–22, 3–30, 3–33, 6–24, 6–25 (2015). The Energy Information Administration reached similar conclusions, projecting that the rule would cause retail electricity prices to remain persistently 10% higher in many States, and would reduce GDP by at least a trillion 2009 dollars by 2040. Dept. of Energy, Analysis of the Impacts of the Clean Power Plan 21, 63–64 (May 2015).

C

These projections were never tested, because the Clean Power Plan never went into effect. The same day that EPA promulgated the rule, dozens of parties (including 27 States) petitioned for review in the D. C. Circuit. After that

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court declined to enter a stay of the rule, the challengers sought the same relief from this Court. We granted a stay, preventing the rule from taking effect. *West Virginia* v. *EPA*, 577 U. S. 1126 (2016). The Court of Appeals later heard argument on the merits en banc. But before it could issue a decision, there was a change in Presidential administrations. The new administration requested that the litigation be held in abeyance so that EPA could reconsider the Clean Power Plan. The D. C. Circuit obliged, and later dismissed the petitions for review as moot.

EPA eventually repealed the rule in 2019, concluding that the Clean Power Plan had been "in excess of its statutory authority" under Section 111(d). 84 Fed. Reg. 32523 (2019). Specifically, the Agency concluded that generation shifting should not have been considered as part of the BSER. The Agency interpreted Section 111 as "limit[ing] the BSER to those systems that can be put into operation *at* a building, structure, facility, or installation," such as "add-on controls" and "inherently lower-emitting processes/practices/designs." *Id.*, at 32524. It then explained that the Clean Power Plan, rather than setting the standard "based on the application of equipment and practices at the level of an individual facility," had instead based it on "a shift in the energy generation mix at the grid level," *id.*, at 32523—not the sort of measure that has "a potential for application to an individual source." *Id.*, at 32524.

The Agency determined that "the interpretative question raised" by the Clean Power Plan—"*i.e.*, whether a 'system of emission reduction' can consist of generation-shifting measures"—fell under the "major question doctrine." *Id.*, at 32529. Under that doctrine, EPA explained, courts "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance." *Ibid.* (quoting *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (internal quotation marks omitted)). The Agency concluded that the Clean Power Plan was

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such a decision, for a number of reasons. Its "generation-shifting scheme was projected to have billions of dollars of impact." 84 Fed. Reg. 32529. "[N]o section 111 rule of the scores issued ha[d] ever been based on generation shifting." *Ibid.* And that novel reading of the statute would empower EPA "to order the wholesale restructuring of any industrial sector" based only on its discretionary assessment of "such factors as 'cost' and 'feasibility.'" *Ibid.*

EPA argued that under the major questions doctrine, a clear statement was necessary to conclude that Congress intended to delegate authority "of this breadth to regulate a fundamental sector of the economy." *Ibid.* It found none. "Indeed," it concluded, given the text and structure of the statute, "Congress has directly spoken to this precise question and precluded" the use of measures such as generation shifting. *Ibid.*

In the same rulemaking, the Agency replaced the Clean Power Plan by promulgating a different Section 111(d) regulation, known as the Affordable Clean Energy (ACE) Rule. *Id.*, at 32532. Based on its view of what measures may permissibly make up the BSER, EPA determined that the best system would be akin to building block one of the Clean Power Plan: a combination of equipment upgrades and operating practices that would improve facilities' heat rates. *Id.*, at 32522, 32537. The ACE Rule determined that the application of its BSER measures would result in only small reductions in carbon dioxide emissions. *Id.*, at 32561.

D

A number of States and private parties immediately filed petitions for review in the D. C. Circuit, challenging EPA's repeal of the Clean Power Plan and its enactment of the replacement ACE Rule. Other States and private entities—including petitioners here West Virginia, North Dakota, Westmoreland Mining Holdings LLC, and The North American Coal Corporation (NACC)—intervened to defend both

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actions.

The Court of Appeals consolidated all 12 petitions for review into one case. It then held that EPA's "repeal of the Clean Power Plan rested critically on a mistaken reading of the Clean Air Act"—namely, that generation shifting cannot be a "system of emission reduction" under Section 111. 985 F. 3d, at 995. To the contrary, the court concluded, the statute could reasonably be read to encompass generation shifting. As part of that analysis, the Court of Appeals concluded that the major questions doctrine did not apply, and thus rejected the need for a clear statement of congressional intent to delegate such power to EPA. *Id.*, at 959–968. Having found that EPA misunderstood the scope of its authority under the Clean Air Act, the Court vacated the Agency's repeal of the Clean Power Plan and remanded to the Agency for further consideration. *Id.*, at 995. It also vacated and remanded the replacement rule, the ACE Rule, for the same reason. *Ibid.*

The court's decision, handed down on January 19, 2021, was quickly followed by another change in Presidential administrations. One month later, EPA moved the Court of Appeals to partially stay the issuance of its mandate as it pertained to the Clean Power Plan. The Agency did so to ensure that the Clean Power Plan would not immediately go back into effect. Respondents' Motion for a Partial Stay of Issuance of the Mandate in *American Lung Assn.* v. *EPA*, No. 19–1140 etc. (CADC), p. 4. EPA believed that such a result would not make sense while it was in the process of considering whether to promulgate a new Section 111(d) rule. *Ibid*. No party opposed the motion, and the court accordingly stayed its vacatur of the Agency's repeal of the Clean Power Plan.

Westmoreland, NACC, and the States defending the repeal of the Clean Power Plan all filed petitions for certiorari. We granted the petitions and consolidated the cases. 595 U. S. ___ (2021).

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II

We first consider the Government's contention that no petitioner has Article III standing to seek our review.

Although most disputes over standing concern whether a plaintiff has satisfied the requirement when filing suit, "Article III demands that an actual controversy persist throughout all stages of litigation." *Hollingsworth* v. *Perry*, 570 U. S. 693, 705 (2013) (internal quotation marks omitted). The requirement of standing "must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance." *Arizonans for Official English* v. *Arizona*, 520 U. S. 43, 64 (1997). In considering a litigant's standing to appeal, the question is whether it has experienced an injury "fairly traceable to the *judgment below*." *Food Marketing Institute* v. *Argus Leader Media*, 588 U. S. ___, ___ (2019) (slip op., at 4) (emphasis added; internal quotation marks omitted). If so, and a "favorable ruling" from the appellate court "would redress [that] injury," then the appellant has a cognizable Article III stake. *Ibid.*

Here, it is apparent that at least one group of petitioners—the state petitioners—are injured by the Court of Appeals' judgment. That judgment vacated "the ACE rule *and* its embedded repeal of the Clean Power Plan," 985 F. 3d, at 995 (emphasis added), and accordingly purports to bring the Clean Power Plan back into legal effect. Thus, to the extent the Clean Power Plan harms the States, the D. C. Circuit's judgment inflicts the same injury. And there can be "little question" that the rule does injure the States, since they are "the object of" its requirement that they more stringently regulate power plant emissions within their borders. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 561–562 (1992).

The Government counters that "agency and judicial actions" subsequent to the court's entry of judgment have "eliminated any . . . possibility" of injury. Brief for Federal

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Respondents 16. First, after the decision, EPA informed the Court of Appeals that it does not intend to enforce the Clean Power Plan because it has decided to promulgate a new Section 111(d) rule. Second, on EPA's request, the lower court stayed the part of its judgment that vacated the repeal, pending that new rulemaking. "These circumstances," says the Government, "have *mooted* the prior dispute as to the CPP Repeal Rule's legality." *Id.*, at 17 (emphasis added).

That Freudian slip, however, reveals the basic flaw in the Government's argument: It is the doctrine of *mootness*, not standing, that addresses whether "an intervening circumstance [has] deprive[d] the plaintiff of a personal stake in the outcome of the lawsuit." *Genesis HealthCare Corp.* v. *Symczyk*, 569 U. S. 66, 72 (2013) (internal quotation marks omitted); see also *Friends of the Earth, Inc.* v. *Laidlaw Environmental Services (TOC), Inc.*, 528 U. S. 167, 189–192 (2000). The distinction matters because the Government, not petitioners, bears the burden to establish that a once-live case has become moot. *Id.*, at 189; *Adarand Constructors, Inc.* v. *Slater*, 528 U. S. 216, 222 (2000) (*per curiam*).

That burden is "heavy" where, as here, "[t]he only conceivable basis for a finding of mootness in th[e] case is [the respondent's] voluntary conduct." *Friends of the Earth*, 528 U. S., at 189. Although the Government briefly argues that the lower court's stay of its mandate extinguished the controversy, it cites no authority for that proposition, and it does not make sense: Lower courts frequently stay their mandates when notified that the losing party intends to seek our certiorari review. So the Government's mootness argument boils down to its representation that EPA has no intention of enforcing the Clean Power Plan prior to promulgating a new Section 111(d) rule.

But "voluntary cessation does not moot a case" unless it is "absolutely clear that the allegedly wrongful behavior

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could not reasonably be expected to recur." *Parents Involved in Community Schools* v. *Seattle School Dist. No. 1*, 551 U. S. 701, 719 (2007). Here the Government "nowhere suggests that if this litigation is resolved in its favor it will not" reimpose emissions limits predicated on generation shifting; indeed, it "vigorously defends" the legality of such an approach. *Ibid.* We do not dismiss a case as moot in such circumstances. See *City of Mesquite* v. *Aladdin's Castle*, *Inc.*, 455 U. S. 283, 288–289 (1982). The case thus remains justiciable, and we may turn to the merits.

III

A

In devising emissions limits for power plants, EPA first "determines" the "best system of emission reduction" that—taking into account cost, health, and other factors—it finds "has been adequately demonstrated." 42 U. S. C. §7411(a)(1). The Agency then quantifies "the degree of emission limitation achievable" if that best system were applied to the covered source. *Ibid.*; see also 80 Fed. Reg. 64719. The BSER, therefore, "is the central determination that the EPA must make in formulating [its emission] guidelines" under Section 111. *Id.*, at 64723. The issue here is whether restructuring the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030, can be the "best system of emission reduction" within the meaning of Section 111.

"It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis* v. *Michigan Dept. of Treasury*, 489 U. S. 803, 809 (1989). Where the statute at issue is one that confers authority upon an administrative agency, that inquiry must be "shaped, at least in some measure, by the nature of the question presented"—whether Congress in fact meant to confer the power the agency has asserted. *FDA* v. *Brown &*

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Williamson Tobacco Corp., 529 U. S. 120, 159 (2000). In the ordinary case, that context has no great effect on the appropriate analysis. Nonetheless, our precedent teaches that there are "extraordinary cases" that call for a different approach—cases in which the "history and the breadth of the authority that [the agency] has asserted," and the "economic and political significance" of that assertion, provide a "reason to hesitate before concluding that Congress" meant to confer such authority. *Id.*, at 159–160.

Such cases have arisen from all corners of the administrative state. In *Brown & Williamson*, for instance, the Food and Drug Administration claimed that its authority over "drugs" and "devices" included the power to regulate, and even ban, tobacco products. *Id.*, at 126–127. We rejected that "expansive construction of the statute," concluding that "Congress could not have intended to delegate" such a sweeping and consequential authority "in so cryptic a fashion." *Id.*, at 160. In *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 3), we concluded that the Centers for Disease Control and Prevention could not, under its authority to adopt measures "necessary to prevent the . . . spread of" disease, institute a nationwide eviction moratorium in response to the COVID–19 pandemic. We found the statute's language a "wafer-thin reed" on which to rest such a measure, given "the sheer scope of the CDC's claimed authority," its "unprecedented" nature, and the fact that Congress had failed to extend the moratorium after previously having done so. *Id.*, at ___–___ (slip op., at 6–8).

Our decision in *Utility Air* addressed another question regarding EPA's authority—namely, whether EPA could construe the term "air pollutant," in a specific provision of the Clean Air Act, to cover greenhouse gases. 573 U. S., at 310. Despite its textual plausibility, we noted that the Agency's interpretation would have given it permitting authority over millions of small sources, such as hotels and office

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buildings, that had never before been subject to such requirements. *Id.*, at 310, 324. We declined to uphold EPA's claim of "unheralded" regulatory power over "a significant portion of the American economy." *Id.*, at 324. In *Gonzales* v. *Oregon*, 546 U. S. 243 (2006), we confronted the Attorney General's assertion that he could rescind the license of any physician who prescribed a controlled substance for assisted suicide, even in a State where such action was legal. The Attorney General argued that this came within his statutory power to revoke licenses where he found them "inconsistent with the public interest," 21 U. S. C. §823(f). We considered the "idea that Congress gave [him] such broad and unusual authority through an implicit delegation . . . not sustainable." 546 U. S., at 267. Similar considerations informed our recent decision invalidating the Occupational Safety and Health Administration's mandate that "84 million Americans . . . either obtain a COVID–19 vaccine or undergo weekly medical testing at their own expense." *National Federation of Independent Business* v. *Occupational Safety and Health Administration*, 595 U. S. ___, ___ (2022) (*per curiam*) (slip op., at 5). We found it "telling that OSHA, in its half century of existence," had never relied on its authority to regulate occupational hazards to impose such a remarkable measure. *Id.*, at ___ (slip op., at 8).

All of these regulatory assertions had a colorable textual basis. And yet, in each case, given the various circumstances, "common sense as to the manner in which Congress [would have been] likely to delegate" such power to the agency at issue, *Brown & Williamson*, 529 U. S., at 133, made it very unlikely that Congress had actually done so. Extraordinary grants of regulatory authority are rarely accomplished through "modest words," "vague terms," or "subtle device[s]." *Whitman*, 531 U. S., at 468. Nor does Congress typically use oblique or elliptical language to empower an agency to make a "radical or fundamental change" to a statutory scheme. *MCI Telecommunications Corp.* v.

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American Telephone & Telegraph Co., 512 U. S. 218, 229 (1994). Agencies have only those powers given to them by Congress, and "enabling legislation" is generally not an "open book to which the agency [may] add pages and change the plot line." E. Gellhorn & P. Verkuil, Controlling *Chevron*-Based Delegations, 20 Cardozo L. Rev. 989, 1011 (1999). We presume that "Congress intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc).

Thus, in certain extraordinary cases, both separation of powers principles and a practical understanding of legislative intent make us "reluctant to read into ambiguous statutory text" the delegation claimed to be lurking there. *Utility Air*, 573 U. S., at 324. To convince us otherwise, something more than a merely plausible textual basis for the agency action is necessary. The agency instead must point to "clear congressional authorization" for the power it claims. *Ibid.*

The dissent criticizes us for "announc[ing] the arrival" of this major questions doctrine, and argues that each of the decisions just cited simply followed our "ordinary method" of "normal statutory interpretation," *post,* at 13, 15 (opinion of KAGAN, J.). But in what the dissent calls the "key case" in this area, *Brown & Williamson*, *post,* at 15, the Court could not have been clearer: "In extraordinary cases . . . there may be reason to hesitate" before accepting a reading of a statute that would, under more "ordinary" circumstances, be upheld. 529 U. S., at 159. Or, as we put it more recently, we "typically greet" assertions of "extravagant statutory power over the national economy" with "skepticism." *Utility Air*, 573 U. S., at 324. The dissent attempts to fit the analysis in these cases within routine statutory interpretation, but the bottom line—a requirement of "clear

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congressional authorization," *ibid.*—confirms that the approach under the major questions doctrine is distinct.

As for the major questions doctrine "label[]," *post,* at 13, it took hold because it refers to an identifiable body of law that has developed over a series of significant cases all addressing a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted. Scholars and jurists have recognized the common threads between those decisions. So have we. See *Utility Air*, 573 U. S., at 324 (citing *Brown & Williamson* and *MCI*); *King* v. *Burwell*, 576 U. S. 473, 486 (2015) (citing *Utility Air*, *Brown & Williamson*, and *Gonzales*).

B

Under our precedents, this is a major questions case. In arguing that Section 111(d) empowers it to substantially restructure the American energy market, EPA "claim[ed] to discover in a long-extant statute an unheralded power" representing a "transformative expansion in [its] regulatory authority." *Utility Air*, 573 U. S., at 324. It located that newfound power in the vague language of an "ancillary provision[]" of the Act, *Whitman*, 531 U. S., at 468, one that was designed to function as a gap filler and had rarely been used in the preceding decades. And the Agency's discovery allowed it to adopt a regulatory program that Congress had conspicuously and repeatedly declined to enact itself. *Brown & Williamson*, 529 U. S., at 159–160; *Gonzales*, 546 U. S., at 267–268; *Alabama Assn.*, 594 U. S., at ___, ___ (slip op., at 2, 8). Given these circumstances, there is every reason to "hesitate before concluding that Congress" meant to confer on EPA the authority it claims under Section 111(d). *Brown & Williamson*, 529 U. S., at 159–160.

Prior to 2015, EPA had always set emissions limits under Section 111 based on the application of measures that would reduce pollution by causing the regulated source to

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operate more cleanly. See, *e.g.*, 41 Fed. Reg. 48706 (requiring "degree of control achievable through the application of fiber mist eliminators"); see also *supra*, at 6. It had never devised a cap by looking to a "system" that would reduce pollution simply by "shifting" polluting activity "from dirtier to cleaner sources." 80 Fed. Reg. 64726; see *id.*, at 64738 ("[O]ur traditional interpretation . . . has allowed regulated entities to produce as much of a particular good as they desire provided that they do so through an appropriately clean (or low-emitting) process."). And as Justice Frankfurter has noted, "just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred." *FTC* v. *Bunte Brothers*, *Inc.*, 312 U. S. 349, 352 (1941).

The Government quibbles with this description of the history of Section 111(d), pointing to one rule that it says relied upon a cap-and-trade mechanism to reduce emissions. See 70 Fed. Reg. 28616 (2005) (Mercury Rule). The legality of that choice was controversial at the time and was never addressed by a court. See *New Jersey* v. *EPA*, 517 F. 3d 574 (CADC 2008) (vacating on other grounds). Even assuming the Rule was valid, though, it still does not help the Government. In that regulation, EPA set the actual "emission cap"—*i.e.*, the limit on emissions that sources would be required to meet—"based on the level of [mercury] emissions reductions that w[ould] be achievable by" the use of "technologies [that could be] installed and operational on a nationwide basis" in the relevant timeframe—namely, wet scrubbers. 70 Fed. Reg. 28620–28621. In other words, EPA set the cap based on the application of particular controls, and regulated sources could have complied by installing them. By contrast, and by design, there is no control a coal

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plant operator can deploy to attain the emissions limits established by the Clean Power Plan. See *supra*, at 10. The Mercury Rule, therefore, is no precedent for the Clean Power Plan. To the contrary, it was one more entry in an unbroken list of prior Section 111 rules that devised the enforceable emissions limit by determining the best control mechanisms available for the source.[1]

This consistent understanding of "system[s] of emission reduction" tracked the seemingly universal view, as stated by EPA in its inaugural Section 111(d) rulemaking, that "Congress intended a technology-based approach" to regulation in that Section. 40 Fed. Reg. 53343 (1975); see *id.*, at 53341 ("degree of control to be reflected in EPA's emission guidelines" will be based on "application of best adequately demonstrated control technology").[2] A technology-based standard, recall, is one that focuses on improving the emissions performance of individual sources. EPA "commonly

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[1] The dissent cites other ostensible precedents, see *post*, at 25–26, but they are also inapposite. A few allowed cap-and-trade or similar averaging measures as compliance mechanisms, like the Mercury Rule. See, *e.g.*, 60 Fed. Reg. 65402 (1995). The others were not Section 111 rules.

[2] See McGarity 165 (EPA promulgates "technology-based new source performance standards that require the implementation of the 'best available demonstrated' technology"); P. McCubbin, The Risk in Technology-Based Standards, 16 Duke Env. L. & Pol'y Forum 1, 46, n. 180 (2003) (Section 111 standards "are another set of technology-based standards"); W. Wagner, The Triumph of Technology-Based Standards, 2000 U. Ill. L. Rev 83, 84, n. 4 ("Technology-based standards made their initial appearance" in "Section 111 of the Clean Air Act," which "requires the EPA to set technology-based emission limitations").

The dissent points to a 1977 amendment to Section 111 as evidence that the 1970 Congress did not intend for EPA to establish this sort of source-specific standard. *Post*, at 10–11. But it is clear that the 1977 amendment was merely intended to prohibit power plants from adopting one specific kind of at-the-source measure—a switch from burning high-sulfur coal to low-sulfur coal—and was not intended or understood to change the basic, source-focused regulatory approach. See *Wisconsin Elec. Power Co.* v. *Reilly*, 893 F. 2d 901, 919 (CA8 1990) (explaining the history); B. Ackerman & W. Hassler, Clean Coal/Dirty Air (1981) (same).

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referred to" the "level of control" required as a "best demonstrated technology (BDT)" standard, 73 Fed. Reg. 34073, and consistently applied it as such. *E.g.*, 61 Fed. Reg. 9907 (declaring "BDT" to be "a well-designed and well-operated gas collection system and . . . a control device capable of reducing [harmful gases] in the collected gas by 98 weight-percent.").

Indeed, EPA nodded to this history in the Clean Power Plan itself, describing the sort of "systems of emission reduction" it had always before selected—"efficiency improvements, fuel-switching," and "add-on controls"—as "more traditional air pollution control measures." 80 Fed. Reg. 64784. The Agency noted that it had "considered" such measures as potential systems of emission reduction for carbon dioxide, *ibid.*, including a measure it ultimately adopted as a "component" of the BSER, namely, heat rate improvements. *Id.*, at 64727.

But, the Agency explained, in order to "control[] CO_2 from affected [plants] at levels . . . necessary to mitigate the dangers presented by climate change," it could not base the emissions limit on "measures that improve efficiency at the power plants." *Id.*, at 64728. "The quantity of emissions reductions resulting from the application of these measures" would have been "too small." *Id.*, at 64727. Instead, to attain the necessary "critical CO_2 reductions," EPA adopted what it called a "broader, forward-thinking approach to the design" of Section 111 regulations. *Id.*, at 64703. Rather than focus on improving the performance of individual sources, it would "improve the *overall power system* by lowering the carbon intensity of power generation." *Ibid.* (emphasis added). And it would do that by forcing a shift throughout the power grid from one type of energy source to another. In the words of the then-EPA Administrator, the rule was "not about pollution control" so much as it was "an investment opportunity" for States, especially "investments in renewables and clean energy." Oversight

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Hearing on EPA's Proposed Carbon Pollution Standards for Existing Power Plants before the Senate Committee on Environment and Public Works, 113th Cong., 2d Sess., p. 33 (2014).

This view of EPA's authority was not only unprecedented; it also effected a "fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation" into an entirely different kind. *MCI*, 512 U. S., at 231. Under the Agency's prior view of Section 111, its role was limited to ensuring the efficient pollution performance of each individual regulated source. Under that paradigm, if a source was already operating at that level, there was nothing more for EPA to do. Under its newly "discover[ed]" authority, *Utility Air*, 573 U. S., at 324, however, EPA can demand much greater reductions in emissions based on a very different kind of policy judgment: that it would be "best" if coal made up a much smaller share of national electricity generation. And on this view of EPA's authority, it could go further, perhaps forcing coal plants to "shift" away virtually all of their generation—*i.e.*, to cease making power altogether.[3]

The Government attempts to downplay the magnitude of this "unprecedented power over American industry." *Industrial Union Dept.*, *AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion). The amount of generation shifting ordered, it argues, must be "adequately demonstrated" and "best" in light of the statu-

[3] The dissent suggests that EPA could bring about the same result by, for example, simply requiring coal plants to become natural gas plants, and that this would fit within the prior regulatory approach of efficiency-improving, at-the-source measures. *Post*, at 24. Of course, EPA has never ordered anything remotely like that, and we doubt it could. Section 111(d) empowers EPA to guide States in "establish[ing] standards of performance" for "existing source[s]," §7411(d)(1), not to direct existing sources to effectively cease to exist.

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tory factors of "cost," "nonair quality health and environmental impact," and "energy requirements." 42 U. S. C. §7411(a)(1). EPA therefore must limit the magnitude of generation shift it demands to a level that will not be "exorbitantly costly" or "threaten the reliability of the grid." Brief for Federal Respondents 42.

But this argument does not so much *limit* the breadth of the Government's claimed authority as *reveal* it. On EPA's view of Section 111(d), Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy. EPA decides, for instance, how much of a switch from coal to natural gas is practically feasible by 2020, 2025, and 2030 before the grid collapses, and how high energy prices can go as a result before they become unreasonably "exorbitant."

There is little reason to think Congress assigned such decisions to the Agency. For one thing, as EPA itself admitted when requesting special funding, "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." EPA, Fiscal Year 2016: Justification of Appropriation Estimates for the Committee on Appropriations 213 (2015) (emphasis added). "When [an] agency has no comparative expertise" in making certain policy judgments, we have said, "Congress presumably would not" task it with doing so. *Kisor* v. *Wilkie*, 588 U. S. ___, ___ (2019) (slip op., at 17); see also *Gonzales*, 546 U. S., at 266–267.

We also find it "highly unlikely that Congress would leave" to "agency discretion" the decision of how much coal-based generation there should be over the coming decades. *MCI*, 512 U. S., at 231; see also *Brown & Williamson*, 529 U. S., at 160 ("We are confident that Congress could not have intended to delegate a decision of such economic and

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political significance to an agency in so cryptic a fashion."). The basic and consequential tradeoffs involved in such a choice are ones that Congress would likely have intended for itself. See W. Eskridge, Interpreting Law: A Primer on How To Read Statutes and the Constitution 288 (2016) ("Even if Congress has delegated an agency general rule-making or adjudicatory power, judges presume that Congress does not delegate its authority to settle or amend major social and economic policy decisions."). Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d).

The dissent contends that there is nothing surprising about EPA dictating the optimal mix of energy sources nationwide, since that sort of mandate will reduce air pollution from power plants, which is EPA's bread and butter. *Post*, at 20–22. But that does not follow. Forbidding evictions may slow the spread of disease, but the CDC's ordering such a measure certainly "raise[s] an eyebrow." *Post*, at 18. We would not expect the Department of Homeland Security to make trade or foreign policy even though doing so could decrease illegal immigration. And no one would consider generation shifting a "tool" in OSHA's "toolbox," *post*, at 21, even though reducing generation at coal plants would reduce workplace illness and injury from coal dust.

The dissent also cites our decision in *American Elec. Power Co.* v. *Connecticut*, 564 U. S. 410 (2011). *Post*, at 20. The question there, however, was whether Congress wanted district court judges to decide, under unwritten federal nuisance law, "whether and how to regulate carbon-dioxide emissions from powerplants." 564 U. S., at 426. We answered no, given the existence of Section 111(d). But we said nothing about the ways in which Congress intended EPA to exercise its power under that provision. And it is doubtful we had in mind that it would claim the authority

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to require a large shift from coal to natural gas, wind, and solar. After all, EPA had never regulated in that manner, despite having issued many prior rules governing power plants under Section 111. See, *e.g.*, 71 Fed. Reg. 9866 (2006); 70 Fed. Reg. 28616; 44 Fed. Reg. 33580; 36 Fed. Reg. 24875 (1973).[4]

Finally, we cannot ignore that the regulatory writ EPA newly uncovered conveniently enabled it to enact a program that, long after the dangers posed by greenhouse gas emissions "had become well known, Congress considered and rejected" multiple times. *Brown & Williamson*, 529 U. S., at 144; see also *Alabama Assn.*, 594 U. S., at ___ (slip op., at 2); *Bunte Brothers*, 312 U. S., at 352 (lack of authority not previously exercised "reinforced by [agency's] unsuccessful attempt . . . to secure from Congress an express grant of [the challenged] authority"). At bottom, the Clean Power Plan essentially adopted a cap-and-trade scheme, or set of state cap-and-trade schemes, for carbon. See 80 Fed. Reg. 64734 ("Emissions trading is . . . an integral part of our BSER analysis."). Congress, however, has consistently rejected proposals to amend the Clean Air Act to create such a program. See, *e.g.*, American Clean Energy and Security

[4] According to the dissent, "EPA is always controlling the mix of energy sources" under Section 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. *Post,* at 22. But there is an obvious difference between (1) issuing a rule that may end up causing an incidental loss of coal's market share, and (2) simply announcing what the market share of coal, natural gas, wind, and solar must be, and then requiring plants to reduce operations or subsidize their competitors to get there. No one has ever thought that the Clean Power Plan was just business as usual. See *American Lung Assn.* v. *EPA*, 985 F. 3d 914, 1000 (CADC 2021) (Walker, J., dissenting) ("Leaders of the environmental movement considered the rule 'groundbreaking,' called its announcement 'historic,' and labeled it a 'critically important catalyst.'" (footnotes omitted)).

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Act of 2009, H. R. 2454, 111th Cong., 1st Sess.; Clean Energy Jobs and American Power Act, S. 1733, 111th Cong., 1st Sess. (2009). It has also declined to enact similar measures, such as a carbon tax. See, *e.g.*, Climate Protection Act of 2013, S. 332, 113th Cong., 1st Sess.; Save our Climate Act of 2011, H. R. 3242, 112th Cong., 1st Sess. "The importance of the issue," along with 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." *Gonzales*, 546 U. S., at 267–268 (internal quotation marks omitted).

C

Given these circumstances, our precedent counsels skepticism toward EPA's claim that Section 111 empowers it to devise carbon emissions caps based on a generation shifting approach. To overcome that skepticism, the Government must—under the major questions doctrine—point to "clear congressional authorization" to regulate in that manner. *Utility Air*, 573 U. S., at 324.

All the Government can offer, however, is the Agency's authority to establish emissions caps at a level reflecting "the application of the best system of emission reduction . . . adequately demonstrated." 42 U. S. C. §7411(a)(1). As a matter of "definitional possibilities," *FCC* v. *AT&T Inc.*, 562 U. S. 397, 407 (2011), generation shifting can be described as a "system"—"an aggregation or assemblage of objects united by some form of regular interaction," Brief for Federal Respondents 31—capable of reducing emissions. But of course almost anything could constitute such a "system"; shorn of all context, the word is an empty vessel. Such a vague statutory grant is not close to the sort of clear authorization required by our precedents.

The Government, echoed by the other respondents, looks to other provisions of the Clean Air Act for support. It

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points out that the Act elsewhere uses the word "system" or "similar words" to describe cap-and-trade schemes or other sector-wide mechanisms for reducing pollution. *Ibid*. The Acid Rain program set out in Title IV of the Act establishes a cap-and-trade scheme for reducing sulfur dioxide emissions, which the statute refers to as an "emission allocation and transfer *system*." §7651(b) (emphasis added). And Section 110 of the NAAQS program specifies that "marketable permits" and "auctions of emissions rights" qualify as "control measures, means, or techniques" that States may adopt in their state implementation plans in order "to meet the applicable requirements of" a NAAQS. §7410(a)(2)(A). If the word "system" or similar words like "technique" or "means" can encompass cap-and-trade, the Government maintains, why not in Section 111?

But just because a cap-and-trade "system" can be used to reduce emissions does not mean that it is the kind of "system of emission reduction" referred to in Section 111. Indeed, the Government's examples demonstrate why it is not.

First, unlike Section 111, the Acid Rain and NAAQS programs contemplate trading systems as a means of *complying* with an *already established emissions limit*, set either directly by Congress (as with Acid Rain, see 42 U. S. C. §7651c) or by reference to the safe concentration of the pollutant in the ambient air (as with the NAAQS). In Section 111, by contrast, it is EPA's job to come up with the cap itself: the "numerical limit on emissions" that States must apply to each source. 80 Fed. Reg. 64768. We doubt that Congress directed the Agency to set an emissions cap at the level "which reflects the degree of emission limitation achievable through the application of [a cap-and-trade] system," §7411(a)(1), for that degree is indeterminate. It is one thing for Congress to authorize regulated sources to use trading to comply with a preset cap, or a cap that must be based on some scientific, objective criterion, such as the

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NAAQS. It is quite another to simply authorize EPA to set the cap itself wherever the Agency sees fit.

Second, Congress added the above authorizations for the use of emissions trading programs in 1990, simultaneous with amending Section 111 to its present form. At the time, cap-and-trade was a novel and highly touted concept. The Acid Rain program was "the nation's first-ever emissions trading program." L. Heinzerling & R. Steinzor, A Perfect Storm: Mercury and the Bush Administration, 34 Env. L. Rep. 10297, 10309 (2004). And Congress went out of its way to amend the NAAQS statute to make absolutely clear that the "measures, means, [and] techniques" States could use to meet the NAAQS included cap-and-trade. §7410(a)(2)(A). Yet "not a peep was heard from Congress about the possibility that a trading regime could be installed under §111." *Id.*, at 10309.

Finally, the Government notes that other parts of the Clean Air Act, past and present, have "explicitly limited the permissible components of a particular 'system'" of emission reduction in some regard. Brief for Federal Respondents 32. For instance, a separate section of the statute empowers EPA to require the "degree of reduction achievable through the *retrofit* application of the best system of *continuous* emission reduction." §7651f(b)(2) (emphasis added). The comparatively unadorned use of the phrase "best system of emission reduction" in Section 111, the Government urges, "suggest[s] a conscious congressional" choice *not* to limit the measures that may constitute the BSER to those applicable at or to an individual source. *Id.*, at 32.

These arguments, however, concern an interpretive question that is not at issue. We have 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. To be sure, it is pertinent to our analysis that EPA has acted consistent

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with such a limitation for the first four decades of the statute's existence. But the only interpretive question before us, and the only one we answer, is more narrow: whether the "best system of emission reduction" identified by EPA in the Clean Power Plan was within the authority granted to the Agency in Section 111(d) of the Clean Air Act. For the reasons given, the answer is no.[5]

* * *

Capping carbon dioxide emissions at a level that will force a nationwide transition away from the use of coal to generate electricity may be a sensible "solution to the crisis of the day." *New York* v. *United States*, 505 U. S. 144, 187 (1992). But it is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body. The judgment of the Court of Appeals for the District of Columbia Circuit is reversed, and the cases are remanded for further proceedings consistent with this opinion.

It is so ordered.

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[5] We find it odd that the dissent accuses us of champing at the bit to "constrain EPA's efforts to address climate change," *post*, at 4, yet also chides us for "mak[ing] no effort" to opine—in what would be plain dicta—on "how far [our] opinion constrain[s] EPA," *post*, at 12.

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SUPREME COURT OF THE UNITED STATES

Nos. 20–1530, 20–1531, 20–1778 and 20–1780

WEST VIRGINIA, ET AL., PETITIONERS
20–1530 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE NORTH AMERICAN COAL CORPORATION, PETITIONER
20–1531 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC, PETITIONER
20–1778 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NORTH DAKOTA, PETITIONER
20–1780 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 30, 2022]

JUSTICE GORSUCH, with whom JUSTICE ALITO joins, concurring.

To resolve today's case the Court invokes the major questions doctrine. Under that doctrine's terms, administrative agencies must be able to point to "'clear congressional authorization'" when they claim the power to make decisions of vast "'economic and political significance.'" *Ante*, at 17, 19. Like many parallel clear-statement rules in our law, this one operates to protect foundational constitutional

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guarantees. I join the Court's opinion and write to offer some additional observations about the doctrine on which it rests.

I

A

One of the Judiciary's most solemn duties is to ensure that acts of Congress are applied in accordance with the Constitution in the cases that come before us. To help fulfill that duty, courts have developed certain "clear-statement" rules. These rules assume that, absent a clear statement otherwise, Congress means for its laws to operate in congruence with the Constitution rather than test its bounds. In this way, these clear-statement rules help courts "act as faithful agents of the Constitution." A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 169 (2010) (Barrett).

Consider some examples. The Constitution prohibits Congress from passing laws imposing various types of retroactive liability. See Art. I, § 9; *Landgraf* v. *USI Film Products*, 511 U. S. 244, 265–266 (1994). Consistent with this rule, Chief Justice Marshall long ago advised that "a court . . . ought to struggle hard against a [statutory] construction which will, by a retrospective operation, affect the rights of parties." *United States* v. *Schooner Peggy*, 1 Cranch 103, 110 (1801). Justice Paterson likewise insisted that courts must interpret statutes to apply only prospectively "unless they are so clear, strong, and imperative, that no other meaning can be annexed to them." *United States* v. *Heth*, 3 Cranch 399, 413 (1806).

The Constitution also incorporates the doctrine of sovereign immunity. See, *e.g.*, *Hans* v. *Louisiana*, 134 U. S. 1, 12–17 (1890). To enforce that doctrine, courts have consistently held that "nothing but express words, or an insurmountable implication" would justify the conclusion that

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lawmakers intended to abrogate the States' sovereign immunity. *Chisholm* v. *Georgia*, 2 Dall. 419, 450 (1793) (Iredell, J., dissenting); see *Seminole Tribe of Fla.* v. *Florida*, 517 U. S. 44, 55 (1996). In a similar vein, Justice Story observed that "[i]t is a general rule in the interpretation of legislative acts not to construe them to embrace the sovereign power or government, unless expressly named or included by necessary implication." *United States* v. *Greene*, 26 F. Cas. 33, 34 (No. 15, 258) (CC Me. 1827).

The major questions doctrine works in much the same way to protect the Constitution's separation of powers. *Ante*, at 19. In Article I, "the People" vested "[a]ll" federal "legislative powers . . . in Congress." Preamble; Art. I, § 1. As Chief Justice Marshall put it, this means that "important subjects . . . must be entirely regulated by the legislature itself," even if Congress may leave the Executive "to act under such general provisions to fill up the details." *Wayman* v. *Southard*, 10 Wheat. 1, 42–43 (1825). Doubtless, what qualifies as an important subject and what constitutes a detail may be debated. See, *e.g.*, *Gundy* v. *United States*, 588 U. S. ___, ___–___ (2019) (plurality opinion) (slip op., at 4–6); *id.*, at ___–___ (GORSUCH, J., dissenting) (slip op., at 10–12). But no less than its rules against retroactive legislation or protecting sovereign immunity, the Constitution's rule vesting federal legislative power in Congress is "vital to the integrity and maintenance of the system of government ordained by the Constitution." *Marshall Field & Co.* v. *Clark*, 143 U. S. 649, 692 (1892).

It is vital because the framers believed that a republic—a thing of the people—would be more likely to enact just laws than a regime administered by a ruling class of largely unaccountable "ministers." The Federalist No. 11, p. 85 (C. Rossiter ed. 1961) (A. Hamilton). From time to time, some

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have questioned that assessment.[1] But by vesting the lawmaking power in the people's elected representatives, the Constitution sought to ensure "not only that all power [w]ould be derived from the people," but also "that those [e]ntrusted with it should be kept in dependence on the people." *Id.*, No. 37, at 227 (J. Madison). The Constitution, too, placed its trust not in the hands of "a few, but [in] a number of hands," *ibid.*, so that those who make our laws would better reflect the diversity of the people they represent and have an "immediate dependence on, and an intimate sympathy with, the people." *Id.*, No. 52, at 327 (J. Madison). Today, some might describe the Constitution as having designed the federal lawmaking process to capture the wisdom of the masses. See P. Hamburger, Is Administrative Law Unlawful? 502–503 (2014).

Admittedly, lawmaking under our Constitution can be difficult. But that is nothing particular to our time nor any accident. The framers believed that the power to make new laws regulating private conduct was a grave one that could, if not properly checked, pose a serious threat to individual liberty. See The Federalist No. 48, at 309–312 (J. Madison); see also *id.*, No. 73, at 441–442 (A. Hamilton). As a result,

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[1] For example, Woodrow Wilson famously argued that "popular sovereignty" "embarrasse[d]" the Nation because it made it harder to achieve "executive expertness." The Study of Administration, 2 Pol. Sci. Q. 197, 207 (1887) (Administration). In Wilson's eyes, the mass of the people were "selfish, ignorant, timid, stubborn, or foolish." *Id.*, at 208. He expressed even greater disdain for particular groups, defending "[t]he white men of the South" for "rid[ding] themselves, by fair means or foul, of the intolerable burden of governments sustained by the votes of ignorant [African-Americans]." 9 W. Wilson, History of the American People 58 (1918). He likewise denounced immigrants "from the south of Italy and men of the meaner sort out of Hungary and Poland," who possessed "neither skill nor energy nor any initiative of quick intelligence." 5 *id.*, at 212. To Wilson, our Republic "tr[ied] to do too much by vote." Administration 214.

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the framers deliberately sought to make lawmaking difficult by insisting that two houses of Congress must agree to any new law and the President must concur or a legislative supermajority must override his veto.

The difficulty of the design sought to serve other ends too. By effectively requiring a broad consensus to pass legislation, the Constitution sought to ensure that any new laws would enjoy wide social acceptance, profit from input by an array of different perspectives during their consideration, and thanks to all this prove stable over time. See *id.*, No. 10, at 82–84 (J. Madison). The need for compromise inherent in this design also sought to protect minorities by ensuring that their votes would often decide the fate of proposed legislation—allowing them to wield real power alongside the majority. See *id.*, No. 51, at 322–324 (J. Madison). The difficulty of legislating at the federal level aimed as well to preserve room for lawmaking "by governments more local and more accountable than a distant federal" authority, *National Federation of Independent Business* v. *Sebelius*, 567 U. S. 519, 536 (2012) (plurality opinion), and in this way allow States to serve as "laborator[ies]" for "novel social and economic experiments," *New State Ice Co.* v. *Liebmann*, 285 U. S. 262, 311 (1932) (Brandeis, J., dissenting); see J. Sutton, 51 Imperfect Solutions: States and the Making of American Constitutional Law 11 (2018).

Permitting Congress to divest its legislative power to the Executive Branch would "dash [this] whole scheme." *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43, 61 (2015) (ALITO, J., concurring). Legislation would risk becoming nothing more than the will of the current President, or, worse yet, the will of unelected officials barely responsive to him. See S. Breyer, Making Our Democracy Work: A Judge's View 110 (2010) ("[T]he president may not have the time or willingness to review [agency] decisions"). In a world like that, agencies could churn out new laws more or less at whim. Intrusions on

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liberty would not be difficult and rare, but easy and profuse. See The Federalist No. 47, at 303 (J. Madison); *id.*, No. 62, at 378 (J. Madison). Stability would be lost, with vast numbers of laws changing with every new presidential administration. Rather than embody a wide social consensus and input from minority voices, laws would more often bear the support only of the party currently in power. Powerful special interests, which are sometimes "uniquely" able to influence the agendas of administrative agencies, would flourish while others would be left to ever-shifting winds. T. Merrill, Capture Theory and the Courts: 1967–1983, 72 Chi.-Kent L. Rev. 1039, 1043 (1997). Finally, little would remain to stop agencies from moving into areas where state authority has traditionally predominated. See, *e.g.*, *Solid Waste Agency of Northern Cook Cty.* v. *Army Corps of Engineers*, 531 U. S. 159, 173–174 (2001) (*SWANC*). That would be a particularly ironic outcome, given that so many States have robust nondelegation doctrines designed to ensure democratic accountability in their state lawmaking processes. See R. May, The Nondelegation Doctrine is Alive and Well in the States, The Reg. Rev. (Oct. 15, 2020).

B

Much as constitutional rules about retroactive legislation and sovereign immunity have their corollary clear-statement rules, Article I's Vesting Clause has its own: the major questions doctrine. See *Gundy*, 588 U. S., at ___–___ (GORSUCH, J., dissenting) (slip op., at 20–21). Some version of this clear-statement rule can be traced to at least 1897, when this Court confronted a case involving the Interstate Commerce Commission, the federal government's "first modern regulatory agency." S. Dudley, Milestones in the Evolution of the Administrative State 3 (Nov. 2020). The ICC argued that Congress had endowed it with the power to set carriage prices for railroads. See *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 499 (1897). The Court

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deemed that claimed authority "a power of supreme delicacy and importance," given the role railroads then played in the Nation's life. *Id.*, at 505. Therefore, the Court explained, a special rule applied:

> "That Congress has transferred such a power to any administrative body is not to be presumed or implied from any doubtful and uncertain language. The words and phrases efficacious to make such a delegation of power are well understood, and have been frequently used, and if Congress had intended to grant such a power to the [agency], it cannot be doubted that it would have used language *open to no misconstruction*, but *clear and direct*." *Ibid.* (emphasis added).

With the explosive growth of the administrative state since 1970, the major questions doctrine soon took on special importance.[2] In 1980, this Court held it "unreasonable to assume" that Congress gave an agency "unprecedented power[s]" in the "absence of a clear [legislative] mandate." *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (plurality opinion). In the years that followed, the Court routinely enforced "the nondelegation doctrine" through "the interpretation of statu-

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[2] In the 1960s and 1970s, Congress created dozens of new federal administrative agencies. See W. Howell & D. Lewis, Agencies by Presidential Design, 64 J. of Politics 1095, 1105 (Nov. 2002). Between 1970 and 1990, the Code of Federal Regulations grew from about 44,000 pages to about 106,000. See C. DeMuth, Can the Administrative State be Tamed?, 8 J. Legal Analysis 121, 126 (Feb. 2016). Today, Congress issues "roughly two hundred to four hundred laws" every year, while "federal administrative agencies adopt something on the order of three thousand to five thousand final rules." R. Cass, Rulemaking Then and Now: From Management to Lawmaking, 28 Geo. Mason L. Rev. 683, 694 (2021). Beyond that, agencies regularly "produce thousands, if not millions," of guidance documents which, as a practical matter, bind affected parties too. See C. Coglianese, Illuminating Regulatory Guidance, 9 Mich. J. Env. & Admin. L. 243, 247–248 (2020).

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tory texts, and, more particularly, [by] giving narrow constructions to statutory delegations that might otherwise be thought to be unconstitutional." *Mistretta* v. *United States*, 488 U. S. 361, 373, n. 7 (1989). In fact, this Court applied the major questions doctrine in "all corners of the administrative state," whether the issue at hand involved an agency's asserted power to regulate tobacco products, ban drugs used in physician-assisted suicide, extend Clean Air Act regulations to private homes, impose an eviction moratorium, or enforce a vaccine mandate. *Ante*, at 17; see *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 160 (2000); *Gonzales* v. *Oregon*, 546 U. S. 243, 267 (2006); *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014); *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 6); *National Federation of Independent Business* v. *OSHA*, 595 U. S. ___, ___ (2022) (*per curiam*) (slip op., at 6).[3]

The Court has applied the major questions doctrine for the same reason it has applied other similar clear-statement rules—to ensure that the government does "not inadvertently cross constitutional lines." Barrett 175. And the constitutional lines at stake here are surely no less important than those this Court has long held sufficient to justify parallel clear-statement rules. At stake is not just a question of retroactive liability or sovereign immunity, but basic questions about self-government, equality, fair notice,

[3] At times, this Court applied the major questions doctrine more like an ambiguity canon. See *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159 (2000). Ambiguity canons merely instruct courts on how to "choos[e] between equally plausible interpretations of ambiguous text," and are thus weaker than clear-statement rules. Barrett 109. But our precedents have usually applied the doctrine as a clear-statement rule, and the Court today confirms that is the proper way to apply it. See *ante*, at 19–20, 28.

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federalism, and the separation of powers. See Part I–A, *supra*. The major questions doctrine seeks to protect against "unintentional, oblique, or otherwise unlikely" intrusions on these interests. *NFIB* v. *OSHA*, 595 U. S., at ___ (GORSUCH, J., concurring) (slip op., at 5). The doctrine does so by ensuring that, when agencies seek to resolve major questions, they at least act with clear congressional authorization and do not "exploit some gap, ambiguity, or doubtful expression in Congress's statutes to assume responsibilities far beyond" those the people's representatives actually conferred on them. *Ibid.* As the Court aptly summarizes it today, the doctrine addresses "a particular and recurring problem: agencies asserting highly consequential power beyond what Congress could reasonably be understood to have granted." *Ante*, at 20.

II

A

Turning from the doctrine's function to its application, it seems to me that our cases supply a good deal of guidance about when an agency action involves a major question for which clear congressional authority is required.

First, this Court has indicated that the doctrine applies when an agency claims the power to resolve a matter of great "political significance," *NFIB* v. *OSHA*, 595 U. S., at ___ (slip op., at 6) (internal quotation marks omitted), or end an "earnest and profound debate across the country," *Gonzales*, 546 U. S., at 267–268 (internal quotation marks omitted); see *ante*, at 17. So, for example, in *Gonzales*, the Court found that the doctrine applied when the Attorney General issued a regulation that would have effectively banned most forms of physician-assisted suicide even as certain States were considering whether to permit the practice. 546 U. S., at 267. And in *NFIB* v. *OSHA*, the Court held the doctrine applied when an agency sought to mandate COVID–19 vaccines nationwide for most workers at a

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time when Congress and state legislatures were engaged in robust debates over vaccine mandates. 595 U. S., at ___ (slip op., at 5); *id.*, at ___ (GORSUCH, J., concurring) (slip op., at 3). Relatedly, this Court has found it telling when Congress has "'considered and rejected'" bills authorizing something akin to the agency's proposed course of action. *Ante*, at 20, 27 (quoting *Brown & Williamson*, 529 U. S., at 144). That too may be a sign that an agency is attempting to "'work [a]round'" the legislative process to resolve for itself a question of great political significance. *NFIB* v. *OSHA*, 595 U. S., at ___ (GORSUCH, J., concurring) (slip op., at 3).[4]

Second, this Court has said that an agency must point to clear congressional authorization when it seeks to regulate "'a significant portion of the American economy,'" *ante*, at 18 (quoting *Utility Air*, 573 U. S., at 324), or require "billions of dollars in spending" by private persons or entities, *King* v. *Burwell*, 576 U. S. 473, 485 (2015). The Court has held that regulating tobacco products, eliminating rate regulation in the telecommunications industry, subjecting private homes to Clean Air Act restrictions, and suspending local housing laws and regulations can sometimes check this box. See *Brown & Williamson*, 529 U. S., at 160; *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994) (*MCI*); *Utility Air*, 573 U. S., at 324; *Alabama Assn. of Realtors*, 594 U. S., at ___ (slip op., at 6).

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[4] In the dissent's view, the Court has erred both today and in the past by pointing to failed legislation. *Post*, at 27–28 (opinion of KAGAN, J.). But the Court has not pointed to failed legislation to resolve what a duly enacted statutory text means, only to help resolve the antecedent question whether the agency's challenged action implicates a major question. The dissent endorses looking to extrinsic evidence to resolve that question too. See *post*, at 21–22 (discussing whether there is a "mismatch" between an agency's expertise and its challenged action).

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Third, this Court has said that the major questions doctrine may apply when an agency seeks to "intrud[e] into an area that is the particular domain of state law." *Ibid*. Of course, another longstanding clear-statement rule—the federalism canon—also applies in these situations. To preserve the "proper balance between the States and the Federal Government" and enforce limits on Congress's Commerce Clause power, courts must "'be certain of Congress's intent'" before finding that it "legislate[d] in areas traditionally regulated by the States." *Gregory* v. *Ashcroft*, 501 U. S. 452, 459–460 (1991). But unsurprisingly, the major questions doctrine and the federalism canon often travel together. When an agency claims the power to regulate vast swaths of American life, it not only risks intruding on Congress's power, it also risks intruding on powers reserved to the States. See *SWANC*, 531 U. S., at 162, 174.

While this list of triggers may not be exclusive, each of the signs the Court has found significant in the past is present here, making this a relatively easy case for the doctrine's application. The EPA claims the power to force coal and gas-fired power plants "to cease [operating] altogether." *Ante*, at 24. Whether these plants should be allowed to operate is a question on which people today may disagree, but it is a question everyone can agree is vitally important. See *ante*, at 24–25. Congress has debated the matter frequently. *Ibid.*; see generally Climate Change, The History of a Consensus and the Causes of Inaction, Hearing before the Subcommittee on Environment of the House Committee on Oversight and Reform, 116th Cong., 1st Sess., pt. I (2019). And so far it has "conspicuously and repeatedly declined" to adopt legislation similar to the Clean Power Plan (CPP). *Ante*, at 20; see *American Lung Assn.* v. *EPA*, 985 F. 3d 914, 998, n. 19 (CADC 2021) (Walker, J., concurring in part, concurring in judgment in part, and dissenting in part) (cataloguing failed legislative proposals); cf. *Brown &*

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Williamson, 529 U. S., at 144. It seems that fact has frustrated the Executive Branch and led it to attempt its own regulatory solution in the CPP. See 985 F. 3d, at 998, n. 20 (President stating that "'if Congress won't act soon . . . I will'"); cf. *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381, 423–424 (CADC 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) (noting a "President's intervention [may] underscor[e] the enormous significance" of a regulation).

Other suggestive factors are present too. "The electric power sector is among the largest in the U. S. economy, with links to every other sector." N. Richardson, Keeping Big Cases From Making Bad Law: The Resurgent "Major Questions" Doctrine, 49 Conn. L. Rev. 355, 388 (2016). The Executive Branch has acknowledged that its proposed rule would force an "aggressive transformation" of the electricity sector through "transition to zero-carbon renewable energy sources." White House Fact Sheet, App. in *American Lung Assn.* v. *EPA*, No. 19–1140 (CADC), pp. 2076–2077. The Executive Branch has also predicted its rule would force dozens of power plants to close and eliminate thousands of jobs by 2025. See EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 3–27, 3–30, 3–33, 6–25 (Oct. 23, 2015). And industry analysts have estimated the CPP would cause consumers' electricity costs to rise by over $200 billion. See National Mining Assn., EPA's Clean Power Plan: An Economic Impact Analysis 2, 4 (2015). Finally, the CPP unquestionably has an impact on federalism, as "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Elec. Cooperative Corp.* v. *Arkansas Pub. Serv. Comm'n*, 461 U. S. 375, 377 (1983). None of this is to say the policy the agency seeks to pursue is unwise or should not be pursued. It is only to say that the agency seeks to resolve for itself the sort of question normally reserved for Congress. As a result, we look for clear evidence

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that the people's representatives in Congress have actually afforded the agency the power it claims.

B

At this point, the question becomes what qualifies as a clear congressional statement authorizing an agency's action. Courts have long experience applying clear-statement rules throughout the law, and our cases have identified several telling clues in this context too.

First, courts must look to the legislative provisions on which the agency seeks to rely "'with a view to their place in the overall statutory scheme.'" *Brown & Williamson*, 529 U. S., at 133. "[O]blique or elliptical language" will not supply a clear statement. *Ante*, at 18; see *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U. S. 119, 139 (2005) (plurality opinion) (cautioning against reliance on "broad or general language"). Nor may agencies seek to hide "elephants in mouseholes," *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001), or rely on "gap filler" provisions, *ante*, at 20. So, for example, in *MCI* this Court rejected the Federal Communication Commission's attempt to eliminate rate regulation for the telecommunications industry based on a "subtle" provision that empowered the FCC to "'modify'" rates. 512 U. S., at 231. In *Brown & Williamson*, the Court rejected the Food and Drug Administration's attempt to regulate cigarettes based a "cryptic" statutory provision that granted the agency the power to regulate "drugs" and "devices." 529 U. S., at 126, 156, 160. And in *Gonzales*, the Court doubted that Congress gave the Attorney General "broad and unusual authority" to regulate drugs for physician-assisted suicide through "oblique" statutory language. 546 U. S., at 267.

Second, courts may examine the age and focus of the statute the agency invokes in relation to the problem the agency seeks to address. As the Court puts it today, it is unlikely

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that Congress will make an "[e]xtraordinary gran[t] of regulatory authority" through "vague language" in "'a long-extant statute.'" *Ante*, at 18–20 (quoting *Utility Air*, 573 U. S., at 324). Recently, too, this Court found a clear statement lacking when OSHA sought to impose a nationwide COVID–19 vaccine mandate based on a statutory provision that was adopted 40 years before the pandemic and that focused on conditions specific to the workplace rather than a problem faced by society at large. See *NFIB* v. *OSHA*, 595 U. S., at ___ (GORSUCH, J., concurring) (slip op., at 3). Of course, sometimes old statutes may be written in ways that apply to new and previously unanticipated situations. See *Sedima, S. P. R. L.* v. *Imrex Co.*, 473 U. S. 479, 499 (1985). But an agency's attempt to deploy an old statute focused on one problem to solve a new and different problem may also be a warning sign that it is acting without clear congressional authority. See *ante*, at 18.

Third, courts may examine the agency's past interpretations of the relevant statute. See *ante*, at 20–21. A "contemporaneous" and long-held Executive Branch interpretation of a statute is entitled to some weight as evidence of the statute's original charge to an agency. *United States* v. *Philbrick*, 120 U. S. 52, 59 (1887). Conversely, in *NFIB* v. *OSHA*, the Court found it "telling that OSHA, in its half century of existence, ha[d] never before adopted a broad public health regulation" under the statute that the agency sought to invoke as authority for a nationwide vaccine mandate. 595 U. S., at ___ (slip op., at 8); *ante*, at 18; see also *Brown & Williamson*, 529 U. S., at 158–159 (noting that for decades the FDA had said it lacked statutory power to regulate cigarettes). As the Court states today, "'the want of [an] assertion of power by those who presumably would be alert'" to it is "'significant in determining whether such power was actually conferred.'" *Ante*, at 21. When an agency claims to have found a previously "unheralded power," its assertion generally warrants "a measure of

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skepticism." *Utility Air*, 573 U. S., at 324.

Fourth, skepticism may be merited when there is a mismatch between an agency's challenged action and its congressionally assigned mission and expertise. *Ante*, at 25. As the Court explains, "[w]hen an agency has no comparative expertise in making certain policy judgments, . . . Congress presumably would not task it with doing so." *Ibid.* (internal quotation marks and alterations omitted). So, for example, in *Alabama Assn. of Realtors*, this Court rejected an attempt by a public health agency to regulate housing. 594 U. S., at ___ (slip op., at 5). And in *NFIB* v. *OSHA*, the Court rejected an effort by a workplace safety agency to ordain "broad public health measures" that "f[ell] outside [its] sphere of expertise." 595 U. S., at ___ (slip op., at 6).[5]

Asking these questions again yields a clear answer in our case. See *ante*, at 28–31. As the Court details, the agency before us cites no specific statutory authority allowing it to transform the Nation's electrical power supply. See *ante*, at 28. Instead, the agency relies on a rarely invoked statutory provision that was passed with little debate and has been characterized as an "obscure, never-used section of the law." *Ante*, at 6 (internal quotation marks omitted). Nor has the agency previously interpreted the relevant provision to confer on it such vast authority; there is no original, longstanding, and consistent interpretation meriting judi-

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[5] The dissent not only agrees that a mismatch between an agency's expertise and its challenged action is relevant to the major questions doctrine analysis; the dissent suggests that such a mismatch is necessary to the doctrine's application. See *post*, at 14–15. But this Court has never taken that view. See, *e.g.*, *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 505 (1897) (interstate commerce agency regulating interstate railroad commerce); *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion) (workplace safety agency regulating workplace carcinogens); *Brown & Williamson*, 529 U. S., at 159–160 (drug agency regulating tobacco); *King* v. *Burwell*, 576 U. S. 473, 485–486 (2015) (tax agency administering tax credits).

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cial respect. See *ante*, at 20–22. Finally, there is a "mismatch" between the EPA's expertise over environmental matters and the agency's claim that "Congress implicitly tasked it, and it alone, with balancing the many vital considerations of national policy implicated in deciding how Americans will get their energy." *Ante*, at 25. Such a claimed power "requires technical and policy expertise *not* traditionally needed in [the] EPA's regulatory development." *Ibid.* (internal quotation marks omitted). Again, in observing this much, the Court does not purport to pass on the wisdom of the agency's course. It acknowledges only that agency officials have sought to resolve a major policy question without clear legislative authorization to do so.

III

In places, the dissent seems to suggest that we should not be unduly "'concerned'" with the Constitution's assignment of the legislative power to Congress. *Post*, at 29 (opinion of KAGAN, J.). Echoing Woodrow Wilson, the dissent seems to think "a modern Nation" cannot afford such sentiments. *Post*, at 29–31. But recently, our dissenting colleagues acknowledged that the Constitution assigns "all legislative Powers" to Congress and "bar[s their] further delegation." *Gundy*, 588 U. S., at ___ (plurality opinion of KAGAN, J.) (slip op., at 4) (internal quotation marks and alteration omitted). To be sure, in that case we disagreed about the exact nature of the "nondelegation inquiry" courts must employ to vindicate the Constitution. *Id.*, at ___ (slip op., at 5). But like Chief Justice Marshall, we all recognized that the Constitution does impose some limits on the delegation of legislative power. See *ibid.*; *Wayman*, 10 Wheat., at 42–43. And while we all agree that administrative agencies have important roles to play in a modern nation, surely none of us wishes to abandon our Republic's promise that the people and their representatives should have a mean-

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ingful say in the laws that govern them. Cf. *Rucho* v. *Common Cause*, 588 U. S. ___, ___ (2019) (KAGAN, J., dissenting) (slip op., at 7) ("Republican liberty demands not only, that all power should be derived from the people; but that those entrusted with it should be kept in dependence on the people" (internal quotation marks and alteration omitted)).[6]

So what is our real point of disagreement? The dissent next suggests that the Court strays from its commitment to textualism by relying on a clear-statement rule (the major questions doctrine) to resolve today's case. *Post*, at 28. But our law is full of clear-statement rules and has been since the founding. Our colleagues do not dispute the point. In fact, they have regularly invoked many of these rules.[7]

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[6] In the course of its argument, the dissent leans heavily on two recent academic articles. *Post*, at 29. But if a battle of law reviews were the order of the day, it might be worth adding to the reading list. See, *e.g.*, I. Wurman, Nondelegation at the Founding, 130 Yale L. J. 1490, 1493–1494 (2021); D. Candeub, Preference and Administrative Law, 72 Admin. L. Rev. 607, 614–628 (2020); P. Hamburger, Delegation or Divesting?, 115 Nw. L. Rev. Online 88, 91–110 (2020); M. McConnell, The President Who Would Not Be King 326–335 (2020); A. Gordon, Nondelegation, 12 N. Y. U. J. L. & Liberty 718, 719 (2019); R. Cass, Delegation Reconsidered: A Delegation Doctrine for the Modern Administrative State, 40 Harv. J. L. & Pub. Pol'y 147, 155–161 (2017); G. Lawson & G. Seidman, "A Great Power of Attorney:" Understanding the Fiduciary Constitution 104–129 (2017); P. Hamburger, Is Administrative Law Unlawful? 377–402 (2014); L. Alexander & S. Prakash, Reports of the Nondelegation Doctrine's Death are Greatly Exaggerated, 70 U. Chi. L. Rev. 1297, 1298–1299 (2003); G. Lawson, Delegation and Original Meaning, 88 Va. L. Rev. 327, 335–343 (2002); D. Schoenbrod, The Delegation Doctrine: Could the Court Give It Substance? 83 Mich. L. Rev. 1223, 1252–1255, 1260–1261 (1985); see generally P. Wallison & J. Yoo, The Administrative State Before the Supreme Court: Perspectives on the Nondelegation Doctrine (2022).

[7] See, *e.g.*, *United States* v. *Washington*, 596 U. S. ___, ___ (2022) (slip op., at 6) (intergovernmental immunity); *Rehaif* v. *United States*, 588 U. S. ___, ___ (2019) (slip op., at 3) (*mens rea*); *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 790–791 (2014) (sovereign immunity); *Vartelas* v. *Holder*, 566 U. S. 257, 261, 266–267 (2012) (retroactivity); *Gonzalez* v. *Thaler*, 565 U. S. 134, 141–142 (2012) (presumption against

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If that's not the problem, perhaps the dissent means to suggest that the major questions doctrine does not belong on the list of our clear-statement rules. At times, the dissent appears to dismiss the doctrine as a "get-out-of-text free car[d]." *Ibid.* The dissent even seems to suggest that the doctrine could threaten "the safety and efficacy of medications" or lead to "the routine adulteration of food." *Post*, at 31. But then again, the dissent also acknowledges that the major questions doctrine should "sensibl[y]" apply in at least some situations. *Post*, at 14–15. The dissent even favorably highlights one application of the doctrine that our colleagues criticized less than a year ago. See *post*, at 18 (citing *Alabama Assn. of Realtors*, 594 U. S. ___). And, of course, our colleagues have joined other applications of the major questions doctrine in the past. See, *e.g.*, *King*, 576 U. S., at 485–486; *Gonzales*, 546 U. S., at 267–268. Nor does the dissent really seem to dispute that a major question is at stake in this case. As the dissent observes, the agency's challenged action before us concerns one of "the greatest . . . challenge[s] of our time." *Post*, at 21. If this case does not implicate a "question of deep economic and political significance," *King*, 576 U. S., at 486 (internal quotation marks omitted), it is unclear what might.[8]

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rule being jurisdictional); *Smith* v. *Bayer Corp.*, 564 U. S. 299, 307 (2011) (presumption that federal injunctions don't bar parallel state proceedings); *Fowler* v. *United States*, 563 U. S. 668, 677 (2011) (federalism canon); *Kucana* v. *Holder*, 558 U. S. 233, 237 (2010) (presumption in favor of judicial review); *Holland* v. *Florida*, 560 U. S. 631, 645–646 (2010) (presumption in favor of equitable tolling); *Hamilton* v. *Lanning*, 560 U. S. 505, 517 (2010) (presumption that Bankruptcy Code didn't erode past practice).

[8]The dissent seeks to invoke Justice Scalia as authority against the major questions doctrine. See *post*, at 31–32. But the dissent neglects to mention that Justice Scalia authored or joined several of the Court's major questions decisions, including *Brown & Williamson*, which the dissent describes as the "key case." *Post*, at 15–16 (citing 529 U. S. 120); see also *Whitman* v. *American Trucking Assns.*, *Inc.*, 531 U. S. 457, 468 (2001); *Utility Air*, 573 U. S., at 307; A. Scalia, A Note on the Benzene

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In the end, our disagreement really seems to center on a difference of opinion about whether the statute at issue here clearly authorizes the agency to adopt the CPP. The dissent even complains that I have failed to conduct an exhaustive analysis of the relevant statutory language. See *post*, at 28, n. 8. But in this concurrence, I have sought to provide some observations about the underlying doctrine on which today's decision rests. On the merits of the case before us, I join the Court's opinion, which comprehensively sets forth why Congress did not clearly authorize the EPA to engage in a "generation shifting approach" to the production of energy in this country. *Ante*, at 28. In reaching its judgment, the Court hardly professes to "appoin[t] itself" "the decision-maker on climate policy." *Post*, at 33. The Court acknowledges only that, under our Constitution, the people's elected representatives in Congress are the decisionmakers here—and they have not clearly granted the agency the authority it claims for itself. *Ante*, at 31.

*

When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the people's representatives. In our Republic, "[i]t is the peculiar province of the legislature to prescribe general rules for the government of society." *Fletcher* v. *Peck*, 6 Cranch 87, 136 (1810). Because today's decision helps safeguard that foundational constitutional promise, I am pleased to concur.

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Case, American Enterprise Institute, J. on Govt. & Soc., July–Aug. 1980, pp. 27–28.

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SUPREME COURT OF THE UNITED STATES

Nos. 20–1530, 20–1531, 20–1778 and 20–1780

WEST VIRGINIA, ET AL., PETITIONERS
20–1530 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE NORTH AMERICAN COAL CORPORATION, PETITIONER
20–1531 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC, PETITIONER
20–1778 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NORTH DAKOTA, PETITIONER
20–1780 *v.*
ENVIRONMENTAL PROTECTION AGENCY, ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[June 30, 2022]

JUSTICE KAGAN, with whom JUSTICE BREYER and JUSTICE SOTOMAYOR join, dissenting.

Today, the Court strips the Environmental Protection Agency (EPA) of the power Congress gave it to respond to "the most pressing environmental challenge of our time." *Massachusetts* v. *EPA*, 549 U. S. 497, 505 (2007).

Climate change's causes and dangers are no longer subject to serious doubt. Modern science is "unequivocal that

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human influence"—in particular, the emission of greenhouse gases like carbon dioxide—"has warmed the atmosphere, ocean and land." Intergovernmental Panel on Climate Change, Sixth Assessment Report, The Physical Science Basis: Headline Statements 1 (2021). The Earth is now warmer than at any time "in the history of modern civilization," with the six warmest years on record all occurring in the last decade. U. S. Global Change Research Program, Fourth National Climate Assessment, Vol. I, p. 10 (2017); Brief for Climate Scientists as *Amici Curiae* 8. The rise in temperatures brings with it "increases in heat-related deaths," "coastal inundation and erosion," "more frequent and intense hurricanes, floods, and other extreme weather events," "drought," "destruction of ecosystems," and "potentially significant disruptions of food production." *American Elec. Power Co.* v. *Connecticut*, 564 U. S. 410, 417 (2011) (internal quotation marks omitted). If the current rate of emissions continues, children born this year could live to see parts of the Eastern seaboard swallowed by the ocean. See Brief for Climate Scientists as *Amici Curiae* 6. Rising waters, scorching heat, and other severe weather conditions could force "mass migration events[,] political crises, civil unrest," and "even state failure." Dept. of Defense, Climate Risk Analysis 8 (2021). And by the end of this century, climate change could be the cause of "4.6 million excess yearly deaths." See R. Bressler, The Mortality Cost of Carbon, 12 Nature Communications 4467, p. 5 (2021).

Congress charged EPA with addressing those potentially catastrophic harms, including through regulation of fossil-fuel-fired power plants. Section 111 of the Clean Air Act directs EPA to regulate stationary sources of any substance that "causes, or contributes significantly to, air pollution" and that "may reasonably be anticipated to endanger public health or welfare." 42 U. S. C. §7411(b)(1)(A). Carbon dioxide and other greenhouse gases fit that description. See

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American Elec. Power, 564 U. S., at 416–417; *Massachusetts*, 549 U. S., at 528–532. EPA thus serves as the Nation's "primary regulator of greenhouse gas emissions." *American Elec. Power*, 564 U. S., at 428. And among the most significant of the entities it regulates are fossil-fuel-fired (mainly coal- and natural-gas-fired) power plants. Today, those electricity-producing plants are responsible for about one quarter of the Nation's greenhouse gas emissions. See EPA, Sources of Greenhouse Gas Emissions (Apr. 14, 2022), https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions. Curbing that output is a necessary part of any effective approach for addressing climate change.

To carry out its Section 111 responsibility, EPA issued the Clean Power Plan in 2015. The premise of the Plan—which no one really disputes—was that operational improvements at the individual-plant level would either "lead to only small emission reductions" or would cost far more than a readily available regulatory alternative. 80 Fed. Reg. 64727–64728 (2015). That alternative—which fossil-fuel-fired plants were "already using to reduce their [carbon dioxide] emissions" in "a cost effective manner"—is called generation shifting. *Id.*, at 64728, 64769. As the Court explains, the term refers to ways of shifting electricity generation from higher emitting sources to lower emitting ones—more specifically, from coal-fired to natural-gas-fired sources, and from both to renewable sources like solar and wind. See *ante*, at 8. A power company (like the many supporting EPA here) might divert its own resources to a cleaner source, or might participate in a cap-and-trade system with other companies to achieve the same emissions-reduction goals.

This Court has obstructed EPA's effort from the beginning. Right after the Obama administration issued the Clean Power Plan, the Court stayed its implementation. That action was unprecedented: Never before had the Court stayed a regulation then under review in the lower courts.

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See Reply Brief for 29 States and State Agencies in No. 15A773, p. 33 (conceding the point). The effect of the Court's order, followed by the Trump administration's repeal of the rule, was that the Clean Power Plan never went into effect. The ensuing years, though, proved the Plan's moderation. Market forces alone caused the power industry to meet the Plan's nationwide emissions target—through exactly the kinds of generation shifting the Plan contemplated. See 84 Fed. Reg. 32561–32562 (2019); Brief for United States 47. So by the time yet another President took office, the Plan had become, as a practical matter, obsolete. For that reason, the Biden administration announced that, instead of putting the Plan into effect, it would commence a new rulemaking. Yet this Court determined to pronounce on the legality of the old rule anyway. The Court may be right that doing so does not violate Article III mootness rules (which are notoriously strict). See *ante*, at 14–16. But the Court's docket is discretionary, and because no one is now subject to the Clean Power Plan's terms, there was no reason to reach out to decide this case. The Court today issues what is really an advisory opinion on the proper scope of the new rule EPA is considering. That new rule will be subject anyway to immediate, pre-enforcement judicial review. But this Court could not wait—even to see what the new rule says—to constrain EPA's efforts to address climate change.

The limits the majority now puts on EPA's authority fly in the face of the statute Congress wrote. The majority says it is simply "not plausible" that Congress enabled EPA to regulate power plants' emissions through generation shifting. *Ante*, at 31. But that is just what Congress did when it broadly authorized EPA in Section 111 to select the "best system of emission reduction" for power plants. §7411(a)(1). The "best system" full stop—no ifs, ands, or buts of any kind relevant here. The parties do not dispute that generation shifting is indeed the "best system"—the

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most effective and efficient way to reduce power plants' carbon dioxide emissions. And no other provision in the Clean Air Act suggests that Congress meant to foreclose EPA from selecting that system; to the contrary, the Plan's regulatory approach fits hand-in-glove with the rest of the statute. The majority's decision rests on one claim alone: that generation shifting is just too new and too big a deal for Congress to have authorized it in Section 111's general terms. But that is wrong. A key reason Congress makes broad delegations like Section 111 is so an agency can respond, appropriately and commensurately, to new and big problems. Congress knows what it doesn't and can't know when it drafts a statute; and Congress therefore gives an expert agency the power to address issues—even significant ones—as and when they arise. That is what Congress did in enacting Section 111. The majority today overrides that legislative choice. In so doing, it deprives EPA of the power needed—and the power granted—to curb the emission of greenhouse gases.

I

The Clean Air Act was major legislation, designed to deal with a major public policy issue. As Congress explained, its goal was to "speed up, expand, and intensify the war against air pollution" in all its forms. H. R. Rep. No. 91–1146, p. 1 (1970). Or as this Court similarly recognized, the Act was a "drastic remedy to what was perceived as a serious and otherwise uncheckable problem." *Union Elec. Co.* v. *EPA*, 427 U. S. 246, 256 (1976). The Act, as the majority describes, established three major regulatory programs to control air pollution from stationary sources like power plants. See *ante*, at 2–6. The National Ambient Air Quality Standards (NAAQS) and Hazardous Air Pollutants (HAP) programs prescribe standards for specified pollutants, not including carbon dioxide. Section 111's New Source Performance Standards program provides an additional tool for

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regulating emissions from categories of stationary sources deemed to contribute significantly to pollution. As applied to existing (not new) sources, the program mandates—via Section 111(d)—that EPA set emissions levels for pollutants not covered by the NAAQS or HAP programs, including carbon dioxide.

Section 111(d) thus ensures that EPA regulates existing power plants' emissions of *all* pollutants. When the pollutant at issue falls within the NAAQS or HAP programs, EPA need do no more. But when the pollutant falls outside those programs, Section 111(d) requires EPA to set an emissions level for currently operating power plants (and other stationary sources). That means no pollutant from such a source can go unregulated: As the Senate Report explained, Section 111(d) guarantees that "there should be no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91–1196, p. 20 (1970). Reflecting that language, the majority calls Section 111(d) a "gap-filler." *Ante*, at 5. It might also be thought of as a backstop or catch-all provision, protecting against pollutants that the NAAQS and HAP programs let go by. But the section is *not*, as the majority further claims, an "ancillary provision" or a statutory "backwater." *Ante*, at 20, 26. That characterization is a non-sequitur. That something is a backstop does not make it a backwater. Even if they are needed only infrequently, see *ante*, at 6, 20, backstops can perform a critical function—and this one surely does. Again, Section 111(d) tells EPA that when a pollutant—like carbon dioxide—is not regulated through other programs, EPA must undertake a further regulatory effort to control that substance's emission from existing stationary sources. In that way, Section 111(d) operates to ensure that the Act achieves comprehensive pollution control.

Section 111 describes the prescribed regulatory effort in expansive terms. EPA must set for the relevant source

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(here, fossil-fuel-fired power plants) and the relevant pollutant (here, carbon dioxide) an emission level—more particularly,

> "the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] Administrator determines has been adequately demonstrated." §7411(a)(1).

To take that language apart a bit, the provision instructs EPA to decide upon the "best system of emission reduction which . . . has been adequately demonstrated." The provision tells EPA, in making that determination, to take account of both costs and varied "nonair" impacts (on health, the environment, and the supply of energy). And the provision finally directs EPA to set the particular emissions limit achievable through use of the demonstrated "best system." Taken as a whole, the section provides regulatory flexibility and discretion. It imposes, to be sure, meaningful constraints: Take into account costs and nonair impacts, and make sure the best system has a proven track record.[1] But the core command—go find the best system of emission reduction—gives broad authority to EPA.

If that flexibility is not apparent on the provision's face, consider some dictionary definitions—supposedly a staple of this Court's supposedly textualist method of reading statutes. A "system" is "a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose." Webster's Third New International Dictionary 2322 (1971). Or again: a "system" is "[a]n organized and

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[1] Those constraints have had real effect: They have led EPA in prior rulemakings to exclude a number of pollution-control measures from the "best system of emission reduction." See Brief for United States 49 (collecting citations).

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coordinated method; a procedure." American Heritage Dictionary 1768 (5th ed. 2018). The majority complains that a similar definition—cited to the Solicitor General's brief but originally from another dictionary—is just too darn broad. *Ante*, at 28; see Brief for United States 31 (quoting Webster's New International Dictionary 2562 (2d ed. 1959)). "[A]lmost anything" capable of reducing emissions, the majority says, "could constitute such a 'system'" of emission reduction. *Ante*, at 28. But that is rather the point. Congress used an obviously broad word (though surrounding it with constraints, see *supra*, at 7) to give EPA lots of latitude in deciding how to set emissions limits. And contra the majority, a broad term is not the same thing as a "vague" one. *Ante*, at 18, 20, 28. A broad term is comprehensive, extensive, wide-ranging; a "vague" term is unclear, ambiguous, hazy. (Once again, dictionaries would tell the tale.) So EPA was quite right in stating in the Clean Power Plan that the "[p]lain meaning" of the term "system" in Section 111 refers to "a set of measures that work together to reduce emissions." 80 Fed. Reg. 64762. Another of this Court's opinions, involving a matter other than the bogeyman of environmental regulation, might have stopped there.

For generation shifting fits comfortably within the conventional meaning of a "system of emission reduction." Consider one of the most common mechanisms of generation shifting: the use of a cap-and-trade scheme. Here is how the majority describes cap and trade: "Under such a scheme, sources that receive a reduction in their emissions can sell a credit representing the value of that reduction to others, who are able to count it toward their own applicable emissions caps." *Ante*, at 8–9. Does that sound like a "system" to you? It does to me too. And it also has to this Court. In the past, we have explained that "[t]his type of 'cap-and-trade' *system* cuts costs while still reducing pollution to target levels." *EPA* v. *EME Homer City Generation, L. P.*, 572 U. S. 489, 503, n. 10 (2014) (emphasis added). So what does

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the majority mean when it says that "[a]s a matter of definitional *possibilities*, generation shifting *can* be described as a 'system'"? *Ante*, at 28 (emphasis added; citation and some internal quotation marks omitted). Rarely has a statutory term so clearly applied.

Other statutory provisions confirm the point. The Clean Air Act's acid rain provision, for example, describes a cap-and-trade program as an "emission allocation and transfer *system*." §7651(b) (emphasis added). So a "system," according to the statute's own usage, includes the kind of cap-and-trade mechanism that the Clean Power Plan relied on. And in a somewhat different way, the NAAQS provision shows that Section 111 encompasses such a regulatory technique. Under that provision, cap-and-trade schemes qualify as "control measures, means, or techniques" that state plans may use to reduce emissions. §7410(a)(2)(A). That language, of course, does not use the word "system." But in specifying that cap and trade is allowable under the NAAQS program, the provision supports the same conclusion here—because Section 111 directs EPA to use "a procedure similar to that provided by [the NAAQS]." §7411(d)(1). The majority discounts the relevance of both those provisions on the ground that they contemplate trading systems only "as a means of *complying* with an *already established emissions limit*." *Ante*, at 29 (emphasis in original). That is a distinction, to be sure. But to begin, it is far less of one than the majority thinks: In arguing that EPA's claim of authority here would allow it to take the emissions limit as low as it wants, the majority ignores the varied constraints surrounding the "best system" language. See *supra*, at 7. And still more important for interpretive purposes, the distinction appears only in the majority's opinion, not in any statutory language. That text, to the contrary, says to EPA: Do as you would do under the NAAQS and Acid Rain programs—go ahead and use cap and trade.

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There is also a flipside point: Congress declined to include in Section 111 the restrictions on EPA's authority contained in other Clean Air Act provisions. Most relevant here, quite a number of statutory sections confine EPA's emissions-reduction efforts to technological controls—essentially, equipment or processes that can be put into place at a particular facility. See *ante*, at 4 (describing those controls). So, for example, one provision tells EPA to set standards "reflect[ing] the greatest degree of emission reduction achievable through the application of technology." §7521(a)(3)(A)(i). Others direct the use of the "best available retrofit technology," or the "best available control technology," or the "maximum achievable control technology." §§7491(b)(2)(A), (g)(2), 7475(a)(4), 7479(3), 7412(g)(2). There are still more. See, *e.g.*, §§7411(h), 7511a(c)(7), 7651f(b)(2). None of those provisions would allow EPA to set emissions limits based on generation shifting, as the Agency acknowledges. See Brief for United States 32–33. But nothing like the language of those provisions is included in Section 111. That matters under normal rules of statutory interpretation. As Justice Scalia once wrote for the Court: "We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama* v. *Immigration and Customs Enforcement*, 543 U. S. 335, 341 (2005).

Statutory history serves only to pile on: It shows that Congress has specifically declined to restrict EPA to technology-based controls in its regulation of existing stationary sources. The key moment came in 1977, when Congress amended Section 111 to distinguish between new sources and existing ones. For new sources, EPA could select only the "best *technological* system of continuous emission reduction." Clean Air Act Amendments, §109(c)(1)(A),

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91 Stat. 700 (emphasis added). But for existing sources, the word "technological" was struck out: EPA could select the "best system of continuous emission reduction." *Ibid.* The House Report emphasized Congress's deliberate choice: Whereas the standards set for new sources were to be based on "the best technological" controls, the "standards adopted for existing sources" were "to be based on available means of emission control (not necessarily technological)." H. R. Rep. No. 95–564, p. 129 (1977). The Report did not further explain the distinction. But presumably Congress gave EPA more flexibility over existing plants because imposing technological controls on old facilities is often not cost-effective.[2] Thirteen years later, Congress followed up by deleting from Section 111 the technological limitation applying to new facilities. See Clean Air Act Amendments of 1990, §403(a), 104 Stat. 2631. Once again, then, Congress faced a choice: confine EPA to technological controls, or not. And replicating its earlier action for existing sources, Congress chose not.

The majority breezes past that congressional choice on the ground that today's opinion does not resolve whether EPA can regulate in some non-technological ways; instead, the opinion says only that the Clean Power Plan goes too

[2] The majority offers a theory for why Congress insisted on a technological system for new sources: It was, the majority says, to prevent EPA's use of a particular kind of technological system (involving fuel switching) to achieve emissions reductions. See *ante*, at 22, n. 2, 23. To begin with: I don't see how requiring EPA to select among technological systems precludes it from picking what the majority agrees is one such measure. See *ante*, at 4, 22, n. 2, 22–23. But more important, I can't see why the majority's explanation matters. Let's assume the majority is right about Congress's motive. The key point remains the same: Whatever that motive, Congress's instruction to use technological systems applied only to new sources, and not to existing ones. As to the latter, Congress allowed EPA more latitude: The Agency could use technological *or* non-technological methods, as it preferred. That distinction is what creates interpretive difficulties for the majority—again, no matter why it arose.

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far. See *ante*, at 30–31. That is a puzzling point. As an initial matter, it recharacterizes what this case has always been about. The Trump administration repealed the Clean Power Plan for one central reason: because (in its view) Section 111 confines EPA to facility-specific, technological measures. See 84 Fed. Reg. 32523–32529. In reviewing that repeal, the court below thus addressed that limit alone. See *American Lung Assn.* v. *EPA*, 985 F. 3d 914, 944 (CADC 2021). So add to the oddity of the Court's declaring a defunct regulation unlawful, see *supra*, at 4, the irregularity of its suggesting some kind of non-technological limit that no one (not EPA, not the parties, not the court below) has ever considered. More important here, both the nature and the statutory basis of that limit are left a mystery. If the majority is not distinguishing between technological controls and all others, what is it doing—and how far does its opinion constrain EPA? The majority makes no effort to say. And because that is so, the majority cannot even attempt to ground its limit in the statutory language. I've just shown that restricting EPA to technological controls is inconsistent with Section 111, especially when read in conjunction with other statutory provisions. And the majority provides no reason to think that its (possibly) different limit fares any better. Section 111 does not impose *any* constraints—technological or otherwise—on EPA's authority to regulate stationary sources (except for those stated, like cost). In somehow (and to some extent) saying otherwise, the majority flouts the statutory text.

"Congress," this Court has said, "knows to speak in plain terms when it wishes to circumscribe, and in capacious terms when it wishes to enlarge, agency discretion." *Arlington* v. *FCC*, 569 U. S. 290, 296 (2013). In Section 111, Congress spoke in capacious terms. It knew that "without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete." *Massachusetts*, 549 U. S., at 532. So the provision

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enables EPA to base emissions limits for existing stationary sources on the "best system." That system may be technological in nature; it may be whatever else the majority has in mind; or, most important here, it may be generation shifting. The statute does not care. And when Congress uses "expansive language" to authorize agency action, courts generally may not "impos[e] limits on [the] agency's discretion." *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ___, ___ (2020) (slip op., at 16). That constraint on judicial authority—that insistence on judicial modesty—should resolve this case.

II

The majority thinks not, contending that in "certain extraordinary cases"—of which this is one—courts should start off with "skepticism" that a broad delegation authorizes agency action. *Ante*, at 19. The majority labels that view the "major questions doctrine," and claims to find support for it in our caselaw. *Ante*, at 19–20, 28. But the relevant decisions do normal statutory interpretation: In them, the Court simply insisted that the text of a broad delegation, like any other statute, should be read in context, and with a modicum of common sense. Using that ordinary method, the decisions struck down agency actions (even though they plausibly fit within a delegation's terms) for two principal reasons. First, an agency was operating far outside its traditional lane, so that it had no viable claim of expertise or experience. And second, the action, if allowed, would have conflicted with, or even wreaked havoc on, Congress's broader design. In short, the assertion of delegated power was a misfit for both the agency and the statutory scheme. But that is not true here. The Clean Power Plan falls within EPA's wheelhouse, and it fits perfectly—as I've just shown—with all the Clean Air Act's provisions. That the Plan addresses major issues of public policy does not upend the analysis. Congress wanted EPA to do just that.

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Section 111 entrusts important matters to EPA in the expectation that the Agency will use that authority to combat pollution—and that courts will not interfere.

A

"[T]he words of a statute," as the majority states, "must be read in their context and with a view to their place in the overall statutory scheme." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000); see *ante*, at 16. We do not assess the meaning of a single word, phrase, or provision in isolation; we also consider the overall statutory design. And that is just as true of statutes broadly delegating power to agencies as of any other kind. In deciding on the scope of such a delegation, courts must assess how an agency action claimed to fall within the provision fits with other aspects of a statutory plan.

So too, a court "must be guided to a degree by common sense as to the manner in which Congress is likely to delegate." *Brown & Williamson*, 529 U. S., at 133. Assume that a policy decision, like this one, is a matter of significant "economic and political magnitude." *Ibid.* We know that Congress delegates such decisions to agencies all the time—and often via broadly framed provisions like Section 111. See *infra*, at 29–31. But Congress does so in a sensible way. To decide whether an agency action goes beyond what Congress wanted, courts must assess (among other potentially relevant factors) the nature of the regulation, the nature of the agency, and the relationship of the two to each other. See, *e.g.*, *Barnhart* v. *Walton*, 535 U. S. 212, 222 (2002). In particular, we have understood, Congress does not usually grant agencies the authority to decide significant issues on which they have no particular expertise. So when there is a mismatch between the agency's usual portfolio and a given assertion of power, courts have reason to question whether Congress intended a delegation to go so far.

The majority today goes beyond those sensible principles.

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It announces the arrival of the "major questions doctrine," which replaces normal text-in-context statutory interpretation with some tougher-to-satisfy set of rules. *Ante*, at 16–31. Apparently, there is now a two-step inquiry. First, a court must decide, by looking at some panoply of factors, whether agency action presents an "extraordinary case[]." *Ante*, at 17; see *ante*, at 20–28. If it does, the agency "must point to clear congressional authorization for the power it claims," someplace over and above the normal statutory basis we require. *Ante*, at 19 (internal quotation marks omitted); see *ante*, at 28–31. The result is statutory interpretation of an unusual kind. It is not until page 28 of a 31-page opinion that the majority begins to seriously discuss the meaning of Section 111. And even then, it does not address straight-up what should be the question: Does the text of that provision, when read in context and with a common-sense awareness of how Congress delegates, authorize the agency action here?

The majority claims it is just following precedent, but that is not so. The Court has never even used the term "major questions doctrine" before. And in the relevant cases, the Court has done statutory construction of a familiar sort. It has looked to the text of a delegation. It has addressed how an agency's view of that text works—or fails to do so—in the context of a broader statutory scheme. And it has asked, in a common-sensical (or call it purposive) vein, about what Congress would have made of the agency's view—otherwise said, whether Congress would naturally have delegated authority over some important question to the agency, given its expertise and experience. In short, in assessing the scope of a delegation, the Court has considered—without multiple steps, triggers, or special presumptions—the fit between the power claimed, the agency claiming it, and the broader statutory design.

The key case here is *FDA* v. *Brown & Williamson*. There, the Food and Drug Administration (FDA) asserted that its

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power to regulate "drugs" and "devices" extended to tobacco products. The claim had something to it: FDA has broad authority over "drugs" and drug-delivery "devices," and the definitions of those terms could be read to encompass nicotine and cigarettes. But the asserted authority "simply [did] not fit" the overall statutory scheme. 529 U. S., at 143. FDA's governing statute required the agency to ensure that regulated products were "safe" to be marketed—but there was no making tobacco products safe in the usual sense. *Id.*, at 133–143. So FDA would have had to reinterpret what it meant to be "safe," or else ban tobacco products altogether. *Ibid.* Both options, the Court thought, were preposterous. Until the agency action at issue, tobacco products hadn't been spoken of in the same breath as pharmaceuticals (FDA's paradigmatic regulated product). And Congress had created in several statutes a "distinct regulatory scheme" for tobacco, not involving FDA. *Id.*, at 155–156. So all the evidence was that Congress had never meant for FDA to have any—let alone total—control over the tobacco industry, with its "unique political history." *Id.*, at 159. Again, there was "simply" a lack of "fit" between the regulation at issue, the agency in question, and the broader statutory scheme. *Id.*, at 143.

The majority's effort to find support in *Brown & Williamson* for its interpretive approach fails. See *ante*, at 19. It may be helpful here to quote the full sentence that the majority quotes half of. "In extraordinary cases," the Court stated, "there may be reason to hesitate before concluding that Congress has intended such an implicit delegation." 529 U. S., at 159. For anyone familiar with this Court's *Chevron* doctrine, that language will ring a bell. The Court was saying only—and it was elsewhere explicit on this point—that there was reason to hesitate before giving FDA's position *Chevron* deference. See *id.*, at 132–133, 159–161. And what was that reason? The Court went on to explain that it would not defer to FDA because it read

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the relevant statutory provisions as negating the agency's claimed authority. See *id.*, at 160 ("[W]e are obliged to defer not to the agency's expansive construction of the statute, but to Congress' consistent judgment to deny the FDA this power"); *id.*, at 133 (finding at *Chevron*'s first step that "Congress has directly spoken to the issue here and precluded the FDA's" asserted power). In reaching that conclusion, the Court relied (as I've just explained) not on any special "clear authorization" demand, but on normal principles of statutory interpretation: look at the text, view it in context, and use what the Court called some "common sense" about how Congress delegates. *Ibid.* *That* is how courts are to decide, in the majority's language, whether an agency has asserted a "highly consequential power beyond what Congress could reasonably be understood to have granted." *Ante*, at 20.

The Court has applied the same kind of analysis in subsequent cases—holding in each that an agency exceeded the scope of a broadly framed delegation when it operated outside the sphere of its expertise, in a way that warped the statutory text or structure. In *Gonzales* v. *Oregon*, 546 U. S. 243 (2006), we rejected the Attorney General's assertion of authority (under a broad "public interest" standard) to rescind doctors' registrations for facilitating assisted suicide, even in States where doing so was legal. See *id.*, at 243, 248–249, 261–275. We doubted Congress would have delegated such a "quintessentially medical judgment[]" to "an executive official who lacks medical expertise." *Id.*, at 266–267. And we pointed to statutory provisions in which Congress—in opposition to the claimed power—had "painstakingly described the Attorney General's limited authority" to deregister physicians. *Id.*, at 262.[3]

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[3] Similarly, in *King* v. *Burwell*, 576 U. S. 473 (2015), we relied on *Brown & Williamson* in declining to defer to the Internal Revenue Service's construction of the Affordable Care Act. We thought it highly "unlikely that Congress would have delegated" an important decision about

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Later, in *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302 (2014), the Court relied on similar reasoning to reject EPA's efforts to regulate "millions of small" and previously unregulated sources of emissions—"including retail stores, offices, apartment buildings, shopping centers, schools, and churches." *Id.*, at 328. Key to that decision was the Court's view that reading the delegation so expansively would be "inconsistent with" the statute's broader "structure and design." *Id.*, at 321. The Court explained that allowing the agency action to proceed would necessitate the "rewriting" of other "unambiguous statutory terms"—indeed, of "precise numerical thresholds." *Id.*, at 321, 325–326. (In quoting one cryptic sentence of *Utility Air* as supporting its new approach, see *ante*, at 19, the majority ignores the nine preceding pages of analysis of the statute's text and context, see 573 U. S., at 315–324.)

And last Term, the Court concluded that the Centers for Disease Control and Prevention (CDC) lacked the power to impose a nationwide eviction moratorium. *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___–___ (2021) (slip op., at 5–7). The Court held that other statutory language made it a "stretch" to read the relied-on delegation as covering the CDC's action. *Id.*, at ___ (slip op., at 6). And the Court raised an eyebrow at the thought of the CDC "intrud[ing]" into "the landlord-tenant relationship"—a matter outside the CDC's usual "domain." *Ibid.*[4]

The eyebrow-raise is indeed a consistent presence in these cases, responding to something the Court found anomalous—looked at from Congress's point of view—in a

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healthcare pricing to an agency with "no expertise in crafting health insurance policy." 576 U. S., at 486.

[4] Not every Justice, of course, agreed with the Court's conclusions in the above-discussed cases; to be frank, I dissented in a couple. But what matters here is the analysis those decisions undertook—and how, as I'll describe, it supports EPA's Clean Power Plan.

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particular agency's exercise of authority. In each case, the Court thought, the agency had strayed out of its lane, to an area where it had neither expertise nor experience. The Attorney General making healthcare policy, the regulator of pharmaceutical concerns deciding the fate of the tobacco industry, and so on. And in each case, the proof that the agency had roamed too far afield lay in the statutory scheme itself. The agency action collided with other statutory provisions; if the former were allowed, the latter could not mean what they said or could not work as intended. FDA having to declare tobacco "safe" to avoid shutting down an industry; or EPA having literally to change hard numbers contained in the Clean Air Act. There, according to the Court, the statutory framework was "not designed to grant" the authority claimed. *Utility Air*, 573 U. S., at 324. The agency's "singular" assertion of power "would render the statute unrecognizable to the Congress" that wrote it. *Ibid.* (internal quotation marks omitted).

B

The Court today faces no such singular assertion of agency power. As I have already explained, nothing in the Clean Air Act (or, for that matter, any other statute) conflicts with EPA's reading of Section 111. Notably, the majority does not dispute that point. Of course, it views Section 111 (if for unexplained reasons) as less clear than I do. Compare *ante*, at 28, with *supra*, at 7–9. But nowhere does the majority provide evidence from within the statute itself that the Clean Power Plan conflicts with or undermines Congress's design. That fact alone makes this case different from all the cases described above. As to the other critical matter in those cases—is the agency operating outside its sphere of expertise?—the majority at least tries to say something. It claims EPA has no "comparative expertise" in "balancing the many vital considerations of national policy" implicated in regulating electricity sources. *Ante*, at

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25–26. But that is wrong.

Start with what this Court has said before on the subject, reflecting Congress's view of the matter. About a decade ago, we recognized that Congress had "delegated to EPA" in Section 111 "the decision whether and how to regulate carbon-dioxide emissions from powerplants." *American Elec. Power*, 564 U. S., at 426. To stress the key word (because the majority seems to miss it, see *ante*, at 26–27): not merely "whether" but also "how." In making that delegation, we explained, Congress knew well what it was doing. Regulating power plant emissions is a complex undertaking. To do it right requires "informed assessment of competing interests": "Along with the environmental benefit potentially achievable, our Nation's energy needs and the possibility of economic disruption must weigh in the balance." 564 U. S., at 427; see §7411(a)(1) (instructing EPA to consider "energy requirements," "cost," and other factors). Congress specifically "entrust[ed] such complex balancing to EPA," because that "expert agency" has the needed "scientific, economic, and technological resources" to carry it out. 564 U. S., at 427–428. So the balancing—including of the Nation's "energy requirements"—that the majority says EPA has no "comparative expertise" in? §7411(a)(1); *ante*, at 25. We explained 11 short years ago, citing Congress, that it was smack in the middle of EPA's wheelhouse.

And we were right. Consider the Clean Power Plan's component parts—let's call them the what, who, and how—to see the rule's normalcy. The "what" is the subject matter of the Plan: carbon dioxide emissions. This Court has already found that those emissions fall within EPA's domain. We said then: "[T]here is nothing counterintuitive to the notion that EPA can curtail the emission of substances that are putting the global climate out of kilter." *Massachusetts*, 549 U. S., at 531. This is not the Attorney General regulating medical care, or even the CDC regulating landlord-

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tenant relations. It is EPA (that's the Environmental Protection Agency, in case the majority forgot) acting to address the greatest environmental challenge of our time. So too, there is nothing special about the Plan's "who": fossil-fuel-fired power plants. In *Utility Air*, we thought EPA's regulation of churches and schools highly unusual. See *supra*, at 18. But fossil-fuel-fired plants? Those plants pollute—a lot—and so they have long lived under the watchful eye of EPA. That was true even before EPA began regulating carbon dioxide. See *Train* v. *Natural Resources Defense Council, Inc.*, 421 U. S. 60, 78 (1975).

Finally, the "how" of generation shifting creates no mismatch with EPA's expertise. As the Plan noted, generation shifting has a well-established pedigree as a tool for reducing pollution; even putting aside other federal regulation, see *infra*, at 25–26, both state regulators and power plants themselves have long used it to attain environmental goals. See 80 Fed. Reg. 64664; Brief for Power Company Respondents 47; see also S. Breyer, Regulation and Its Reform 444, n. 1 (1982) (citing literature on the subject from the 1970s). The technique is, so to speak, a tool in the pollution-control toolbox. And that toolbox is the one EPA uses. So that Agency, more than any other, has the desired "comparative expertise." *Ante*, at 25. The majority cannot contest that point frontally: It knows that cap and trade and similar mechanisms are an ordinary part of modern environmental regulation. Instead, the majority protests that Congress would not have wanted EPA to "dictat[e]," through generation shifting, the "mix of energy sources nationwide." *Ante*, at 26. But that statement reflects a misunderstanding of how the electricity market works. *Every* regulation of power plants—even the most conventional, facility-specific controls—"dictat[es]" the national energy mix to one or another degree. That result follows because regulations affect costs, and the electrical grid works by taking up

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energy from low-cost providers before high-cost ones. Consider an example: Suppose EPA requires coal-fired plants to use carbon-capture technology. That action increases those plants' costs, and automatically (by virtue of the way the grid operates) reduces their share of the electricity market. So EPA is always controlling the mix of energy sources. In that sense (though the term has taken on a more specialized meaning), everything EPA does is "generation shifting." The majority's idea that EPA has no warrant to direct such a shift just indicates that courts sometimes do not really get regulation.[5]

Why, then, be "skeptic[al]" of EPA's exercise of authority? *Ante*, at 28. When there is no misfit, of the kind apparent in our precedents, between the regulation, the agency, and the statutory design? Although the majority offers a flurry of complaints, they come down in the end to this: The Clean Power Plan is a big new thing, issued under a minor statutory provision. See *ante*, at 20, 24, 26 (labeling the Plan "transformative" and "unprecedented" and calling Section 111(d) an "ancillary" "backwater"). I have already addressed the back half of that argument: In fact, there is

[5] The majority's only response to the argument above similarly reveals a misperception as to the practical impact of different regulatory techniques. According to the majority, there is an "obvious difference" between changing the energy mix by conventional technological regulation and doing so by measures like cap and trade. *Ante*, at 27, n. 4. But in fact there is not. As I'll detail later, generation shifting can effect a significant—or instead an insignificant—change in the energy mix; and the same is true of technological regulations. See *infra*, at 24–25. It all depends on the specifics: There is no necessary connection (in either direction) between the *kind* of regulation and the magnitude of its effect. For example, a rule requiring the use of carbon-capture technology would have shifted far more electricity production from coal-fired plants than the Clean Power Plan would have. See *ibid*. In suggesting that cap-and-trade programs are somehow more suspect, the majority merely serves to disadvantage what is often the smartest kind of regulation: market-based programs that achieve the biggest bang for the buck. That is why so many power companies are on EPA's side in this litigation.

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nothing insignificant about Section 111(d), which was intended to ensure that EPA would limit existing stationary sources' emissions of otherwise unregulated pollutants (however few or many there were). See *supra*, at 6. And the front half of the argument doesn't work either. The Clean Power Plan was not so big. It was not so new. And to the extent it was either, that should not matter.

As to bigness—well, events have proved the opposite: The Clean Power Plan, we now know, would have had little or no impact. The Trump administration's repeal of the Plan created a kind of controlled experiment: The Plan's "magnitude" (*ante*, at 24) could be measured by seeing how far short the industry fell of the Plan's nationwide emissions target. Except that turned out to be the wrong question, because the industry didn't fall short of the Plan's goal; rather, the industry exceeded that target, all on its own. See App. 265 (declaration of EPA official). And it did so mainly through the generation-shifting techniques that the Plan called for. See *ibid.*; Brief for United States 47. In effect, the Plan predicted market behavior, rather than altered it (as regulations usually do). Cf. *Utility Air*, 573 U. S., at 321–322 (discussing the "calamitous consequences" of the EPA approach there under review). And that fact has been understood for some years. At the time of the repeal, the Trump administration explained that "there [was] likely to be no difference between a world where the [Clean Power Plan was] implemented and one where it [was] not." 84 Fed. Reg. 32561.[6] It is small wonder, then, that the power

[6] Even when the Clean Power Plan was first issued, its projected impact was far less than what the majority implies. The majority states, for example, that the rule would have "reduce[d] GDP by at least a trillion 2009 dollars by 2040." *Ante*, at 10. That sounds like a lot, but it is in fact "equivalent to changes of a few tenths of 1 percent from baseline." Dept. of Energy, Analysis of the Impacts of the Clean Power Plan 63–64 (2015). And the "billions of dollars in compliance costs" the majority highlights were vastly outweighed by the Plan's projected benefits. *Ante*, at 10; see 80 Fed. Reg. 64679 (anticipating $5–$8 billion in costs and

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industry overwhelmingly supports EPA in this case. See Brief for Power Company Respondents 2–3. In the regulated parties' view, the rule aimed to achieve what most power companies also want: substantial reductions in carbon dioxide emissions accomplished in a cost-effective way while maintaining a reliable electricity market. See *id.*, at 26–27, 38, 41–42.

The majority thus pivots to the massive consequences generation shifting *could* produce—but that claim fares just as poorly. On EPA's view of its own authority, the majority worries, some future rule might "forc[e] coal plants to 'shift' away virtually all of their generation—*i.e.*, to cease making power altogether." *Ante*, at 24. But looking at the text of Section 111(d) might here come in handy. For the statute imposes, as already shown, a set of constraints—particularly involving costs and energy needs—that would preclude so extreme a regulation. See Brief for United States 41–42 (conceding the point); *supra*, at 7. And if the majority thinks those constraints do not really constrain, then it has a much bigger problem. For "traditional" technological controls, of the kind the majority approves, can have equally dramatic effects. *Ante*, at 23. Take, for example, the "fuel-switching" regulation the majority mentions. *Ibid.* Such a rule does just what you might think: It requires a plant to burn a different kind of fuel—say, natural gas instead of coal. So it too can significantly "restructur[e] the Nation's overall mix of electricity generation." *Ante*, at 16. Or take an even more technological-sounding approach: the use of carbon-capture equipment. Order the installation of that equipment, the Trump administration concluded, and the "exorbitant" costs "would almost certainly force the closure" of all affected "coal-fired power plants." 84 Fed. Reg. 32548.

$32–$54 billion in benefits by 2030); see also EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule 6–35 (2015) (estimating that by 2030 jobs gained from the Plan would be some two or three times greater than jobs lost).

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The point is a simple one: If generation shifting can go big, so too can technological controls (assuming, once again, that the statute's text is ignored). The problem (if any exists) is not with the channel, but with the volume.[7]

The majority's claim about the Clean Power Plan's novelty—the most fleshed-out part of today's opinion, see *ante*, at 20–24—is also exaggerated. As EPA explained when it issued the Clean Power Plan, an earlier Section 111(d) regulation had determined that a cap-and-trade program was the "best system of emission reduction" for mercury. 70 Fed. Reg. 28616–28621 (2005); see 80 Fed. Reg. 64772. In the majority's view, that rule was different because the "actual emission cap" for the contemplated cap-and-trade scheme was based on the use of a plant-specific technology—namely, wet scrubbers. *Ante*, at 21 (internal quotation marks omitted). But the approval of cap and trade allowed EPA to make the emissions limits more stringent than it otherwise could have, because EPA knew that plants unable to cost-effectively install scrubbers could instead meet the limits through generation shifting. See 70 Fed. Reg. 28619. EPA could have designed the Clean Power Plan in the same way—say, by setting emissions limits based on carbon-capture technology, with the expectation that many plants would avail themselves of an approved cap-and-trade program instead. The majority gives no reason to think Section 111(d) allows that approach but disallows the Clean Power Plan. In both, generation shifting is

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[7] The majority dismisses these hypotheticals as fantastical, protesting that "EPA has never ordered anything remotely like [them], and we doubt it could." *Ante*, at 24, n. 3. But that's just the point. EPA hasn't forced the elimination of coal plants—whether through technological controls or generation shifting—*because* the statutory constraints prevent it from doing so. The majority offers no reason to think that those constraints suffice for the measures it approves (fuel switching and carbon capture) but not for the measure it rejects (generation shifting). Either the constraints are enough or they are not. The majority cannot have it both ways.

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operating to increase the strictness of emissions limits.

And the mercury rule itself was rooted in precedent. A decade earlier, EPA had determined that States could comply with a Section 111(d) regulation for municipal waste combustors by establishing cap-and-trade programs. See 40 CFR §§60.30a, 60.33b(d)(2) (1996). And beyond Section 111(d), trading and other tools of generation shifting become still more common. For decades, EPA has relied on those pollution-control techniques in rules covering new internal-combustion engines under Section 111(b), sources of nitrogen oxide under the NAAQS program, and motor vehicles under Section 202(a). See 73 Fed. Reg. 3595 (2008); 71 Fed. Reg. 39159 (2006); 63 Fed. Reg. 57358–57359 (1998); 48 Fed. Reg. 33456 (1983); see also Brief for Richard L. Revesz as *Amicus Curiae* 24–29 (collecting similar rules). No doubt the majority is right that scrubbers and other "add-on controls" are "more traditional air pollution control measures." *Ante*, at 23. EPA readily acknowledged that fact in developing the Clean Power Plan. But the idea that the Plan's reliance on generation shifting effected some kind of revolution in power-plant pollution control? No. As I've noted before, power plants themselves use that method. State environmental regulators use that method. And EPA has used that method, including under the statutory provision invoked here.

In any event, newness might be perfectly legitimate—even required—from Congress's point of view. I do not dispute that an agency's longstanding practice may inform a court's interpretation of a statute delegating the agency power. See *ante*, at 20–21. But it is equally true, as *Brown & Williamson* recognized, that agency practices are "not carved in stone." 529 U. S., at 156–157 (internal quotation marks omitted). Congress makes broad delegations in part so that agencies can "adapt their rules and policies to the demands of changing circumstances." *Id.*, at 157. To keep

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faith with that congressional choice, courts must give agencies "ample latitude" to revisit, rethink, and revise their regulatory approaches. *Ibid.* So it is here. Section 111(d) was written, as I've shown, to give EPA plenty of leeway. See *supra*, at 6–8. The enacting Congress told EPA to pick the "best system of emission reduction" (taking into account various factors). In selecting those words, Congress understood—it had to—that the "best system" would change over time. Congress wanted and instructed EPA to keep up. To ensure the statute's continued effectiveness, the "best system" should evolve as circumstances evolved—in a way Congress knew it couldn't then know. See *Massachusetts*, 549 U. S., at 532. EPA followed those statutory directions to the letter when it issued the Clean Power Plan. It selected a system (as the regulated parties agree) that achieved greater emissions reductions at lower cost than any technological alternative could have, while maintaining a reliable electricity market. Even if that system was novel, it was in EPA's view better—actually, "best." So it was the system that accorded with the enacting Congress's choice.

And contra the majority, it is that Congress's choice which counts, not any later one's. The majority says it "cannot ignore" that Congress in recent years has "considered and rejected" cap-and-trade schemes. *Ante*, at 27–28. But under normal principles of statutory construction, the majority *should* ignore that fact (just as I should ignore that Congress failed to enact bills barring EPA from implementing the Clean Power Plan). As we have explained time and again, failed legislation "offers a particularly dangerous basis on which to rest an interpretation of an existing law a different and earlier Congress" adopted. *Bostock* v. *Clayton County*, 590 U. S. ___, ___ (2020) (slip op., at 20) (internal quotation marks omitted); see *Sullivan* v. *Finkelstein*, 496 U. S. 617, 632 (1990) (Scalia, J., concurring in part) ("Arguments based on subsequent legislative history" should "not

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be taken seriously, not even in a footnote"). Return to *Brown & Williamson*, which all agree is the key case in this sphere. It disclaimed any reliance on "Congress' failure" to grant FDA jurisdiction over tobacco. 529 U. S., at 155. Instead, the Court focused on the statutes Congress "*ha[d]* enacted," which created "a distinct regulatory scheme" for tobacco, incompatible with FDA's. *Ibid.* (emphasis added). Here, as I've shown and the majority effectively concedes, there is nothing equivalent. See *supra*, at 9–12. Search high and low, nothing in current law conflicts with, or otherwise casts doubt on, the Clean Power Plan. That leaves the Court in much the same place it was when deciding *Massachusetts* v. *EPA*. Said the Court then: "That subsequent Congresses have eschewed enacting binding emissions limitations to combat global warming tells us nothing about what Congress meant" when it enacted the Clean Air Act. 549 U. S., at 529–530. And so the Court recognized EPA's authority to regulate carbon dioxide. But that Court was not this Court; and this Court deprives EPA of the authority Congress gave it in Section 111(d) to respond to the same environmental danger.

III

Some years ago, I remarked that "[w]e're all textualists now." Harvard Law School, The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes (Nov. 25, 2015). It seems I was wrong. The current Court is textualist only when being so suits it. When that method would frustrate broader goals, special canons like the "major questions doctrine" magically appear as get-out-of-text-free cards.[8] Today, one of those broader goals

[8] The majority opinion at least addresses the statute's text, though overstating its ambiguity and approaching the action taken under it with unwarranted "skepticism." *Ante*, at 28; see *ante*, at 28–31. The concurrence, by contrast, concludes that the Clean Air Act does not clearly enough authorize EPA's Plan without ever citing the statutory text. See

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makes itself clear: Prevent agencies from doing important work, even though that is what Congress directed. That anti-administrative-state stance shows up in the majority opinion, and it suffuses the concurrence. See *ante*, at 19, 25–26; *e.g.*, *ante*, at 3–6 (GORSUCH, J., concurring).

The kind of agency delegations at issue here go all the way back to this Nation's founding. "[T]he founding era," scholars have shown, "wasn't concerned about delegation." E. Posner & A. Vermeule, Interring the Nondelegation Doctrine, 69 U. Chi. L. Rev. 1721, 1734 (2002) (Posner & Vermeule). The records of the Constitutional Convention, the ratification debates, the Federalist—none of them suggests any significant limit on Congress's capacity to delegate policymaking authority to the Executive Branch. And neither does any early practice. The very first Congress gave sweeping authority to the Executive Branch to resolve some of the day's most pressing problems, including questions of "territorial administration," "Indian affairs," "foreign and domestic debt," "military service," and "the federal courts." J. Mortenson & N. Bagley, Delegation at the Founding, 121 Colum. L. Rev. 277, 349 (2021) (Mortenson & Bagley). That Congress, to use a few examples, gave the Executive power to devise a licensing scheme for trading with Indians; to craft appropriate laws for the Territories; and to decide how to pay down the (potentially ruinous) national debt. See *id.*, at 334–338, 340–342, 344–345; C. Chabot, The Lost History of Delegation at the Founding, 56 Ga. L. Rev. 81, 113–134 (2021) (Chabot). Barely anyone objected on delegation grounds. See Mortenson & Bagley 281–282, 332, 339; Chabot 117–119; Posner & Vermeule 1733–1736.

It is not surprising that Congress has always delegated,

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ante, at 13–16. Nowhere will you find the concurrence ask: What does the phrase "best system of emission reduction" mean? §7411(a)(1). So much for "begin[ning], as we must, with a careful examination of the statutory text." *Henson* v. *Santander Consumer USA Inc.*, 582 U. S. 79, ___ (2017) (slip op., at 3).

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and continues to do so—including on important policy issues. As this Court has recognized, it is often "unreasonable and impracticable" for Congress to do anything else. *American Power & Light Co.* v. *SEC*, 329 U. S. 90, 105 (1946). In all times, but ever more in "our increasingly complex society," the Legislature "simply cannot do its job absent an ability to delegate power under broad general directives." *Mistretta* v. *United States*, 488 U. S. 361, 372 (1989). Consider just two reasons why.

First, Members of Congress often don't know enough—and know they don't know enough—to regulate sensibly on an issue. Of course, Members can and do provide overall direction. But then they rely, as all of us rely in our daily lives, on people with greater expertise and experience. Those people are found in agencies. Congress looks to them to make specific judgments about how to achieve its more general objectives. And it does so especially, though by no means exclusively, when an issue has a scientific or technical dimension. Why *wouldn't* Congress instruct EPA to select "the best system of emission reduction," rather than try to choose that system itself? Congress knows that systems of emission reduction lie not in its own but in EPA's "unique expertise." *Martin* v. *Occupational Safety and Health Review Comm'n*, 499 U. S. 144, 151 (1991).

Second and relatedly, Members of Congress often can't know enough—and again, know they can't—to keep regulatory schemes working across time. Congress usually can't predict the future—can't anticipate changing circumstances and the way they will affect varied regulatory techniques. Nor can Congress (realistically) keep track of and respond to fast-flowing developments as they occur. Once again, that is most obviously true when it comes to scientific and technical matters. The "best system of emission reduction" is not today what it was yesterday, and will surely be something different tomorrow. So for this reason too, a rational Congress delegates. It enables an agency to adapt

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old regulatory approaches to new times, to ensure that a statutory program remains effective. See, *e.g.*, *National Federation of Independent Business* v. *OSHA*, 595 U. S. ___, ___ (2022) (BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting) (slip op., at 9) (observing that a statute's broad language was meant to ensure that an agency had "the tools needed to confront emerging dangers").

Over time, the administrative delegations Congress has made have helped to build a modern Nation. Congress wanted fewer workers killed in industrial accidents. It wanted to prevent plane crashes, and reduce the deadliness of car wrecks. It wanted to ensure that consumer products didn't catch fire. It wanted to stop the routine adulteration of food and improve the safety and efficacy of medications. And it wanted cleaner air and water. If an American could go back in time, she might be astonished by how much progress has occurred in all those areas. It didn't happen through legislation alone. It happened because Congress gave broad-ranging powers to administrative agencies, and those agencies then filled in—rule by rule by rule—Congress's policy outlines.

This Court has historically known enough not to get in the way. Maybe the best explanation of why comes from Justice Scalia. See *Mistretta*, 488 U. S., at 415–416 (dissenting opinion). The context was somewhat different. He was responding to an argument that Congress could not constitutionally delegate broad policymaking authority; here, the Court reads a delegation with unwarranted skepticism, and thereby artificially constrains its scope. But Justice Scalia's reasoning remains on point. He started with the inevitability of delegations: "[S]ome judgments involving policy considerations," he stated, "must be left to [administrative] officers." *Id.*, at 415. Then he explained why courts should not try to seriously police those delegations, barring—or, I'll add, narrowing—some on the ground that they went too far. The scope of delegations, he said,

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> "must be fixed according to common sense and the inherent necessities of the governmental co-ordination. Since Congress is no less endowed with common sense than we are, and better equipped to inform itself of the necessities of government; and since the factors bearing upon those necessities are both multifarious and (in the nonpartisan sense) highly political . . . it is small wonder that we have almost never felt qualified to second-guess Congress regarding the permissible degree of policy judgment that can be left to those executing or applying the law." *Id.*, at 416 (internal quotation marks omitted).

In short, when it comes to delegations, there are good reasons for Congress (within extremely broad limits) to get to call the shots. Congress knows about how government works in ways courts don't. More specifically, Congress knows what mix of legislative and administrative action conduces to good policy. Courts should be modest.

Today, the Court is not. Section 111, most naturally read, authorizes EPA to develop the Clean Power Plan—in other words, to decide that generation shifting is the "best system of emission reduction" for power plants churning out carbon dioxide. Evaluating systems of emission reduction is what EPA does. And nothing in the rest of the Clean Air Act, or any other statute, suggests that Congress did not mean for the delegation it wrote to go as far as the text says. In rewriting that text, the Court substitutes its own ideas about delegations for Congress's. And that means the Court substitutes its own ideas about policymaking for Congress's. The Court will not allow the Clean Air Act to work as Congress instructed. The Court, rather than Congress, will decide how much regulation is too much.

The subject matter of the regulation here makes the Court's intervention all the more troubling. Whatever else this Court may know about, it does not have a clue about

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how to address climate change. And let's say the obvious: The stakes here are high. Yet the Court today prevents congressionally authorized agency action to curb power plants' carbon dioxide emissions. The Court appoints itself—instead of Congress or the expert agency—the decision-maker on climate policy. I cannot think of many things more frightening. Respectfully, I dissent.

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Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.,* 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

BIDEN, PRESIDENT OF THE UNITED STATES, ET AL. *v.* NEBRASKA ET AL.

CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 22–506. Argued February 28, 2023—Decided June 30, 2023

Title IV of the Higher Education Act of 1965 (Education Act) governs federal financial aid mechanisms, including student loans. 20 U. S. C. §1070(a). The Act authorizes the Secretary of Education to cancel or reduce loans in certain limited circumstances. The Secretary may cancel a set amount of loans held by some public servants, see §§1078–10, 1087j, 1087ee. He may also forgive the loans of borrowers who have died or become "permanently and totally disabled," §1087(a)(1); borrowers who are bankrupt, §1087(b); and borrowers whose schools falsely certify them, close down, or fail to pay lenders. §1087(c).

The issue presented in this case is whether the Secretary has authority under the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) to depart from the existing provisions of the Education Act and establish a student loan forgiveness program that will cancel about $430 billion in debt principal and affect nearly all borrowers. Under the HEROES Act, the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." §1098bb(a)(1). As relevant here, the Secretary may issue such waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act affected by a national emergency] are not placed in a worse position financially in relation to that financial assistance because of [the national emergency]." §§1098bb(a)(2)(A), 1098ee(2)(C)–(D).

In 2022, as the COVID–19 pandemic came to its end, the Secretary

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invoked the HEROES Act to issue "waivers and modifications" reducing or eliminating the federal student debt of most borrowers. Borrowers with eligible federal student loans who had an income below $125,000 in either 2020 or 2021 qualified for a loan balance discharge of up to $10,000. Those who previously received Pell Grants—a specific type of federal student loan based on financial need—qualified for a discharge of up to $20,000.

Six States challenged the plan as exceeding the Secretary's statutory authority. The Eighth Circuit issued a nationwide preliminary injunction, and this Court granted certiorari before judgment.

Held:

1. At least Missouri has standing to challenge the Secretary's program. Article III requires a plaintiff to have suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561. Here, as the Government concedes, the Secretary's plan would cost MOHELA, a nonprofit government corporation created by Missouri to participate in the student loan market, an estimated $44 million a year in fees. MOHELA is, by law and function, an instrumentality of Missouri: Labeled an "instrumentality" by the State, it was created by the State, is supervised by the State, and serves a public function. The harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself. The Court reached a similar conclusion 70 years ago in *Arkansas* v. *Texas*, 346 U. S. 368.

The Secretary emphasizes that, as a public corporation, MOHELA has a legal personality separate from the State. But such an instrumentality—created and supervised by the State to serve a public function—remains "(for many purposes at least) part of the Government itself." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 397. The Secretary also contends that because MOHELA can sue on its own behalf, it—not Missouri—must be the one to sue. But where a State has been harmed in carrying out its responsibilities, the fact that it chose to exercise its authority through a public corporation it created and controls does not bar the State from suing to remedy that harm itself. See *Arkansas*, 346 U. S. 368. With Article III satisfied, the Court need not consider the States' other standing arguments. Pp. 7–12.

2. The HEROES Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, but does not allow the Secretary to rewrite that statute to the extent of canceling $430 billion of student loan principal. Pp. 12–26.

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(a) The text of the HEROES Act does not authorize the Secretary's loan forgiveness program. The Secretary's power under the Act to "modify" does not permit "basic and fundamental changes in the scheme" designed by Congress. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 225. Instead, "modify" carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." *Ibid.* That is how the word is ordinarily used and defined, and the legal definition is no different.

The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them. Prior to the COVID–19 pandemic, "modifications" issued under the Act were minor and had limited effect. But the "modifications" challenged here create a novel and fundamentally different loan forgiveness program. While Congress specified in the Education Act a few narrowly delineated situations that could qualify a borrower for loan discharge, the Secretary has extended such discharge to nearly every borrower in the country. It is "highly unlikely that Congress" authorized such a sweeping loan cancellation program "through such a subtle device as permission to 'modify.'" *Id.*, at 231.

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them—and that this additional term "grant[s] broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions, where it was simply used to nullify particular legal requirements. The Secretary next argues that the power to "waive or modify" is greater than the sum of its parts: Because waiver allows the Secretary "to eliminate legal obligations in their entirety," the combination of "waive or modify" must allow him "to reduce them to any extent short of waiver" (even if the power to "modify" ordinarily does not stretch that far). But the challenged loan forgiveness program goes beyond even that. In essence, the Secretary has drafted a new section of the Education Act from scratch by "waiving" provisions root and branch and then filling the empty space with radically new text.

The Secretary also cites a procedural provision in the HEROES Act directing the Secretary to publish a notice in the Federal Register, "includ[ing] the terms and conditions to be applied in lieu of such statutory and regulatory provisions" as the Secretary has waived or modified. §1098bb(b)(2). In the Government's view, that language authorizes both "waiving and then putting [the Secretary's] own requirements in"—a sort of "red penciling" of the existing law. But rather than implicitly granting the Secretary authority to draft new substantive statutory provisions at will, §1098bb(b)(2) simply imposes the

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obligation to report any waivers and modifications he has made. The Secretary's ability to add new terms "in lieu of" the old is limited to his authority to "modify" existing law. As with any other modification issued under the Act, no new term or condition reported pursuant to §1098bb(b)(2) may distort the fundamental nature of the provision it alters.

In sum, the Secretary's comprehensive debt cancellation plan is not a waiver because it augments and expands existing provisions dramatically. It is not a modification because it constitutes "effectively the introduction of a whole new regime." *MCI*, 512 U. S., at 234. And it cannot be some combination of the two, because when the Secretary seeks to *add* to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here. Pp. 13–18.

(b) The Secretary also appeals to congressional purpose, arguing that Congress intended "to grant substantial discretion to the Secretary to respond to unforeseen emergencies." On this view, the unprecedented nature of the Secretary's debt cancellation plan is justified by the pandemic's unparalleled scope. But the question here is not whether something should be done; it is who has the authority to do it. As in the Court's recent decision in *West Virginia* v. *EPA*, given the "'history and the breadth of the authority'" asserted by the Executive and the "'economic and political significance' of that assertion," the Court has "'reason to hesitate before concluding that Congress' meant to confer such authority." 597 U. S. ___, ___ (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160).

This case implicates many of the factors present in past cases raising similar separation of powers concerns. The Secretary has never previously claimed powers of this magnitude under the HEROES Act; "[n]o regulation premised on" the HEROES Act "has even begun to approach the size or scope" of the Secretary's program. *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (*per curiam*). The "'economic and political significance'" of the Secretary's action is staggering. *West Virginia*, 597 U. S., at ___ (quoting *Brown & Williamson*, 529 U. S., at 160). And the Secretary's assertion of administrative authority has "conveniently enabled [him] to enact a program" that Congress has chosen not to enact itself. *West Virginia*, 597 U. S., at ___. The Secretary argues that the principles explained in *West Virginia* and its predecessors should not apply to cases involving government benefits. But major questions cases "have arisen from all corners of the administrative state," *id., at* ___, and this is not the first such case to arise in the context of government benefits. See *King*

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v. *Burwell*, 576 U. S. 473, 485.

All this leads the Court to conclude that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation program "are ones that Congress would likely have intended for itself." *West Virginia*, 597 U. S., at ___. In such circumstances, the Court has required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program. *Id.*, at ___, ___ (quoting *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324). And as explained, the HEROES Act provides no authorization for the Secretary's plan when examined using the ordinary tools of statutory interpretation—let alone "clear congressional authorization" for such a program. Pp. 19–25.

Reversed and remanded.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. BARRETT, J., filed a concurring opinion. KAGAN, J., filed a dissenting opinion, in which SOTOMAYOR and JACKSON, JJ., joined.

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SUPREME COURT OF THE UNITED STATES

No. 22–506

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS *v.* NEBRASKA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 30, 2023]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

To ensure that Americans could keep up with increasing international competition, Congress authorized the first federal student loans in 1958—up to a total of $1,000 per student each year. National Defense Education Act of 1958, 72 Stat. 1584. Outstanding federal student loans now total $1.6 trillion extended to 43 million borrowers. Letter from Congressional Budget Office to Members of Congress, p. 3 (Sept. 26, 2022) (CBO Letter). Last year, the Secretary of Education established the first comprehensive student loan forgiveness program, invoking the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act) for authority to do so. The Secretary's plan canceled roughly $430 billion of federal student loan balances, completely erasing the debts of 20 million borrowers and lowering the median amount owed by the other 23 million from $29,400 to $13,600. See *ibid.*; App. 243. Six States sued, arguing that the HEROES Act does not authorize the loan cancellation plan. We agree.

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I

A

The Higher Education Act of 1965 (Education Act) was enacted to increase educational opportunities and "assist in making available the benefits of postsecondary education to eligible students . . . in institutions of higher education." 20 U. S. C. §1070(a). To that end, Title IV of the Act restructured federal financial aid mechanisms and established three types of federal student loans. Direct Loans are, as the name suggests, made directly to students and funded by the federal fisc; they constitute the bulk of the Federal Government's student lending efforts. See §1087a *et seq.* The Government also administers Perkins Loans—government-subsidized, low-interest loans made by schools to students with significant financial need—and Federal Family Education Loans, or FFELs—loans made by private lenders and guaranteed by the Federal Government. See §§1071 *et seq.*, 1087aa *et seq.* While FFELs and Perkins Loans are no longer issued, many remain outstanding. §§1071(d), 1087aa(b).

The terms of federal loans are set by law, not the market, so they often come with benefits not offered by private lenders. Such benefits include deferment of any repayment until after graduation, loan qualification regardless of credit history, relatively low fixed interest rates, income-sensitive repayment plans, and—for undergraduate students with financial need—government payment of interest while the borrower is in school. Dept. of Ed., Federal Student Aid, Federal Versus Private Loans.

The Education Act specifies in detail the terms and conditions attached to federal loans, including applicable interest rates, loan fees, repayment plans, and consequences of default. See §§1077, 1080, 1087e, 1087dd. It also authorizes the Secretary to cancel or reduce loans, but only in certain limited circumstances and to a particular extent. Specifically, the Secretary can cancel a set amount of loans held

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by some public servants—including teachers, members of the Armed Forces, Peace Corps volunteers, law enforcement and corrections officers, firefighters, nurses, and librarians—who work in their professions for a minimum number of years. §§1078–10, 1087j, 1087ee. The Secretary can also forgive the loans of borrowers who have died or been "permanently and totally disabled," such that they cannot "engage in any substantial gainful activity." §1087(a)(1). Bankrupt borrowers may have their loans forgiven. §1087(b). And the Secretary is directed to discharge loans for borrowers falsely certified by their schools, borrowers whose schools close down, and borrowers whose schools fail to pay loan proceeds they owe to lenders. §1087(c).

Shortly after the September 11 terrorist attacks, Congress became concerned that borrowers affected by the crisis—particularly those who served in the military—would need additional assistance. As a result, it enacted the Higher Education Relief Opportunities for Students Act of 2001. That law provided the Secretary of Education, for a limited period of time, with "specific waiver authority to respond to conditions in the national emergency" caused by the September 11 attacks. 115 Stat. 2386. Rather than allow this grant of authority to expire by its terms at the end of September 2003, Congress passed the Higher Education Relief Opportunities for Students Act of 2003 (HEROES Act). 117 Stat. 904. That Act extended the coverage of the 2001 statute to include any war or national emergency—not just the September 11 attacks. By its terms, the Secretary "may waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U. S. C.

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§1098bb(a)(1).[1]

The Secretary may issue waivers or modifications only "as may be necessary to ensure" that "recipients of student financial assistance under title IV of the [Education Act] who are affected individuals are not placed in a worse position financially in relation to that financial assistance because of their status as affected individuals." §1098bb(a)(2)(A). An "affected individual" is defined, in relevant part, as someone who "resides or is employed in an area that is declared a disaster area by any Federal, State, or local official in connection with a national emergency" or who "suffered direct economic hardship as a direct result of a war or other military operation or national emergency, as determined by the Secretary." §§1098ee(2)(C)–(D). And a "national emergency" for the purposes of the Act is "a national emergency declared by the President of the United States." §1098ee(4).

Immediately following the passage of the Act in 2003, the Secretary issued two dozen waivers and modifications addressing a handful of specific issues. 68 Fed. Reg. 69312–69318. Among other changes, the Secretary waived the requirement that "affected individuals" must "return or repay an overpayment" of certain grant funds erroneously disbursed by the Government, *id.*, at 69314, and the requirement that public service work must be uninterrupted to qualify an "affected individual" for loan cancellation, *id.*, at 69317. Additional adjustments were made in 2012, with similar limited effects. 77 Fed. Reg. 59311–59318.

[1] Like its 2001 predecessor, the HEROES Act enjoyed virtually unanimous bipartisan support at the time of its enactment, passing by a 421-to-1 vote in the House of Representatives and a unanimous voice vote in the Senate. See 149 Cong. Rec. 7952–7953 (2003); *id.*, at 20809; 147 Cong. Rec. 20396 (2001); *id.*, at 26292–26293. The single dissenting Representative later voiced his support for the Act, explaining that he "meant to vote 'yea.'" 149 Cong. Rec. 8559 (statement of Rep. Miller).

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But the Secretary took more significant action in response to the COVID–19 pandemic. On March 13, 2020, the President declared the pandemic a national emergency. Presidential Proclamation No. 9994, 85 Fed. Reg. 15337–15338 (2020). One week later, then-Secretary of Education Betsy DeVos announced that she was suspending loan repayments and interest accrual for all federally held student loans. See Dept. of Ed., Breaking News: Testing Waivers and Student Loan Relief (Mar. 20, 2020). The following week, Congress enacted the Coronavirus Aid, Relief, and Economic Security Act, which required the Secretary to extend the suspensions through the end of September 2020. 134 Stat. 404–405. Before that extension expired, the President directed the Secretary, "[i]n light of the national emergency," to "effectuate appropriate waivers of and modifications to" the Education Act to keep the suspensions in effect through the end of the year. 85 Fed. Reg. 49585. And a few months later, the Secretary further extended the suspensions, broadened eligibility for federal financial assistance, and waived certain administrative requirements (to allow, for example, virtual rather than on-site accreditation visits and to extend deadlines for filing reports). *Id.*, at 79856–79863; 86 Fed. Reg. 5008–5009 (2021).

Over a year and a half passed with no further action beyond keeping the repayment and interest suspensions in place. But in August 2022, a few weeks before President Biden stated that "the pandemic is over," the Department of Education announced that it was once again issuing "waivers and modifications" under the Act—this time to reduce and eliminate student debts directly. See App. 257–259; Washington Post, Sept. 20, 2022, p. A3, col. 1. During the first year of the pandemic, the Department's Office of General Counsel had issued a memorandum concluding that "the Secretary does not have statutory authority to provide blanket or mass cancellation, compromise, discharge, or forgiveness of student loan principal balances."

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Memorandum from R. Rubinstein to B. DeVos, p. 8 (Jan. 12, 2021). After a change in Presidential administrations and shortly before adoption of the challenged policy, however, the Office of General Counsel "formally rescinded" its earlier legal memorandum and issued a replacement reaching the opposite conclusion. 87 Fed. Reg. 52945 (2022). The new memorandum determined that the HEROES Act "grants the Secretary authority that could be used to effectuate a program of targeted loan cancellation directed at addressing the financial harms of the COVID–19 pandemic." *Id.*, at 52944. Upon receiving this new opinion, the Secretary issued his proposal to cancel student debt under the HEROES Act. App. 257–259. Two months later, he published the required notice of his "waivers and modifications" in the Federal Register. 87 Fed. Reg. 61512–61514.

The terms of the debt cancellation plan are straightforward: For borrowers with an adjusted gross income below $125,000 in either 2020 or 2021 who have eligible federal loans, the Department of Education will discharge the balance of those loans in an amount up to $10,000 per borrower.[2] *Id.*, at 61514 ("modif[ying] the provisions of" 20 U. S. C. §§1087, 1087dd(g); 34 CFR pt. 647, subpt. D (2022); 34 CFR §§682.402, 685.212). Borrowers who previously received Pell Grants qualify for up to $20,000 in loan cancellation. 87 Fed. Reg. 61514. Eligible loans include "Direct Loans, FFEL loans held by the Department or subject to collection by a guaranty agency, and Perkins Loans held by the Department." *Ibid.* The Department of Education estimates that about 43 million borrowers qualify for relief, and the Congressional Budget Office estimates that the plan will cancel about $430 billion in debt principal. See App. 119; CBO Letter 3.

[2] A borrower filing "jointly or as a Head of Household, or as a qualifying widow(er)," qualifies for loan cancellation with an adjusted gross income lower than $250,000. 87 Fed. Reg. 61514.

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B

Six States moved for a preliminary injunction, claiming that the plan exceeded the Secretary's statutory authority. The District Court held that none of the States had standing to challenge the plan and dismissed the suit. ___ F. Supp. 3d ___ (ED Mo. 2022). The States appealed, and the Eighth Circuit issued a nationwide preliminary injunction pending resolution of the appeal. The court concluded that Missouri likely had standing through the Missouri Higher Education Loan Authority (MOHELA or Authority), a public corporation that holds and services student loans. 52 F. 4th 1044 (2022). It further concluded that the State's challenge raised "substantial" questions on the merits and that the equities favored maintaining the status quo pending further review. *Id.*, at 1048 (internal quotation marks omitted).

With the plan on pause, the Secretary asked this Court to vacate the injunction or to grant certiorari before judgment, "to avoid prolonging this uncertainty for the millions of affected borrowers." Application 4. We granted the petition and set the case for expedited argument. 598 U. S. ___ (2022).

II

Before addressing the legality of the Secretary's program, we must first ensure that the States have standing to challenge it. Under Article III of the Constitution, a plaintiff needs a "personal stake" in the case. *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 7). That is, the plaintiff must have suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit. *Lujan* v. *Defenders of Wildlife*, 504 U. S. 555, 560–561 (1992). If at least one plaintiff has standing, the suit may proceed. *Rumsfeld* v. *Forum for Academic and Institutional*

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Rights, Inc., 547 U. S. 47, 52, n. 2 (2006). Because we conclude that the Secretary's plan harms MOHELA and thereby directly injures Missouri—conferring standing on that State—we need not consider the other theories of standing raised by the States.

Missouri created MOHELA as a nonprofit government corporation to participate in the student loan market. Mo. Rev. Stat. §173.360 (2016). The Authority owns over $1 billion in FFELs. MOHELA, FY 2022 Financial Statement 9 (Financial Statement). It also services nearly $150 billion worth of federal loans, having been hired by the Department of Education to collect payments and provide customer service to borrowers. *Id.*, at 4, 8. MOHELA receives an administrative fee for each of the five million federal accounts it services, totaling $88.9 million in revenue last year alone. *Ibid.*

Under the Secretary's plan, roughly half of all federal borrowers would have their loans completely discharged. App. 119. MOHELA could no longer service those closed accounts, costing it, by Missouri's estimate, $44 million a year in fees that it otherwise would have earned under its contract with the Department of Education. Brief for Respondents 16. This financial harm is an injury in fact directly traceable to the Secretary's plan, as both the Government and the dissent concede. See Tr. of Oral Arg. 18; *post*, at 5 (KAGAN, J., dissenting).

The plan's harm to MOHELA is also a harm to Missouri. MOHELA is a "public instrumentality" of the State. Mo. Rev. Stat. §173.360. Missouri established the Authority to perform the "essential public function" of helping Missourians access student loans needed to pay for college. *Ibid.*; see *Todd* v. *Curators of University of Missouri*, 347 Mo. 460, 464, 147 S. W. 2d 1063, 1064 (1941) ("Our constitution recognizes higher education as a governmental function."). To fulfill this public purpose, the Authority is empowered by the State to invest in or finance student loans, including by

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issuing bonds. §§173.385(1)(6)–(7). It may also service loans and collect "reasonable fees" for doing so. §§173.385(1)(12), (18). Its profits help fund education in Missouri: MOHELA has provided $230 million for development projects at Missouri colleges and universities and almost $300 million in grants and scholarships for Missouri students. Financial Statement 10, 20.

The Authority is subject to the State's supervision and control. Its board consists of two state officials and five members appointed by the Governor and approved by the Senate. §173.360. The Governor can remove any board member for cause. *Ibid.* MOHELA must provide annual financial reports to the Missouri Department of Education, detailing its income, expenditures, and assets. §173.445. The Authority is therefore "directly answerable" to the State. *Casualty Reciprocal Exchange* v. *Missouri Employers Mut. Ins. Co.*, 956 S. W. 2d 249, 254 (Mo. 1997). The State "set[s] the terms of its existence," and only the State "can abolish [MOHELA] and set the terms of its dissolution." *Id.*, at 254–255.

By law and function, MOHELA is an instrumentality of Missouri: It was created by the State to further a public purpose, is governed by state officials and state appointees, reports to the State, and may be dissolved by the State. The Secretary's plan will cut MOHELA's revenues, impairing its efforts to aid Missouri college students. This acknowledged harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself.

We came to a similar conclusion 70 years ago in *Arkansas* v. *Texas*, 346 U. S. 368 (1953). Arkansas sought to invoke our original jurisdiction in a suit against Texas, claiming that Texas had wrongfully interfered with a contract between the University of Arkansas and a Texas charity. *Id.*, at 369. Texas argued that the suit could not proceed because the University did "not stand in the shoes of the State." *Id.*, at 370. The harm to the University, as Texas

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saw it, was not a harm to Arkansas sufficient for the State to sue in its own name.

We disagreed. We recognized that "Arkansas must, of course, represent an interest of her own and not merely that of her citizens or corporations." *Ibid.* But we concluded that Arkansas was in fact seeking to protect its *own* interests because the University was "an official state instrumentality." *Ibid.* The State had labeled the University "an instrument of the state in the performance of a governmental work." *Ibid.* (internal quotation marks omitted). The University served a public purpose, acting as the State's "agen[t] in the educational field." *Id.*, at 371. The University had been "created by the Arkansas legislature," was "governed by a Board of Trustees appointed by the Governor with consent of the Senate," and "report[ed] all of its expenditures to the legislature." *Id.*, at 370. In short, the University was an instrumentality of the State, and "any injury under the contract to the University [was] an injury to Arkansas." *Ibid.* So too here. Because the Authority is part of Missouri, the State does not seek to "rely on injuries suffered by others." *Post*, at 2 (opinion of KAGAN, J.). It aims to remedy its own.

The Secretary and the dissent assert that MOHELA's injuries should not count as Missouri's because MOHELA, as a public corporation, has a legal personality separate from the State. Every government corporation has such a distinct personality; it is a corporation, after all, "with the powers to hold and sell property and to sue and be sued." *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 624 (1983). Yet such an instrumentality—created and operated to fulfill a public function—nonetheless remains "(for many purposes at least) part of the Government itself." *Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374, 397 (1995).

In *Lebron*, Amtrak was sued for refusing to display a political advertisement on a billboard at one of its stations.

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Id., at 376–377. Amtrak argued that it was not subject to the First Amendment because it was a corporation separate from the Federal Government. See *id.*, at 392. Congress had even specified in its authorizing statute that Amtrak was not "an agency or establishment of the United States Government." *Id.*, at 391 (quoting 84 Stat. 1330). Despite this disclaimer, we held that Amtrak remained subject to the First Amendment because it functioned as an instrumentality of the Federal Government, "created by a special statute, explicitly for the furtherance of federal governmental goals" of ensuring that the American public had access to passenger trains. *Lebron*, 513 U. S., at 397. Its board was appointed by the President, and it had to submit annual reports to the President and Congress. *Id.*, at 385–386. Having been "established and organized under federal law for the very purpose of pursuing federal governmental objectives, under the direction and control of federal governmental appointees," Amtrak could not disclaim that it was "part of the Government." *Id.*, at 398, 400.

We reiterated the point in *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43 (2015). There, railroads argued that giving Amtrak regulatory power was an unconstitutional delegation of government authority to a private entity. *Id.*, at 49–50. We rejected that contention, noting that "Amtrak was created by the Government, is controlled by the Government, and operates for the Government's benefit." *Id.*, at 53. It was therefore acting "as a governmental entity" in exercising that regulatory power. *Id.*, at 54.

That principle holds true here. The Secretary and the dissent contend that because MOHELA can sue on its own behalf, it—not Missouri—must be the one to sue. But in *Arkansas*, 346 U. S. 368, the University of Arkansas could have asserted its rights under the contract on its own. The University's governing statute made it "a body politic and corporate," with "all the powers of a corporate body," Ark.

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Stat. §80–2804 (1887)—including the power to sue and be sued on its own behalf, see *HRR Arkansas, Inc.* v. *River City Contractors, Inc.*, 350 Ark. 420, 427, 87 S. W. 3d 232, 237 (2002); see, *e.g.*, *Board of Trustees, Univ. of Ark.* v. *Pulaski County*, 229 Ark. 370, 315 S. W. 2d 879 (1958). We permitted Arkansas to bring an original suit all the same. Where a State has been harmed in carrying out its responsibilities, the fact that it chose to exercise its authority through a public corporation it created and controls does not bar the State from suing to remedy that harm itself.[3]

The Secretary's plan harms MOHELA in the performance of its public function and so directly harms the State that created and controls MOHELA. Missouri thus has suffered an injury in fact sufficient to give it standing to challenge the Secretary's plan. With Article III satisfied, we turn to the merits.

III

The Secretary asserts that the HEROES Act grants him the authority to cancel $430 billion of student loan principal. It does not. We hold today that the Act allows the Secretary to "waive or modify" existing statutory or regulatory provisions applicable to financial assistance programs under the Education Act, not to rewrite that statute from the ground up.

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[3] The dissent, for all its attempts to cabin these precedents, cites no precedents of its own addressing a State's standing to sue for a harm to its instrumentality. The dissent offers only a state court case involving a different public corporation, in which the Missouri Supreme Court said that the corporation was separate from the State for the purposes of a state ban on "the lending of the credit of the state." *Menorah Medical Center* v. *Health and Ed. Facilities Auth.*, 584 S. W. 2d 73, 78 (1979) (plurality opinion). But as the dissent recognizes, a public corporation can count as part of the State for some but not "other purposes." *Post*, at 11, and n. 1. The Missouri Supreme Court said nothing about, and had no reason to address, whether an injury to that public corporation was a harm to the State.

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A

The HEROES Act authorizes the Secretary to "waive or modify any statutory or regulatory provision applicable to the student financial assistance programs under title IV of the [Education Act] as the Secretary deems necessary in connection with a war or other military operation or national emergency." 20 U. S. C. §1098bb(a)(1). That power has limits. To begin with, statutory permission to "modify" does not authorize "basic and fundamental changes in the scheme" designed by Congress. *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 225 (1994). Instead, that term carries "a connotation of increment or limitation," and must be read to mean "to change moderately or in minor fashion." *Ibid.* That is how the word is ordinarily used. See, *e.g.*, Webster's Third New International Dictionary 1952 (2002) (defining "modify" as "to make more temperate and less extreme," "to limit or restrict the meaning of," or "to make minor changes in the form or structure of [or] alter without transforming"). The legal definition is no different. Black's Law Dictionary 1203 (11th ed. 2019) (giving the first definition of "modify" as "[t]o make somewhat different; to make small changes to," and the second as "[t]o make more moderate or less sweeping"). The authority to "modify" statutes and regulations allows the Secretary to make modest adjustments and additions to existing provisions, not transform them.

The Secretary's previous invocations of the HEROES Act illustrate this point. Prior to the COVID–19 pandemic, "modifications" issued under the Act implemented only minor changes, most of which were procedural. Examples include reducing the number of tax forms borrowers are required to file, extending time periods in which borrowers must take certain actions, and allowing oral rather than written authorizations. See 68 Fed. Reg. 69314–69316.

Here, the Secretary purported to "modif[y] the provisions of" two statutory sections and three related regulations

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governing student loans. 87 Fed. Reg. 61514. The affected statutory provisions granted the Secretary the power to "discharge [a] borrower's liability," or pay the remaining principal on a loan, under certain narrowly prescribed circumstances. 20 U. S. C. §§1087, 1087dd(g)(1). Those circumstances were limited to a borrower's death, disability, or bankruptcy; a school's false certification of a borrower or failure to refund loan proceeds as required by law; and a borrower's inability to complete an educational program due to closure of the school. See §§1087(a)–(d), 1087dd(g). The corresponding regulatory provisions detailed rules and procedures for such discharges. They also defined the terms of the Government's public service loan forgiveness program and provided for discharges when schools commit malfeasance. See 34 CFR §§682.402, 685.212; 34 CFR pt. 674, subpt. D.

The Secretary's new "modifications" of these provisions were not "moderate" or "minor." Instead, they created a novel and fundamentally different loan forgiveness program. The new program vests authority in the Department of Education to discharge up to $10,000 for every borrower with income below $125,000 and up to $20,000 for every such borrower who has received a Pell Grant. 87 Fed. Reg. 61514. No prior limitation on loan forgiveness is left standing. Instead, every borrower within the specified income cap automatically qualifies for debt cancellation, no matter their circumstances. The Department of Education estimates that the program will cover 98.5% of all borrowers. See Dept. of Ed., White House Fact Sheet: The Biden Administration's Plan for Student Debt Relief Could Benefit Tens of Millions of Borrowers in All Fifty States (Sept. 20, 2022). From a few narrowly delineated situations specified by Congress, the Secretary has expanded forgiveness to nearly every borrower in the country.

The Secretary's plan has "modified" the cited provisions

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only in the same sense that "the French Revolution 'modified' the status of the French nobility"—it has abolished them and supplanted them with a new regime entirely. *MCI*, 512 U. S., at 228. Congress opted to make debt forgiveness available only in a few particular exigent circumstances; the power to modify does not permit the Secretary to "convert that approach into its opposite" by creating a new program affecting 43 million Americans and $430 billion in federal debt. *Descamps* v. *United States*, 570 U. S. 254, 274 (2013). Labeling the Secretary's plan a mere "modification" does not lessen its effect, which is in essence to allow the Secretary unfettered discretion to cancel student loans. It is "highly unlikely that Congress" authorized such a sweeping loan cancellation program "through such a subtle device as permission to 'modify.'" *MCI*, 512 U. S., at 231.

The Secretary responds that the Act authorizes him to "waive" legal provisions as well as modify them—and that this additional term "grant[s] broader authority" than would "modify" alone. But the Secretary's invocation of the waiver power here does not remotely resemble how it has been used on prior occasions. Previously, waiver under the HEROES Act was straightforward: the Secretary identified a particular legal requirement and waived it, making compliance no longer necessary. For instance, on one occasion the Secretary waived the requirement that a student provide a written request for a leave of absence. See 77 Fed. Reg. 59314. On another, he waived the regulatory provisions requiring schools and guaranty agencies to attempt collection of defaulted loans for the time period in which students were affected individuals. See 68 Fed. Reg. 69316.

Here, the Secretary does not identify any provision that he is actually waiving.[4] No specific provision of the Educa-

[4] While the Secretary's notice published in the Federal Register refers

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tion Act establishes an obligation on the part of student borrowers to pay back the Government. So as the Government concedes, "waiver"—as used in the HEROES Act—cannot refer to "waiv[ing] loan balances" or "waiving the obligation to repay" on the part of a borrower. Tr. of Oral Arg. 9, 64. Contrast 20 U. S. C. §1091b(b)(2)(D) (allowing the Secretary to "waive the amounts that students are required to return" in specified circumstances of overpayment by the Government). Because the Secretary cannot waive a particular provision or provisions to achieve the desired result, he is forced to take a more circuitous approach, one that avoids any need to show compliance with the statutory limitation on his authority. He simply "waiv[es] the elements of the discharge and cancellation provisions that are inapplicable in this [debt cancellation] program that would limit eligibility to other contexts." Tr. of Oral Arg. 64–65.

Yet even that expansive conception of waiver cannot justify the Secretary's plan, which does far more than relax existing legal requirements. The plan specifies particular sums to be forgiven and income-based eligibility requirements. The addition of these new and substantially different provisions cannot be said to be a "waiver" of the old in any meaningful sense. Recognizing this, the Secretary acknowledges that waiver alone is not enough; after waiving whatever "inapplicable" law would bar his debt cancellation plan, he says, he then "modif[ied] the provisions to bring [them] in line with this program." *Id.*, at 65. So in the end, the Secretary's plan relies on modifications all the way down. And as we have explained, the word "modify" simply cannot bear that load.

The Secretary and the dissent go on to argue that the power to "waive or modify" is greater than the sum of its

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to "waivers and modifications" generally, see 87 Fed. Reg. 61512–61514, and while two sentences use the somewhat ambiguous phrase "[t]his waiver," *id.*, at 61514, the notice identifies no specific legal provision as having been "waived" by the Secretary.

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parts. Because waiver allows the Secretary "to eliminate legal obligations in their entirety," the argument runs, the combination of "waive or modify" allows him "to reduce them to any extent short of waiver"—even if the power to "modify" ordinarily does not stretch that far. Reply Brief 16–17 (internal quotation marks omitted). But the Secretary's program cannot be justified by such sleight of hand. The Secretary has not truly waived or modified the provisions in the Education Act authorizing specific and limited forgiveness of student loans. Those provisions remain safely intact in the U. S. Code, where they continue to operate in full force. What the Secretary has actually done is draft a new section of the Education Act from scratch by "waiving" provisions root and branch and then filling the empty space with radically new text.

Lastly, the Secretary points to a procedural provision in the HEROES Act. The Act directs the Secretary to publish a notice in the Federal Register "includ[ing] *the terms and conditions to be applied in lieu of* such statutory and regulatory provisions" as the Secretary has waived or modified. 20 U. S. C. §1098bb(b)(2) (emphasis added). In the Secretary's view, that language authorizes "both deleting and then adding back in, waiving and then putting his own requirements in"—a sort of "red penciling" of the existing law. Tr. of Oral Arg. 65; see also Reply Brief 17.

Section 1098bb(b)(2) is, however, "a wafer-thin reed on which to rest such sweeping power." *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 7). The provision is no more than it appears to be: a humdrum reporting requirement. Rather than implicitly granting the Secretary authority to draft new substantive statutory provisions at will, it simply imposes the obligation to report any waivers and modifications he has made. Section 1098bb(b)(2) suggests that "waivers and modifications" includes addi-

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tions. The dissent accordingly reads the statute as authorizing any degree of change or any new addition, "from modest to substantial"—and nothing in the dissent's analysis suggests stopping at "substantial." *Post*, at 20. Because the Secretary "does not have to leave gaping holes" when he waives provisions, the argument runs, it follows that *any* replacement terms the Secretary uses to fill those holes must be lawful. *Ibid.* But the Secretary's ability to add new terms "in lieu of" the old is limited to his authority to "modify" existing law. As with any other modification issued under the Act, no new term or condition reported pursuant to §1098bb(b)(2) may distort the fundamental nature of the provision it alters.[5]

The Secretary's comprehensive debt cancellation plan cannot fairly be called a waiver—it not only nullifies existing provisions, but augments and expands them dramatically. It cannot be mere modification, because it constitutes "effectively the introduction of a whole new regime." *MCI*, 512 U. S., at 234. And it cannot be some combination of the two, because when the Secretary seeks to *add* to existing law, the fact that he has "waived" certain provisions does not give him a free pass to avoid the limits inherent in the power to "modify." However broad the meaning of "waive or modify," that language cannot authorize the kind of exhaustive rewriting of the statute that has taken place here.[6]

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[5] The dissent asserts that our decision today will control any challenge to the Secretary's temporary suspensions of loan repayments and interest accrual. *Post*, at 21–22. We decide only the case before us. A challenge to the suspensions may involve different considerations with respect to both standing and the merits.

[6] The States further contend that the Secretary's program violates the requirement in the HEROES Act that any waivers or modifications be "necessary to ensure that . . . affected individuals are not placed in a worse position financially in relation to" federal financial assistance. 20 U. S. C. §1098bb(a)(2)(A); see Brief for Respondents 39–44. While our decision does not rest upon that reasoning, we note that the Secretary

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B

In a final bid to elide the statutory text, the Secretary appeals to congressional purpose. "The whole point of" the HEROES Act, the Government contends, "is to ensure that in the face of a national emergency that is causing financial harm to borrowers, the Secretary can do something." Tr. of Oral Arg. 55. And that "something" was left deliberately vague because Congress intended "to grant substantial discretion to the Secretary to respond to unforeseen emergencies." Reply Brief 22, n. 3. So the unprecedented nature of the Secretary's debt cancellation plan only "reflects the pandemic's unparalleled scope." Brief for Petitioners 52 (Brief for United States).

The dissent agrees. "Emergencies, after all, are emergencies," it reasons, and "more serious measures" must be expected "in response to more serious problems." *Post*, at 25, 28. The dissent's interpretation of the HEROES Act would grant unlimited power to the Secretary, not only to modify or waive certain provisions but to "fill the holes that action creates with new terms"—no matter how drastic those terms might be—and to "alter [provisions] to the extent [he] think[s] appropriate," up to and including "the most substantial kind of change" imaginable. *Post,* at 16, 19–20. That is inconsistent with the statutory language and past practice under the statute.

The question here is not whether something should be done; it is who has the authority to do it. Our recent decision in *West Virginia* v. *EPA* involved similar concerns over the exercise of administrative power. 597 U. S. ___ (2022). That case involved the EPA's claim that the Clean Air Act authorized it to impose a nationwide cap on carbon dioxide

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faces a daunting task in showing that cancellation of debt principal is "necessary to ensure" that borrowers are not placed in "worse position[s] financially in relation to" their loans, especially given the Government's prior determination that pausing interest accrual and loan repayments would achieve that end.

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emissions. Given "the 'history and the breadth of the authority that [the agency] ha[d] asserted,' and the 'economic and political significance' of that assertion," we found that there was "'reason to hesitate before concluding that Congress' meant to confer such authority." *Id.*, at ___ (slip op., at 17) (quoting *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 159–160 (2000); first alteration in original).

So too here, where the Secretary of Education claims the authority, on his own, to release 43 million borrowers from their obligations to repay $430 billion in student loans. The Secretary has never previously claimed powers of this magnitude under the HEROES Act. As we have already noted, past waivers and modifications issued under the Act have been extremely modest and narrow in scope. The Act has been used only once before to waive or modify a provision related to debt cancellation: In 2003, the Secretary waived the requirement that borrowers seeking loan forgiveness under the Education Act's public service discharge provisions "perform uninterrupted, otherwise qualifying service for a specified length of time (for example, one year) or for consecutive periods of time, such as 5 consecutive years." 68 Fed. Reg. 69317. That waiver simply eased the requirement that service be uninterrupted to qualify for the public service loan forgiveness program. In sum, "[n]o regulation premised on" the HEROES Act "has even begun to approach the size or scope" of the Secretary's program. *Alabama Assn.*, 594 U. S., at ___ (slip op., at 7).[7]

Under the Government's reading of the HEROES Act, the

[7] The Secretary also cites a prior invocation of the HEROES Act waiving the requirement that borrowers must repay prior overpayments of certain grant funds. See Brief for United States 41; 68 Fed. Reg. 69314. But Congress had already limited borrower liability in such cases to exclude overpayments in amounts up to "50 percent of the total grant assistance received by the student" for the period at issue, so the Secretary's waiver had only a modest effect. 20 U. S. C. §1091b(b)(2)(C)(i)(II). And that waiver simply held the Government responsible for its *own* errors when it had mistakenly disbursed undeserved grant funds.

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Secretary would enjoy virtually unlimited power to rewrite the Education Act. This would "effec[t] a 'fundamental revision of the statute, changing it from [one sort of] scheme of . . . regulation' into an entirely different kind," *West Virginia*, 597 U. S., at ___ (slip op., at 24) (quoting *MCI*, 512 U. S., at 231)—one in which the Secretary may unilaterally define every aspect of federal student financial aid, provided he determines that recipients have "suffered direct economic hardship as a direct result of a . . . national emergency." 20 U. S. C. §1098ee(2)(D).

The "'economic and political significance'" of the Secretary's action is staggering by any measure. *West Virginia*, 597 U. S., at ___ (slip op., at 17) (quoting *Brown & Williamson*, 529 U. S., at 160). Practically every student borrower benefits, regardless of circumstances. A budget model issued by the Wharton School of the University of Pennsylvania estimates that the program will cost taxpayers "between $469 billion and $519 billion," depending on the total number of borrowers ultimately covered. App. 108. That is ten times the "economic impact" that we found significant in concluding that an eviction moratorium implemented by the Centers for Disease Control and Prevention triggered analysis under the major questions doctrine. *Alabama Assn.*, 594 U. S., at ___ (slip op., at 6). It amounts to nearly one-third of the Government's $1.7 trillion in annual discretionary spending. Congressional Budget Office, The Federal Budget in Fiscal Year 2022. There is no serious dispute that the Secretary claims the authority to exercise control over "a significant portion of the American economy." *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014) (quoting *Brown & Williamson*, 529 U. S., at 159).

The dissent is correct that this is a case about one branch of government arrogating to itself power belonging to another. But it is the Executive seizing the power of the Legislature. The Secretary's assertion of administrative authority has "conveniently enabled [him] to enact a program"

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that Congress has chosen not to enact itself. *West Virginia*, 597 U. S., at ___ (slip op., at 27). Congress is not unaware of the challenges facing student borrowers. "More than 80 student loan forgiveness bills and other student loan legislation" were considered by Congress during its 116th session alone. M. Kantrowitz, Year in Review: Student Loan Forgiveness Legislation, Forbes, Dec. 24, 2020.[8] And the discussion is not confined to the halls of Congress. Student loan cancellation "raises questions that are personal and emotionally charged, hitting fundamental issues about the structure of the economy." J. Stein, Biden Student Debt Plan Fuels Broader Debate Over Forgiving Borrowers, Washington Post, Aug. 31, 2022.

The sharp debates generated by the Secretary's extraordinary program stand in stark contrast to the unanimity with which Congress passed the HEROES Act. The dissent asks us to "[i]magine asking the enacting Congress: Can the Secretary use his powers to give borrowers more relief when an emergency has inflicted greater harm?" *Post*, at 27–28. The dissent "can't believe" the answer would be no. *Post*, at 28. But imagine instead asking the enacting Congress a more pertinent question: "Can the Secretary use his powers to abolish $430 billion in student loans, completely canceling loan balances for 20 million borrowers, as a pandemic winds down to its end?" We can't believe the answer would be yes. Congress did not unanimously pass the HEROES Act with such power in mind. "A decision of such magnitude and consequence" on a matter of "'earnest and profound debate across the country'" must "res[t] with Congress itself, or an agency acting pursuant to a clear delegation from that representative body." *West Virginia*, 597 U. S., at ___, ___ (slip op., at 28, 31) (quoting *Gonzales*

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[8] Resolutions were also introduced in 2020 and 2021 "[c]alling on the President . . . to take executive action to broadly cancel Federal student loan debt." See S. Res. 711, 116th Cong., 2d Sess. (2020); S. Res. 46, 117th Cong., 1st Sess. (2021). Those resolutions failed to reach a vote.

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v. *Oregon*, 546 U. S. 243, 267–268 (2006)). As then-Speaker of the House Nancy Pelosi explained:

> "People think that the President of the United States has the power for debt forgiveness. He does not. He can postpone. He can delay. But he does not have that power. That has to be an act of Congress." Press Conference, Office of the Speaker of the House (July 28, 2021).

Aside from reiterating its interpretation of the statute, the dissent offers little to rebut our conclusion that "indicators from our previous major questions cases are present" here. *Post*, at 15 (BARRETT, J., concurring). The dissent insists that "[s]tudent loans are in the Secretary's wheelhouse." *Post*, at 26 (opinion of KAGAN, J.). But in light of the sweeping and unprecedented impact of the Secretary's loan forgiveness program, it would seem more accurate to describe the program as being in the "wheelhouse" of the House and Senate Committees on Appropriations. Rather than dispute the extent of that impact, the dissent chooses to mount a frontal assault on what it styles "the Court's made-up major questions doctrine." *Post*, at 29–30. But its attempt to relitigate *West Virginia* is misplaced. As we explained in that case, while the major questions "label" may be relatively recent, it refers to "an identifiable body of law that has developed over a series of significant cases" spanning decades. *West Virginia*, 597 U. S., at ___ (slip op., at 20). At any rate, "the issue now is not whether [*West Virginia*] is correct. The question is whether that case is distinguishable from this one. And it is not." *Collins* v. *Yellen*, 594 U. S. ___, ___ (2021) (KAGAN, J., concurring in part and concurring in judgment) (slip op., at 2).

The Secretary, for his part, acknowledges that *West Virginia* is the law. Brief for United States 47–48. But he objects that its principles apply only in cases concerning "agency action[s] involv[ing] the power to regulate, not the

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provision of government benefits." Reply Brief 21. In the Government's view, "there are fewer reasons to be concerned" in cases involving benefits, which do not impose "profound burdens" on individual rights or cause "regulatory effects that might prompt a note of caution in other contexts involving exercises of emergency powers." Tr. of Oral Arg. 61.

This Court has never drawn the line the Secretary suggests—and for good reason. Among Congress's most important authorities is its control of the purse. U. S. Const., Art. I, §9, cl. 7; see also *Office of Personnel Management* v. *Richmond*, 496 U. S. 414, 427 (1990) (the Appropriations Clause is "a most useful and salutary check upon profusion and extravagance" (internal quotation marks omitted)). It would be odd to think that separation of powers concerns evaporate simply because the Government is providing monetary benefits rather than imposing obligations. As we observed in *West Virginia*, experience shows that major questions cases "have arisen from all corners of the administrative state," and administrative action resulting in the conferral of benefits is no exception to that rule. 597 U. S., at ___ (slip op., at 17). In *King* v. *Burwell*, 576 U. S. 473 (2015), we declined to defer to the Internal Revenue Service's interpretation of a healthcare statute, explaining that the provision at issue affected "billions of dollars of spending each year and . . . the price of health insurance for millions of people." *Id.*, at 485. Because the interpretation of the provision was "a question of deep 'economic and political significance' that is central to [the] statutory scheme," we said, we would not assume that Congress entrusted that task to an agency without a clear statement to that effect. *Ibid.* (quoting *Utility Air*, 573 U. S., at 324). That the statute at issue involved government benefits made no difference in *King*, and it makes no difference here.

All this leads us to conclude that "[t]he basic and consequential tradeoffs" inherent in a mass debt cancellation

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program "are ones that Congress would likely have intended for itself." *West Virginia*, 597 U. S., at ___ (slip op., at 26). In such circumstances, we have required the Secretary to "point to 'clear congressional authorization'" to justify the challenged program. *Id.*, at ___, ___ (slip op., at 19, 28) (quoting *Utility Air*, 573 U. S., at 324). And as we have already shown, the HEROES Act provides no authorization for the Secretary's plan even when examined using the ordinary tools of statutory interpretation—let alone "clear congressional authorization" for such a program.[9]

* * *

It has become a disturbing feature of some recent opinions to criticize the decisions with which they disagree as going beyond the proper role of the judiciary. Today, we have concluded that an instrumentality created by Missouri, governed by Missouri, and answerable to Missouri is indeed part of Missouri; that the words "waive or modify" do not mean "completely rewrite"; and that our precedent—old and new—requires that Congress speak clearly before a Department Secretary can unilaterally alter large sections of the American economy. We have employed the traditional tools of judicial decisionmaking in doing so. Reasonable minds may disagree with our analysis—in fact, at least three do. See *post*, p. ___ (KAGAN, J., dissenting). We do

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[9] The dissent complains that our application of the major questions doctrine is a "tell" revealing that "'normal' statutory interpretation cannot sustain [our] decision." *Post*, at 23, 30. Not so. As we have explained, the statutory text alone precludes the Secretary's program. Today's opinion simply reflects this Court's familiar practice of providing multiple grounds to support its conclusions. See, *e.g.*, *Kucana* v. *Holder*, 558 U. S. 233, 243–252 (2010) (interpreting the text of a federal immigration statute in the first instance, then citing the "presumption favoring judicial review of administrative action" as an additional sufficient basis for the Court's decision). The fact that multiple grounds support a result is usually regarded as a strength, not a weakness.

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not mistake this plainly heartfelt disagreement for disparagement. It is important that the public not be misled either. Any such misperception would be harmful to this institution and our country.

The judgment of the District Court for the Eastern District of Missouri is reversed, and the case is remanded for further proceedings consistent with this opinion. The Government's application to vacate the Eighth Circuit's injunction is denied as moot.

It is so ordered.

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SUPREME COURT OF THE UNITED STATES

No. 22–506

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS *v.* NEBRASKA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 30, 2023]

JUSTICE BARRETT, concurring.

I join the Court's opinion in full. I write separately to address the States' argument that, under the "major questions doctrine," we can uphold the Secretary of Education's loan cancellation program only if he points to "'clear congressional authorization'" for it. *West Virginia* v. *EPA*, 597 U. S. ___, ___ (2022) (slip op., at 19). In this case, the Court applies the ordinary tools of statutory interpretation to conclude that the HEROES Act does not authorize the Secretary's plan. *Ante*, at 12–18. The major questions doctrine reinforces that conclusion but is not necessary to it. *Ante*, at 25.

Still, the parties have devoted significant attention to the major questions doctrine, and there is an ongoing debate about its source and status. I take seriously the charge that the doctrine is inconsistent with textualism. *West Virginia*, 597 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 28) ("When [textualism] would frustrate broader goals, special canons like the 'major questions doctrine' magically appear as get-out-of-text-free cards"). And I grant that some articulations of the major questions doctrine on offer—most notably, that the doctrine is a substantive canon—should give a textualist pause.

Yet for the reasons that follow, I do not see the major

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questions doctrine that way. Rather, I understand it to emphasize the importance of *context* when a court interprets a delegation to an administrative agency. Seen in this light, the major questions doctrine is a tool for discerning—not departing from—the text's most natural interpretation.

I

A

Substantive canons are rules of construction that advance values external to a statute.[1] A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 117 (2010) (Barrett). Some substantive canons, like the rule of lenity, play the modest role of breaking a tie between equally plausible interpretations of a statute. *United States* v. *Santos*, 553 U. S. 507, 514 (2008) (plurality opinion). Others are more aggressive—think of them as strong-form substantive canons. Unlike a tie-breaking rule, a strong-form canon counsels a court to *strain* statutory text to advance a particular value. Barrett 168. There are many such canons on the books, including constitutional avoidance, the clear-statement federalism rules, and the presumption against retroactivity. *Id.*, at 138–145, 172–173. Such rules effectively impose a "clarity tax" on Congress by demanding that it speak unequivocally if it wants to accomplish certain ends. J. Manning, Clear Statement Rules and the Constitution, 110 Colum. L. Rev. 399, 403 (2010). This "clear statement" requirement means that the better interpretation of a statute will not necessarily prevail. *E.g.*, *Boechler* v. *Commissioner*, 596 U. S. ___, ___ (2022) (slip op., at 6) ("[I]n this context, better is not enough"). Instead, if

[1] They stand in contrast to linguistic or descriptive canons, which are designed to reflect grammatical rules (such as the punctuation canon) or speech patterns (like the inclusion of some things implies the exclusion of others). A. Barrett, Substantive Canons and Faithful Agency, 90 B. U. L. Rev. 109, 117 (2010).

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the better reading leads to a disfavored result (like provoking a serious constitutional question), the court will adopt an inferior-but-tenable reading to avoid it. So to achieve an end protected by a strong-form canon, Congress must close all plausible off ramps.

While many strong-form canons have a long historical pedigree, they are "in significant tension with textualism" insofar as they instruct a court to adopt something other than the statute's most natural meaning. Barrett 123–124. The usual textualist enterprise involves "hear[ing] the words as they would sound in the mind of a skilled, objectively reasonable user of words." F. Easterbrook, The Role of Original Intent in Statutory Construction, 11 Harv. J. L. & Pub. Pol'y 59, 65 (1988). But a strong-form canon "load[s] the dice for or against a particular result" in order to serve a value that the judiciary has chosen to specially protect. A. Scalia, A Matter of Interpretation 27 (1997) (Scalia); see also Barrett 124, 168–169. Even if the judiciary's adoption of such canons can be reconciled with the Constitution,[2] it is undeniable that they pose "a lot of trouble" for "the honest textualist." Scalia 28.

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[2] Whether the creation or application of strong-form canons exceeds the "judicial Power" conferred by Article III is a difficult question. On the one hand, "federal courts have been developing and applying [such] canons for as long as they have been interpreting statutes," and that is some reason to regard the practice as consistent with the original understanding of the "judicial Power." Barrett 155, 176. Moreover, many strong-form canons advance constitutional values, which heightens their claim to legitimacy. *Id.*, at 168–170. On the other hand, these canons advance constitutional values by imposing prophylactic constraints on Congress—and that is in tension with the Constitution's structure. *Id.*, at 174, 176. Thus, even assuming that the federal courts have not overstepped by adopting such canons in the past, I am wary of adopting new ones—and if the major questions doctrine were a newly minted strong-form canon, I would not embrace it. In my view, however, the major questions doctrine is neither new nor a strong-form canon.

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B

Some have characterized the major questions doctrine as a strong-form substantive canon designed to enforce Article I's Vesting Clause. See, *e.g.*, C. Sunstein, There Are Two "Major Questions" Doctrines, 73 Admin. L. Rev. 475, 483–484 (2021) (asserting that recent cases apply the major questions doctrine as "a nondelegation canon"); L. Heinzerling, The Power Canons, 58 Wm. & Mary L. Rev. 1933, 1946–1948 (2017) (describing the major questions doctrine as a "normative" canon that "is both a presumption against certain kinds of agency interpretations and an instruction to Congress"). On this view, the Court overprotects the nondelegation principle by increasing the cost of delegating authority to agencies—namely, by requiring Congress to speak unequivocally in order to grant them significant rule-making power. See Barrett 172–176; see also *post*, at 27 (KAGAN, J., dissenting) (describing the major questions doctrine as a "heightened-specificity requirement"); *Georgia* v. *President of the United States*, 46 F. 4th 1283, 1314 (CA11 2022) (Anderson, J., concurring in part and dissenting in part) ("[T]he major questions doctrine is essentially a clear-statement rule"). This "clarity tax" might prevent Congress from getting too close to the nondelegation line, especially since the "intelligible principle" test largely leaves Congress to self-police. (So the doctrine would function like constitutional avoidance.) In addition or instead, the doctrine might reflect the judgment that it is so important for Congress to exercise "[a]ll legislative Powers," Art. I, §1, that it should be forced to think twice before delegating substantial discretion to agencies—even if the delegation is well within Congress's power to make. (So the doctrine would function like the rule that Congress must speak clearly to abrogate state sovereign immunity.) No matter which rationale justifies it, this "clear statement" version of the major questions doctrine "loads the dice" so that a plausible

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antidelegation interpretation wins even if the agency's interpretation is better.

While one could walk away from our major questions cases with this impression, I do not read them this way. No doubt, many of our cases express an expectation of "clear congressional authorization" to support sweeping agency action. See, *e.g.*, *West Virginia*, 597 U. S., at ___ (slip op., at 19); *Utility Air Regulatory Group* v. *EPA*, 573 U. S. 302, 324 (2014); see also *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___, ___ (2021) (*per curiam*) (slip op., at 6). But none requires "an 'unequivocal declaration'" from Congress authorizing the *precise* agency action under review, as our clear-statement cases do in their respective domains. See *Financial Oversight and Management Bd. for P. R.* v. *Centro De Periodismo Investigativo, Inc.*, 598 U. S. ___, ___ (2023) (slip op., at 6). And none purports to depart from the best interpretation of the text—the hallmark of a true clear-statement rule.

So what work is the major questions doctrine doing in these cases? I will give you the long answer, but here is the short one: The doctrine serves as an interpretive tool reflecting "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude to an administrative agency." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 133 (2000).

II

The major questions doctrine situates text in context, which is how textualists, like all interpreters, approach the task at hand. C. Nelson, What Is Textualism? 91 Va. L. Rev. 347, 348 (2005) ("[N]o 'textualist' favors isolating statutory language from its surrounding context"); Scalia 37 ("In textual interpretation, context is everything"). After all, the meaning of a word depends on the circumstances in which it is used. J. Manning, The Absurdity Doctrine, 116

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Harv. L. Rev. 2387, 2457 (2003) (Manning). To strip a word from its context is to strip that word of its meaning.

Context is not found exclusively "'within the four corners' of a statute." *Id.*, at 2456. Background legal conventions, for instance, are part of the statute's context. F. Easterbrook, The Case of the Speluncean Explorers: Revisited, 112 Harv. L. Rev. 1876, 1913 (1999) ("Language takes meaning from its linguistic context," as well as "historical and governmental contexts"). Thus, courts apply a presumption of *mens rea* to criminal statutes, *Xiulu Ruan* v. *United States*, 597 U. S. ___, ___ (2022) (slip op., at 5), and a presumption of equitable tolling to statutes of limitations, *Irwin* v. *Department of Veterans Affairs*, 498 U. S. 89, 95–96 (1990). It is also well established that "[w]here Congress employs a term of art obviously transplanted from another legal source, it brings the old soil with it." *George* v. *McDonough*, 596 U. S. ___, ___ (2022) (slip op., at 5) (internal quotation marks omitted). I could go on. See, *e.g.*, *Lexmark Int'l, Inc.* v. *Static Control Components, Inc.*, 572 U. S. 118, 132 (2014) (federal causes of action are construed "to incorporate a requirement of proximate causation"); *Wisconsin Dept. of Revenue* v. *William Wrigley, Jr., Co.*, 505 U. S. 214, 231 (1992) ("*de minimis non curat lex*"). As it happens, "[t]he notion that some things 'go without saying' applies to legislation just as it does to everyday life." *Bond* v. *United States*, 572 U. S. 844, 857 (2014).

Context also includes common sense, which is another thing that "goes without saying." Case reporters and casebooks brim with illustrations of why literalism—the antithesis of context-driven interpretation—falls short. Consider the classic example of a statute imposing criminal penalties on "'whoever drew blood in the streets.'" *United States* v. *Kirby*, 7 Wall. 482, 487 (1869). Read literally, the statute would cover a surgeon accessing a vein of a person in the street. But "common sense" counsels otherwise, *ibid.*, be-

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cause in the context of the criminal code, a reasonable observer would "expect the term 'drew blood' to describe a violent act," Manning 2461. Common sense similarly bears on judgments like whether a floating home is a "vessel," *Lozman* v. *Riviera Beach*, 568 U. S. 115, 120–121 (2013), whether tomatoes are "vegetables," *Nix* v. *Hedden*, 149 U. S. 304, 306–307 (1893), and whether a skin irritant is a "chemical weapon," *Bond*, 572 U. S., at 860–862.

Why is any of this relevant to the major questions doctrine? Because context is also relevant to interpreting the scope of a delegation. Think about agency law, which is all about delegations. When an agent acts on behalf of a principal, she "has actual authority to take action designated or implied in the principal's manifestations to the agent . . . as the agent reasonably understands [those] manifestations." Restatement (Third) of Agency §2.02(1) (2005). Whether an agent's understanding is reasonable depends on "[t]he *context* in which the principal and agent interact," including their "[p]rior dealings," industry "customs and usages," and "the nature of the principal's business or the principal's personal situation." *Id.*, §2.02, Comment *e* (emphasis added). With that in mind, imagine that a grocer instructs a clerk to "go to the orchard and buy apples for the store." Though this grant of apple-purchasing authority sounds unqualified, a reasonable clerk would know that there are limits. For example, if the grocer usually keeps 200 apples on hand, the clerk does not have actual authority to buy 1,000—the grocer would have spoken more directly if she meant to authorize such an out-of-the-ordinary purchase. A clerk who disregards context and stretches the words to their fullest will not have a job for long.

This is consistent with how we communicate conversationally. Consider a parent who hires a babysitter to watch her young children over the weekend. As she walks out the door, the parent hands the babysitter her credit card and says: "Make sure the kids have fun." Emboldened, the

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babysitter takes the kids on a road trip to an amusement park, where they spend two days on rollercoasters and one night in a hotel. Was the babysitter's trip consistent with the parent's instruction? Maybe in a literal sense, because the instruction was open-ended. But was the trip consistent with a *reasonable* understanding of the parent's instruction? Highly doubtful. In the normal course, permission to spend money on fun authorizes a babysitter to take children to the local ice cream parlor or movie theater, not on a multiday excursion to an out-of-town amusement park. If a parent were willing to greenlight a trip that big, we would expect much more clarity than a general instruction to "make sure the kids have fun."

But what if there is more to the story? Perhaps there is obvious contextual evidence that the babysitter's jaunt was permissible—for example, maybe the parent left tickets to the amusement park on the counter. Other clues, though less obvious, can also demonstrate that the babysitter took a reasonable view of the parent's instruction. Perhaps the parent showed the babysitter where the suitcases are, in the event that she took the children somewhere overnight. Or maybe the parent mentioned that she had budgeted $2,000 for weekend entertainment. Indeed, some relevant points of context may not have been communicated by the parent at all. For instance, we might view the parent's statement differently if this babysitter had taken the children on such trips before or if the babysitter were a grandparent.

In my view, the major questions doctrine grows out of these same commonsense principles of communication. Just as we would expect a parent to give more than a general instruction if she intended to authorize a babysitter-led getaway, we also "expect Congress to speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Utility Air*, 573 U. S., at 324. That clarity may come from specific words in the statute,

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but context can also do the trick. Surrounding circumstances, whether contained within the statutory scheme or external to it, can narrow or broaden the scope of a delegation to an agency.

This expectation of clarity is rooted in the basic premise that Congress normally "intends to make major policy decisions itself, not leave those decisions to agencies." *United States Telecom Assn.* v. *FCC*, 855 F. 3d 381, 419 (CADC 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc). Or, as Justice Breyer once observed, "Congress is more likely to have focused upon, and answered, major questions, while leaving interstitial matters [for agencies] to answer themselves in the course of a statute's daily administration." S. Breyer, Judicial Review of Questions of Law and Policy, 38 Admin. L. Rev. 363, 370 (1986); see also A. Gluck & L. Bressman, Statutory Interpretation From the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I, 65 Stan. L. Rev. 901, 1003–1006 (2013). That makes eminent sense in light of our constitutional structure, which is itself part of the legal context framing any delegation. Because the Constitution vests Congress with "[a]ll legislative Powers," Art. I, §1, a reasonable interpreter would expect it to make the big-time policy calls itself, rather than pawning them off to another branch. See *West Virginia*, 597 U. S., at ___ (slip op., at 19) (explaining that the major questions doctrine rests on "both separation of powers principles and a practical understanding of legislative intent").

Crucially, treating the Constitution's structure as part of the context in which a delegation occurs is *not* the same as using a clear-statement rule to overenforce Article I's nondelegation principle (which, again, is the rationale behind the substantive-canon view of the major questions doctrine). My point is simply that in a system of separated powers, a reasonably informed interpreter would expect

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Congress to legislate on "important subjects" while delegating away only "the details." *Wayman* v. *Southard*, 10 Wheat. 1, 43 (1825). That is different from a normative rule that *discourages* Congress from empowering agencies. To see what I mean, return to the ambitious babysitter. Our expectation of clearer authorization for the amusement-park trip is not about discouraging the parent from giving significant leeway to the babysitter or forcing the parent to think hard before doing so. Instead, it reflects the intuition that the parent is in charge and sets the terms for the babysitter—so if a judgment is significant, we expect the parent to make it. If, by contrast, one parent left the children with the other parent for the weekend, we would view the same trip differently because the parents share authority over the children. In short, the balance of power between those in a relationship inevitably frames our understanding of their communications. And when it comes to the Nation's policy, the Constitution gives Congress the reins—a point of context that no reasonable interpreter could ignore.

Given these baseline assumptions, an interpreter should "typically greet" an agency's claim to "extravagant statutory power" with at least some "measure of skepticism." *Utility Air*, 573 U. S., at 324. That skepticism is neither "made-up" nor "new." *Post*, at 24, 29 (KAGAN, J., dissenting). On the contrary, it appears in a line of decisions spanning at least 40 years. *E.g.*, *King* v. *Burwell*, 576 U. S. 473, 485–486 (2015); *Gonzales* v. *Oregon*, 546 U. S. 243, 267–268 (2006); *Brown & Williamson*, 529 U. S., at 159–160; *Industrial Union Dept., AFL–CIO* v. *American Petroleum Institute*, 448 U. S. 607, 645 (1980) (plurality opinion).[3]

Still, this skepticism does not mean that courts have an

[3] Indeed, the doctrine may have even deeper roots. See *ICC* v. *Cincinnati, N. O. & T. P. R. Co.*, 167 U. S. 479, 494–495 (1897) (explaining that for agency assertions of "vast and comprehensive" power, "no just rule of construction would tolerate a grant of such power by mere implication").

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obligation (or even permission) to choose an inferior-but-tenable alternative that curbs the agency's authority—and that marks a key difference between my view and the "clear statement" view of the major questions doctrine. In some cases, the court's initial skepticism might be overcome by text directly authorizing the agency action or context demonstrating that the agency's interpretation is convincing. (And because context can suffice, I disagree with JUSTICE KAGAN's critique that "[t]he doctrine forces Congress to delegate in highly specific terms." *Post*, at 24.) If so, the court must adopt the agency's reading despite the "majorness" of the question.[4] In other cases, however, the court might conclude that the agency's expansive reading, even if "plausible," is not the best. *West Virginia*, 597 U. S., at ___ (slip op., at 19). In that event, the major questions doctrine plays a role, because it helps explain the court's conclusion that the agency overreached.

Consider *Brown & Williamson*, in which we rejected the Food and Drug Administration's (FDA's) determination that tobacco products were within its regulatory purview. 529 U. S., at 131. The agency's assertion of authority—which depended on the argument that nicotine is a "'drug'" and that cigarettes and smokeless tobacco are "'drug delivery devices'"—would have been plausible if the relevant statutory text were read in a vacuum. *Ibid.* But a vacuum is no home for a textualist. Instead, we stressed that the "meaning" of a word or phrase "may only become evident when placed in *context*." *Id.*, at 132 (emphasis added). And the critical context in *Brown & Williamson* was tobacco's

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[4] I am dealing only with statutory interpretation, not the separate argument that a statutory delegation exceeds constitutional limits. See *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 474 (2001) (describing a delegation held unconstitutional because it "conferred authority to regulate the entire economy on the basis of" an imprecise standard).

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"unique political history": the FDA's longstanding disavowal of authority to regulate it, Congress's creation of "a distinct regulatory scheme for tobacco products," and the tobacco industry's "significant" role in "the American economy." *Id.*, at 159–160. In light of those considerations, we concluded that "Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion." *Id.*, at 160.

We have also been "[s]keptical of mismatches" between broad "invocations of power by agencies" and relatively narrow "statutes that purport to delegate that power." *In re MCP No. 165, OSHA, Interim Final Rule: Covid–19 Vaccination and Testing*, 20 F. 4th 264, 272 (CA6 2021) (Sutton, C. J., dissenting from denial of initial hearing en banc). Just as an instruction to "pick up dessert" is not permission to buy a four-tier wedding cake, Congress's use of a "subtle device" is not authorization for agency action of "enormous importance." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 231 (1994); cf. *Whitman* v. *American Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes"). This principle explains why the Centers for Disease Control and Prevention's (CDC's) general authority to "'prevent the . . . spread of communicable diseases'" did not authorize a nationwide eviction moratorium. *Alabama Assn. of Realtors*, 594 U. S., at ___–___, ___ (slip op., at 2–3, 6). The statute, we observed, was a "wafer-thin reed" that could not support the assertion of "such sweeping power." *Id.*, at ___ (slip op., at 7). Likewise, in *West Virginia*, we held that a "little-used backwater" provision in the Clean Air Act could not justify an Environmental Protection Agency (EPA) rule that would "restructur[e] the Nation's overall mix of electricity generation." 597 U. S., at ___, ___ (slip op., at 16, 26).

Another telltale sign that an agency may have transgressed its statutory authority is when it regulates outside

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its wheelhouse. For instance, in *Gonzales* v. *Oregon*, we rebuffed an interpretive rule from the Attorney General that restricted the use of controlled substances in physician-assisted suicide. 546 U. S., at 254, 275. This judgment, we explained, was a medical one that lay beyond the Attorney General's expertise, and so a sturdier source of statutory authority than "an implicit delegation" was required. *Id.*, at 267–268. Likewise, in *King* v. *Burwell*, we blocked the Internal Revenue Service's (IRS's) attempt to decide whether the Affordable Care Act's tax credits could be available on federally established exchanges. 576 U. S., at 485–486. Among other things, the IRS's lack of "expertise in crafting health insurance policy" made us think that "had Congress wished to assign that question to an agency, it surely would have done so expressly." *Id.*, at 486. Echoing the theme, our reasoning in *Alabama Association of Realtors* rested partly on the fact that the CDC's eviction moratorium "intrude[d] into . . . the landlord-tenant relationship"—hardly the day-in, day-out work of a public-health agency. 594 U. S., at ___ (slip op., at 6). *National Federation of Independent Business* v. *OSHA* is of a piece. 595 U. S. ___ (2022) (*per curiam*). There, we held that the Occupational Safety and Health Administration's (OSHA's) authority to ensure "'safe and healthful working conditions'" did not encompass the power to mandate the vaccination of employees; as we explained, the statute empowered the agency "to set *workplace* safety standards, not broad public health measures." *Id.*, at ___, ___ (slip op., at 2, 6). The shared intuition behind these cases is that a reasonable speaker would not understand Congress to confer an unusual form of authority without saying more.

We have also pumped the brakes when "an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy.'" *Utility Air*, 573 U. S., at 324. Of course, an agency's post-

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enactment conduct does not control the meaning of a statute, but "this Court has long said that courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court." *Bittner* v. *United States*, 598 U. S. 85, 97 (2023) (citing *Skidmore* v. *Swift & Co.*, 323 U. S. 134, 140 (1944)). The agency's track record can be particularly probative in this context: A longstanding "want of assertion of power by those who presumably would be alert to exercise it" may provide some clue that the power was never conferred. *FTC* v. *Bunte Brothers, Inc.*, 312 U. S. 349, 352 (1941). Once again, *Brown & Williamson* is a good example. There, we balked at the FDA's novel attempt to regulate tobacco in part because this move was "[c]ontrary to its representations to Congress since 1914." 529 U. S., at 159. And in *Utility Air*, we were dubious when the EPA discovered "newfound authority" in the Clean Air Act that would have allowed it to require greenhouse-gas permits for "millions of small sources—including retail stores, offices, apartment buildings, shopping centers, schools, and churches." 573 U. S., at 328.

If the major questions doctrine were a substantive canon, then the common thread in these cases would be that we "exchange[d] the most natural reading of a statute for a bearable one more protective of a judicially specified value." Barrett 111. But by my lights, the Court arrived at the most plausible reading of the statute in these cases. To be sure, "[a]ll of these regulatory assertions had a colorable textual basis." *West Virginia*, 597 U. S., at ___ (slip op., at 18). In each case, we could have "[p]ut on blinders" and confined ourselves to the four corners of the statute, and we might have reached a different outcome. *Sykes* v. *United States*, 564 U. S. 1, 43 (2011) (KAGAN, J., dissenting). Instead, we took "off those blinders," "view[ed] the statute as a whole," *ibid.*, and considered context that would be important to a reasonable observer. With the full picture in

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view, it became evident in each case that the agency's assertion of "highly consequential power" went "beyond what Congress could reasonably be understood to have granted." *West Virginia*, 597 U. S., at ___ (slip op., at 20).

III

As for today's case: The Court surely could have "hi[t] the send button," *post*, at 23 (KAGAN, J., dissenting), after the routine statutory analysis set out in Part III–A. But it is nothing new for a court to punctuate its conclusion with an additional point, and the major questions doctrine is a good one here. *Ante*, at 25, n. 9. It is obviously true that the Secretary's loan cancellation program has "vast 'economic and political significance.'" *Utility Air*, 573 U. S., at 324. That matters not because agencies are incapable of making highly consequential decisions, but rather because an initiative of this scope, cost, and political salience is not the type that Congress lightly delegates to an agency. And for the reasons given by the Court, the HEROES Act provides no indication that Congress empowered the Secretary to do anything of the sort. *Ante*, at 12–18, 25.

Granted, some context clues from past major questions cases are absent here—for example, this is not a case where the agency is operating entirely outside its usual domain. But the doctrine is not an on-off switch that flips when a critical mass of factors is present—again, it simply reflects "common sense as to the manner in which Congress is likely to delegate a policy decision of such economic and political magnitude." *Brown & Williamson*, 529 U. S., at 133. Common sense tells us that as more indicators from our previous major questions cases are present, the less likely it is that Congress would have delegated the power to the agency without saying so more clearly.

Here, enough of those indicators are present to demonstrate that the Secretary has gone far "beyond what Congress could reasonably be understood to have granted" in

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the HEROES Act. *West Virginia*, 597 U. S., at ___ (slip op., at 20). Our decision today does not "trump" the statutory text, nor does it make this Court the "arbiter" of "national policy." *Post*, at 24–25 (KAGAN, J., dissenting). Instead, it gives Congress's words their best reading.

* * *

The major questions doctrine has an important role to play when courts review agency action of "vast 'economic and political significance.'" *Utility Air*, 573 U. S., at 324. But the doctrine should not be taken for more than it is—the familiar principle that we do not interpret a statute for all it is worth when a reasonable person would not read it that way.

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SUPREME COURT OF THE UNITED STATES

No. 22–506

JOSEPH R. BIDEN, PRESIDENT OF THE UNITED STATES, ET AL., PETITIONERS *v.* NEBRASKA, ET AL.

ON WRIT OF CERTIORARI BEFORE JUDGMENT TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[June 30, 2023]

JUSTICE KAGAN, with whom JUSTICE SOTOMAYOR and JUSTICE JACKSON join, dissenting.

In every respect, the Court today exceeds its proper, limited role in our Nation's governance.

Some 20 years ago, Congress enacted legislation, called the HEROES Act, authorizing the Secretary of Education to provide relief to student-loan borrowers when a national emergency struck. The Secretary's authority was bounded: He could do only what was "necessary" to alleviate the emergency's impact on affected borrowers' ability to repay their student loans. 20 U. S. C. §1098bb(a)(2). But within that bounded area, Congress gave discretion to the Secretary. He could "waive or modify any statutory or regulatory provision" applying to federal student-loan programs, including provisions relating to loan repayment and forgiveness. And in so doing, he could replace the old provisions with new "terms and conditions." §§1098bb(a)(1), (b)(2). The Secretary, that is, could give the relief that was needed, in the form he deemed most appropriate, to counteract the effects of a national emergency on borrowers' capacity to repay. That may have been a good idea, or it may have been a bad idea. Either way, it was what Congress said.

When COVID hit, two Secretaries serving two different

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Presidents decided to use their HEROES Act authority. The first suspended loan repayments and interest accrual for all federally held student loans. The second continued that policy for a time, and then replaced it with the loan forgiveness plan at issue here, granting most low- and middle-income borrowers up to $10,000 in debt relief. Both relied on the HEROES Act language cited above. In establishing the loan forgiveness plan, the current Secretary scratched the pre-existing conditions for loan discharge, and specified different conditions, opening loan forgiveness to more borrowers. So he "waive[d]" and "modif[ied]" statutory and regulatory provisions and applied other "terms and conditions" in their stead. That may have been a good idea, or it may have been a bad idea. Either way, the Secretary did only what Congress had told him he could.

The Court's first overreach in this case is deciding it at all. Under Article III of the Constitution, a plaintiff must have standing to challenge a government action. And that requires a personal stake—an injury in fact. We do not allow plaintiffs to bring suit just because they oppose a policy. Neither do we allow plaintiffs to rely on injuries suffered by others. Those rules may sound technical, but they enforce "fundamental limits on federal judicial power." *Allen* v. *Wright*, 468 U. S. 737, 750 (1984). They keep courts acting like courts. Or stated the other way around, they prevent courts from acting like this Court does today. The plaintiffs in this case are six States that have no personal stake in the Secretary's loan forgiveness plan. They are classic ideological plaintiffs: They think the plan a very bad idea, but they are no worse off because the Secretary differs. In giving those States a forum—in adjudicating their complaint—the Court forgets its proper role. The Court acts as though it is an arbiter of political and policy disputes, rather than of cases and controversies.

And the Court's role confusion persists when it takes up the merits. For years, this Court has insisted that the way

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to keep judges' policy views and preferences out of judicial decisionmaking is to hew to a statute's text. The HEROES Act's text settles the legality of the Secretary's loan forgiveness plan. The statute provides the Secretary with broad authority to give emergency relief to student-loan borrowers, including by altering usual discharge rules. What the Secretary did fits comfortably within that delegation. But the Court forbids him to proceed. As in other recent cases, the rules of the game change when Congress enacts broad delegations allowing agencies to take substantial regulatory measures. See, *e.g.*, *West Virginia* v. *EPA*, 597 U. S. ___ (2022). Then, as in this case, the Court reads statutes unnaturally, seeking to cabin their evident scope. And the Court applies heightened-specificity requirements, thwarting Congress's efforts to ensure adequate responses to unforeseen events. The result here is that the Court substitutes itself for Congress and the Executive Branch in making national policy about student-loan forgiveness. Congress authorized the forgiveness plan (among many other actions); the Secretary put it in place; and the President would have been accountable for its success or failure. But this Court today decides that some 40 million Americans will not receive the benefits the plan provides, because (so says the Court) that assistance is too "significan[t]." *Ante*, at 20–21. With all respect, I dissent.

I

"No principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *Simon* v. *Eastern Ky. Welfare Rights Organization*, 426 U. S. 26, 37 (1976). In our system, "[f]ederal courts do not possess a roving commission to publicly opine on every legal question." *TransUnion LLC* v. *Ramirez*, 594 U. S. ___, ___ (2021) (slip op., at 8). Nor do they "exercise general legal oversight of the Legislative and

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Executive Branches." *Ibid.* A court may address the legality of a government action only if the person challenging it has standing—which requires that the person have suffered a "concrete and particularized injury." *Ibid.* It is not enough for the plaintiff to assert a "generalized grievance[]" about government policy. *Gill* v. *Whitford*, 585 U. S. ___, ___ (2018) (slip op., at 13). And critically here, the plaintiff cannot rest its claim on a third party's rights and interests. See *Warth* v. *Seldin*, 422 U. S. 490, 499 (1975). The plaintiff needs its own stake—a "personal stake"—in the outcome of the litigation. *TransUnion*, 594 U. S., at ___ (slip op., at 7). If the plaintiff has no such stake, a court must stop in its tracks. To decide the case is to exceed the permissible boundaries of the judicial role.

That is what the Court does today. The plaintiffs here are six States: Arkansas, Iowa, Kansas, Missouri, Nebraska, and South Carolina. They oppose the Secretary's loan cancellation plan on varied policy and legal grounds. But as everyone agrees, those objections are just general grievances; they do not show the particularized injury needed to bring suit. And the States have no straightforward way of making that showing—of explaining how *they* are harmed by a plan that reduces individual borrowers' federal student-loan debt. So the States have thrown no fewer than four different theories of injury against the wall, hoping that a court anxious to get to the merits will say that one of them sticks. The most that can be said of the theory the majority selects, proffered solely by Missouri, is that it is less risible than the others. It still contravenes a bedrock principle of standing law—that a plaintiff cannot ride on someone else's injury. Missouri is doing just that in relying on injuries to the Missouri Higher Education Loan Authority (MOHELA), a legally and financially independent public corporation. And that means the Court, by deciding this case, exercises authority it does not have. It violates the Constitution.

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A

Missouri's theory of standing, as accepted by the majority, goes as follows. MOHELA is a state-created corporation participating in the student-loan market. As part of that activity, it has contracted with the Department of Education to service federally held loans—essentially, to handle billing and collect payments for the Federal Government. Under that contract, MOHELA receives an administrative fee for each loan serviced. When a loan is canceled, MOHELA will not get a fee; so the Secretary's plan will cost MOHELA money. And if MOHELA is harmed, Missouri must be harmed, because the corporation is a "public instrumentality" and, as such, "part of Missouri's government." Brief for Respondents 16–17; see *ante*, at 8–9.

Up to the last step, the theory is unexceptionable—except that it points to MOHELA as the proper plaintiff. Financial harm is a classic injury in fact. MOHELA plausibly alleges that it will suffer that harm as a result of the Secretary's plan. So MOHELA can sue the Secretary, as the Government readily concedes. See Tr. of Oral Arg. 18. But not even Missouri, and not even the majority, claims that MOHELA's revenue loss gets passed through to the State. As further discussed below, MOHELA is financially independent from Missouri—as corporations typically are, the better to insulate their creators from financial loss. See *infra*, at 6. So MOHELA's revenue decline—the injury in fact claimed to justify this suit—is not in fact Missouri's. The State's treasury will not be out one penny because of the Secretary's plan. The revenue loss allegedly grounding this case is MOHELA's alone.

Which leads to an obvious question: Where's MOHELA? The answer is: As far from this suit as it can manage. MOHELA could have brought this suit. It possesses the power under Missouri law to "sue and be sued" in its own name. Mo. Rev. Stat. §173.385.1(3) (2016). But MOHELA is not a party here. Nor is it an *amicus*. Nor is it even a

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rooting bystander. MOHELA was "not involved with the decision of the Missouri Attorney General's Office" to file this suit. Letter from Appellees in No. 22–3179 (CA8), p. 3 (Nov. 1, 2022). And MOHELA did not cooperate with the Attorney General's efforts. When the AG wanted documents relating to MOHELA's loan-servicing contract, to aid him in putting forward the State's standing theory, he had to file formal "sunshine law" demands on the entity. See *id.*, at 3–4. MOHELA had no interest in assisting voluntarily.

If all that makes you suspect that MOHELA is distinct from the State, you would be right. And that is so as a matter of law and financing alike. Yes, MOHELA is a creature of state statute, a public instrumentality established to serve a public function. §173.360. But the law sets up MOHELA as a corporation—a so-called "body corporate"—with a "[s]eparate legal personality." *Ibid.*; *First Nat. City Bank* v. *Banco Para el Comercio Exterior de Cuba*, 462 U. S. 611, 625 (1983) (*Bancec*). Or said a bit differently, MOHELA is—like the lion's share of corporations, whether public or private—a "separate legal [entity] with distinct legal rights and obligations" from those belonging to its creator. *Agency for Int'l Development* v. *Alliance for Open Society Int'l Inc.*, 591 U. S. ___, ___ (2020) (slip op., at 5). MOHELA, for example, has the power to contract with other entities, which is how it entered into a loan-servicing contract with the Department of Education. See §173.385.1(15). MOHELA's assets, including the fees gained from that contract, are not "part of the revenue of the [S]tate" and cannot be "used for the payment of debt incurred by the [S]tate." §§173.386, 173.425. On the other side of the ledger, MOHELA's debts are MOHELA's alone; Missouri cannot be liable for them. §173.410. And as noted earlier, MOHELA has the power to "sue and be sued" independent of Missouri, so it can both "prosecute and defend"

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all its varied interests. §173.385.1(3); see *supra*, at 5. Indeed, before this case, Missouri had never tried to appear in court on MOHELA's behalf. That is no surprise. In the statutory scheme, independence is everywhere: State law created MOHELA, but in so doing set it apart.

The Missouri Supreme Court itself recognized as much in addressing a near-carbon-copy state instrumentality. MOHEFA (note the one-letter difference) issues bonds to support various health and educational institutions in the State. Like MOHELA, MOHEFA is understood as a "public instrumentality" serving a "public function." *Menorah Medical Center* v. *Health and Ed. Facilities Auth.*, 584 S. W. 2d 73, 76 (Mo. 1979). And like MOHELA, MOHEFA has a board appointed by the Governor and sends annual reports to a state department. See Mo. Rev. Stat. §§360.020, 360.140 (1978); *ante*, at 9 (suggesting those features matter). But the State Supreme Court, when confronted with a claim that MOHEFA's undertakings should be ascribed to the State, could hardly have been more dismissive. The court thought it beyond dispute that MOHEFA "is not the [S]tate," and that its activities are not state activities. *Menorah*, 584 S. W. 2d, at 78. Citing MOHEFA's financial and legal independence, the court explained that "[s]imilar bodies have been adjudged as 'separate entities' from" Missouri. *Ibid.* MOHELA is no different.

Under our usual standing rules, that separation would matter—indeed, would decide this case. A plaintiff, this Court has held time and again, cannot rest its claim to judicial relief on the "legal rights and interests" of third parties. *Warth*, 422 U. S., at 499. And MOHELA qualifies as such a party, for all the reasons just given. That MOHELA is publicly created makes not a whit of difference: When a "government instrumentalit[y]" is "established as [a] juridical entit[y] distinct and independent from [its] sovereign," the law—including the law of standing—is supposed to treat it that way. *Bancec*, 462 U. S., at 626–627; see *Sloan*

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Shipyards Corp. v. *United States Shipping Bd. Emergency Fleet Corporation*, 258 U. S. 549, 567 (1922). So this case should have been open-and-shut. Missouri and MOHELA are legally, and also financially, "separate entities." *Menorah*, 584 S. W. 2d, at 78. MOHELA is fully capable of representing its own interests, and always has done so before. The injury to MOHELA thus does not entitle Missouri—under our normal standing rules—to go to court.

And those normal rules are more than just rules: They are, as this case shows, guarantors of our constitutional order. The requirement that the proper party—the party actually affected—challenge an action ensures that courts do not overstep their proper bounds. See *Clapper* v. *Amnesty Int'l USA*, 568 U. S. 398, 408–409 (2013) ("Relaxation of standing [rules] is directly related to the expansion of judicial power"). Without that requirement, courts become "forums for the ventilation of public grievances"—for settlement of ideological and political disputes. *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, *Inc.*, 454 U. S. 464, 473 (1982). The kind of forum this Court has become today. Is there a person in America who thinks Missouri is here because it is worried about MOHELA's loss of loan-servicing fees? I would like to meet him. Missouri is here because it thinks the Secretary's loan cancellation plan makes for terrible, inequitable, wasteful policy. And so too for Arkansas, Iowa, Kansas, Nebraska, and South Carolina. And maybe all of them are right. But that question is not what this Court sits to decide. That question is "more appropriately addressed in the representative branches," and by the broader public. *Allen*, 468 U. S., at 751. Our third-party standing rules, like the rest of our standing doctrine, exist to separate powers in that way—to send political issues to political institutions, and retain only legal controversies, brought by plaintiffs who have suffered real legal injury. If MOHELA had brought this suit, we would have had to resolve it, however

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hot or divisive. But Missouri? In adjudicating Missouri's claim, the majority reaches out to decide a matter it has no business deciding. It blows through a constitutional guard-rail intended to keep courts acting like courts.

B

The majority does not over-expend itself in defending that action. It recites the State's assertion that a "harm to MOHELA is also a harm to Missouri" because the former is the latter's instrumentality. *Ante*, at 8. But in doing so, the majority barely addresses MOHELA's separate corporate identity, its financial independence, and its distinct legal rights. In other words, the majority glides swiftly over all the attributes of MOHELA ensuring that its economic losses (1) are not passed on to the State and (2) can be rectified (if there is legal wrong) without the State's help. The majority is left to argue from a couple of prior decisions and a single idea, the latter relating to the State's desire to "aid Missouri college students." *Ante*, at 9. But the decisions do not stand for what the majority claims. And the idea collides with another core precept of standing law. All in all, the majority's justifications turn standing law from a pillar of a restrained judiciary into nothing more than "a lawyer's game." *Massachusetts* v. *EPA*, 549 U. S. 497, 548 (2007) (ROBERTS, C. J., dissenting).

The majority mainly relies on *Arkansas* v. *Texas*, 346 U. S. 368 (1953), but that case shows only that not all public instrumentalities are the same. The Court there held that Arkansas could bring suit on behalf of a state university. But it did so because the school *lacked* the financial and legal separateness MOHELA has. Arkansas, we observed, "owns all the property used by the University." *Id.*, at 370. And the suit, if successful, would have enhanced that property: The litigation sought to stop Texas from interfering with a contract to build a medical facility on campus. For the same reason, the Court found that "any injury under

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the contract to the University is an injury to Arkansas": The State was the principal beneficiary of the contract to improve its own property. *Ibid.* So Arkansas had the sort of direct financial interest not present here. And there is more: The University, the Court thought, could not sue on its own. See *ibid.* The majority suggests otherwise, citing a state-court decision holding that corporations usually have the power to bring and defend legal actions. See *ante*, at 11–12. But the *Arkansas* Court referenced a different state-court decision—one holding that another state school was "not authorized" to "sue and be sued." *Allen Eng. Co.* v. *Kays*, 106 Ark. 174, 177, 152 S. W. 992, 993 (1913); see *Arkansas*, 346 U. S., at 370, and n. 9. That decision led this Court to conclude that Arkansas law treated "a suit against the University" as "a suit against the State." *Id.*, at 370. But if state law had not done so—as it does not in Missouri for MOHELA? See *supra*, at 6–7. The Court made clear that a State cannot stand in for an independent entity. The State, the Court said, "must, of course, represent an interest of her own and not merely that of her citizens or corporations." *Ibid.*

The majority's second case—*Lebron* v. *National Railroad Passenger Corporation*, 513 U. S. 374 (1995)—is yet further afield. The issue there was whether Amtrak, a public corporation similar to MOHELA, had to comply with the First Amendment. The Court held that it did, labeling Amtrak a state actor for that purpose. On the opposite view, we reasoned, a government could "evade the most solemn obligations imposed in the Constitution by simply resorting to the corporate form." *Id.*, at 397; see *ibid.* (noting that *Plessy* could then be "resurrected by the simple device" of creating a public corporation to run trains). But that did not mean Amtrak was equivalent to the Government for all purposes. Over and over, we cabined our holding that Amtrak was a state actor by adding a phrase like "for purposes of the First Amendment" or other constitutional rights. *Id.*, at 400; see

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id., at 383 (Amtrak "must be regarded as a Government entity for First Amendment purposes"); *id.*, at 392 (Amtrak is "a Government entity for purposes of determining the constitutional rights of citizens"); *id.*, at 394 (Amtrak is an "instrumentality of the United States for the purpose of individual rights guaranteed against the Government"); *id.*, at 397, 399, 400 (similar, similar, and similar). But for other purposes, a different rule might, or would, obtain. Our holding, we said, did not mean Amtrak had sovereign immunity. See *id.*, at 392. And most relevant here, we reaffirmed that "[t]he State does not, by becoming a corporator, identify itself with the corporation" for purposes of litigation. *Id.*, at 398. Or said again, the Government is "not a party to suits brought by or against" its corporation. *Id.*, at 399. So what *Lebron* tells us about MOHELA is that it must comply with the Constitution. *Lebron* offers no support (more like the opposite) for the different view that MOHELA and Missouri are interchangeable parties in litigation.[1]

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[1] The same goes for the majority's other case about Amtrak, which just "reiterate[s]" *Lebron*'s reasoning. *Ante*, at 11; see *Department of Transportation* v. *Association of American Railroads*, 575 U. S. 43 (2015). There too we held that Amtrak was a "governmental entity" for purposes of the "requirements of the Constitution"—specifically, the nondelegation doctrine. *Id.*, at 54. And there too we kept our holding as limited as possible, repeatedly stating that we were treating Amtrak as the Government for that purpose alone. See, *e.g.*, *id.*, at 51 ("for purposes of separation-of-powers analysis under the Constitution"); *id.*, at 54 ("for purposes of the Constitution's separation of powers provisions"); *id.*, at 55 ("for purposes of determining the constitutional issues presented in this case"). As for any other purpose? Not a word to suggest the same result. And as even the majority concedes, "a public corporation can count as part of the State for some but not other purposes." *Ante*, at 12, n. 3 (internal quotation marks omitted). The Amtrak decisions, to continue borrowing the majority's language, "said nothing about, and had no reason to address, whether an injury to [a] public corporation is a harm to the [Government]." *Ibid.*

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Remaining is the majority's unsupported—and insupportable—idea that the Secretary's plan "necessarily" hurts Missouri because it "impair[s]" MOHELA's "efforts to aid [the State's] college students." *Ante*, at 9. To begin with, it seems unlikely that the reduction in MOHELA's revenues resulting from the discharge would make it harder for students to "access student loans," as the majority contends. *Ante*, at 8. MOHELA is not a lender; it services loans others have made. Which is probably why even Missouri has never tried to show that the Secretary's plan will so detrimentally affect the State's borrowers. In any event—and more important—such a harm to citizens cannot provide an escape hatch out of MOHELA's legal and financial independence. That is because of another canonical limit on a State's ability to ride on third parties: A State may never sue the Federal Government based on its citizens' rights and interests. See *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U. S. 592, 610, n. 16 (1982); *Haaland* v. *Brackeen*, 599 U. S. ___, ___, and n. 11 (2023) (slip op., at 32, and n. 11). Or said more technically, a "State does not have standing as *parens patriae* to bring an action against the Federal Government." *Ibid.*; see *Massachusetts* v. *Mellon*, 262 U. S. 447, 485–486 (1923). So Missouri cannot get standing by asserting that a harm to MOHELA will harm the State's citizens. Missouri needs to show that the harm to MOHELA produces harm to the State itself. And because, as explained above, MOHELA was set up (as corporations typically are) to insulate its creator from such derivative harm, Missouri is incapable of making that showing. See *supra*, at 6. The separateness, both financial and legal, between MOHELA and Missouri makes MOHELA alone the proper party.

The author of today's opinion once wrote that a 1970s-era standing decision "became emblematic" of "how utterly manipulable" this Court's standing law is "if not taken seriously as a matter of judicial self-restraint." *Massachusetts*,

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549 U. S., at 548 (ROBERTS, C. J., dissenting). After today, no one will have to go back 50 years for the classic case of the Court manipulating standing doctrine, rather than obeying the edict to stay in its lane. The majority and I differ, as I'll soon address, on whether the Executive Branch exceeded its authority in issuing the loan cancellation plan. But assuming the Executive Branch did so, that does not license this Court to exceed its own role. Courts must still "function as courts," this one no less than others. *Ibid.* And in our system, that means refusing to decide cases that are not really cases because the plaintiffs have not suffered concrete injuries. The Court ignores that principle in allowing Missouri to piggy-back on the "legal rights and interests" of an independent entity. *Warth*, 422 U. S., at 499. If MOHELA wanted to, it could have brought this suit. It declined to do so. Under the non-manipulable, serious version of standing law, that would have been the end of the matter—regardless how much Missouri, or this Court, objects to the Secretary's plan.

II

The majority finds no firmer ground when it reaches the merits. The statute Congress enacted gives the Secretary broad authority to respond to national emergencies. That authority kicks in only under exceptional conditions. But when it kicks in, the Secretary can take exceptional measures. He can "waive or modify any statutory or regulatory provision" applying to the student-loan program. §1098bb(a)(1). And as part of that power, he can "appl[y]" new "terms and conditions" "in lieu of" the former ones. §1098bb(b)(2). That means when an emergency strikes, the Secretary can alter, so as to cover more people, pre-existing provisions enabling loan discharges. Which is exactly what the Secretary did in establishing his loan forgiveness plan. The majority's contrary conclusion rests first on stilted textual analysis. The majority picks the statute apart piece by

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piece in an attempt to escape the meaning of the whole. But the whole—the expansive delegation—is so apparent that the majority has no choice but to justify its holding on extra-statutory grounds. So the majority resorts, as is becoming the norm, to its so-called major-questions doctrine. And the majority again reveals that doctrine for what it is—a way for this Court to negate broad delegations Congress has approved, because they will have significant regulatory impacts. Thus the Court once again substitutes itself for Congress and the Executive Branch—and the hundreds of millions of people they represent—in making this Nation's most important, as well as most contested, policy decisions.

A

A bit of background first, to give a sense of where the HEROES Act came from. In 1991 and again in 2002, Congress authorized the Secretary to grant student-loan relief to borrowers affected by a specified war or emergency. The first statute came out of the Persian Gulf Conflict. It gave the Secretary power to "waive or modify any statutory or regulatory provision" relating to student-loan programs in order to assist "the men and women serving on active duty in connection with Operation Desert Storm." §§372(a)(1), (b), 105 Stat. 93. The next iteration responded to the impacts of the September 11 terrorist attacks. It too gave the Secretary power to "waive or modify" any student-loan provision, but this time to help borrowers affected by the "national emergency" created by September 11. §2(a)(1), 115 Stat. 2386.

With those one-off statutes in its short-term memory, Congress decided there was a need for a broader and more durable emergency authorization. So in 2003, it passed the HEROES Act. Instead of specifying a particular crisis, that statute enables the Secretary to act "as [he] deems necessary" in connection with any military operation or "national

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emergency." §1098bb(a)(1). But the statute's greater coverage came with no sacrifice of potency. When the law's emergency conditions are satisfied, the Secretary again has the power to "waive or modify any statutory or regulatory provision" relating to federal student-loan programs. *Ibid.*

Before turning to the scope of that power, note the stringency of the triggering conditions. Putting aside military applications, the Secretary can act only when the President has declared a national emergency. See §1098ee(4). Further, the Secretary may provide benefits only to "affected individuals"—defined as anyone who "resides or is employed in an area that is declared a disaster area . . . in connection with a national emergency" or who has "suffered direct economic hardship as a direct result of a . . . national emergency." §§1098ee(2)(C)–(D). And the Secretary can do only what he determines to be "necessary" to ensure that those individuals "are not placed in a worse position financially in relation to" their loans "because of" the emergency. §1098bb(a)(2). That last condition, said more simply, requires the Secretary to show that the relief he awards does not go beyond alleviating the economic effects of an emergency on affected borrowers' ability to repay their loans.

But if those conditions are met, the Secretary's delegated authority is capacious. As in the prior statutes, the Secretary has the linked power to "waive or modify any statutory or regulatory provision" applying to the student-loan programs. §1098bb(a)(1). To start with the phrase after the verbs, "the word 'any' has an expansive meaning." *United States* v. *Gonzales*, 520 U. S. 1, 5 (1997). "Any" of the referenced provisions means, well, any of those provisions. And those provisions include several relating to student-loan cancellation—more precisely, specifying conditions in which the Secretary can discharge loan principal. See §§1087, 1087dd(g); 34 CFR §§682.402, 685.212 (2022). Now go back to the twin verbs: "waive or modify." To "waive" means to "abandon, renounce, or surrender"—so here, to

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eliminate a regulatory requirement or condition. Black's Law Dictionary 1894 (11th ed. 2019). To "modify" means "[t]o make somewhat different" or "to reduce in degree or extent"—so here, to lessen rather than eliminate such a requirement. *Id.*, at 1203. Then put the words together, as they appear in the statute: To "waive or modify" a requirement means to lessen its effect, from the slightest adjustment up to eliminating it altogether. Of course, making such changes may leave gaps to fill. So the statute says what is anyway obvious: that the Secretary's waiver/modification power includes the ability to specify "the terms and conditions to be applied in lieu of such [modified or waived] statutory and regulatory provisions." §1098bb(b)(2). Finally, attach the "waive or modify" power to all the provisions relating to loan cancellation: The Secretary may amend, all the way up to discarding, those provisions and fill the holes that action creates with new terms designed to counteract an emergency's effects on borrowers.

Before reviewing how that statutory scheme operated here, consider how it might work for a hypothetical emergency that the enacting Congress had in the front of its mind. As noted above, a precursor to the HEROES Act was a statute authorizing the Secretary to assist student-loan borrowers affected by September 11. See *supra*, at 14. The HEROES Act, as Congress designed it, would give him the identical power to address similar terrorist attacks in the future. So imagine the horrific. A terrorist organization sets off a dirty bomb in Chicago. Beyond causing deaths, the incident leads millions of residents (including many with student loans) to flee the city to escape the radiation. They must find new housing, probably new jobs. And still their student-loan bills are coming due every month. To prevent widespread loan delinquencies and defaults, the Secretary wants to discharge $10,000 for the class of affected borrowers. Is that legal? Of course it is; it is exactly what Congress provided for. The statutory preconditions

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are met: The President has declared a national emergency; the Secretary's proposed relief extends only to "affected individuals"; and the Secretary has deemed the action "necessary to ensure" that the attack does not place those borrowers "in a worse position" to repay their loans. §1098bb(a). And the statutory powers of waiver and modification give the Secretary the means to offer the needed assistance. He can, for purposes of this special loan forgiveness program, scratch the pre-existing conditions for discharge and specify different conditions met by the affected borrowers. That is what the congressionally delegated powers are *for*. If the Secretary did not use them, Congress would be appalled.

The HEROES Act applies to the COVID loan forgiveness program in just the same way. Of course, Congress did not know COVID was coming; and maybe it wasn't even thinking about pandemics generally. But that is immaterial, because Congress delegated broadly, for all national emergencies. It is true, too, that the Secretary's use of the HEROES Act delegation has proved politically controversial, in a way that assistance to terrorism victims presumably would not. But again, that fact is irrelevant to the lawfulness of the program. If the hypothetical plan just discussed is legal, so too is this real one. Once more, the statutory preconditions have been met. The President declared the COVID pandemic a "national emergency." §1098ee(4); see 87 Fed. Reg. 10289 (2022). The eligible borrowers all fall within the law's definition of "affected individual[s]." §1098ee(2); see *supra*, at 15. And the Secretary "deem[ed]" relief "necessary to ensure" that the pandemic did not put low- and middle-income borrowers "in a worse position" to repay their loans. §§1098bb(a)(1)–(2).[2] With those boxes checked,

[2] More specifically, the Secretary determined that without a loan discharge, borrowers making less than $125,000 are likely to experience higher delinquency and default rates because of the pandemic's economic effects. See App. 234–242, 257–259. In a puzzling footnote, the majority

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the Secretary's waiver/modification powers kick in. And the Secretary used them just as described in the hypothetical above. For purposes of the COVID program, he scratched the conditions for loan discharge contained in several provisions. See App. 261–262 (citing §§1087, 1087dd(g); 34 CFR §§682.402, 685.212). He then altered those provisions by specifying different conditions, which opened up loan forgiveness to more borrowers. So he "waive[d]" and "modif[ied]" pre-existing law and, in so doing, applied new "terms and conditions" "in lieu of" the old. §§1098bb(a)(1), (b)(2); see 87 Fed. Reg. 61514. As in the prior hypothetical, then, he used his statutory emergency powers in the manner Congress designed.

How does the majority avoid this conclusion? By picking the statute apart, and addressing each segment of Congress's authorization as if it had nothing to do with the others. For the first several pages—really, the heart—of its analysis, the majority proceeds as though the statute contains only the word "modify." See *ante*, at 13–15. It eventually gets around to the word "waive," but similarly spends most of its time treating that word alone. See *ante*, at 15–16. Only when that discussion is over does the majority in-

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expresses doubt about that finding, though says that its skepticism plays no role in its decision. See *ante*, at 18–19, n. 6. Far better if the majority had ruled on that alternative ground. Then, the Court's invalidation of the Secretary's plan would not have neutered the statute for all future uses. But in any event, the skepticism is unwarranted. All the majority says to support it is that the current "paus[e]" on "interest accrual and loan repayments" could achieve the same end. *Ibid.* But the majority gives no reason for concluding that the pause would work just as well to ensure that borrowers are not "placed in a worse position financially in relation to" their loans because of the COVID emergency. §1098bb(a)(2)(A). How could it possibly know? And in any event, the majority's view of the statute would also make the pause unlawful, as later discussed. See *infra*, at 21. So the availability of the pause can hardly provide a basis for the majority's questioning of the Secretary's finding that cancellation is necessary.

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form the reader that the statute also contemplates the Secretary's addition of new terms and conditions. See *ante*, at 17–18. But once again the majority treats that authority in isolation, and thus as insignificant. Each aspect of the Secretary's authority—waiver, modification, replacement—is kept sealed in a vacuum-packed container. The way they connect and reinforce each other is generally ignored. "Divide to conquer" is the watchword. So there cannot possibly emerge "a fair construction of the whole instrument." *McCulloch* v. *Maryland*, 4 Wheat. 316, 406 (1819). The majority fails to read the statutory authorization right because it fails to read it whole. See A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 167–169 (2012) (discussing the importance of the whole-text—here, really, the whole-sentence—canon).

The majority's cardinal error is reading "modify" as if it were the only word in the statutory delegation. Taken alone, this Court once stated, the word connotes "increment" and means "to change moderately or in minor fashion." *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U. S. 218, 225 (1994). But no sooner did the Court say that much than it noted the importance of "contextual indications." *Id.*, at 226; see Scalia & Garner 167 ("Context is a primary determinant of meaning"). And in the HEROES Act, the dominant piece of context is that "modify" does not stand alone. It is one part of a couplet: "waive or modify." The first verb, as discussed above, means eliminate—usually the most substantial kind of change. See *supra*, at 15; accord, *ante*, at 16. So the question becomes: Would Congress have given the Secretary power to wholly eliminate a requirement, as well as to relax it just a little bit, but nothing in between? The majority says yes. But the answer is no, because Congress would not have written so insane a law. The phrase "waive or modify" instead says to the Secretary: "Feel free to get rid of a requirement or, short of that, to alter it to the extent

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you think appropriate." Otherwise said, the phrase extends from minor changes all the way up to major ones.

The majority fares no better in claiming that the phrase "waive or modify" somehow limits the Secretary's ability "to *add* to existing law." *Ante*, at 18 (emphasis in original). The majority's explanation of that idea oscillates a fair bit. At times the majority tries to convey that "additions" as a class are somehow suspect. See *ante*, at 17–18 (looking askance at "add[ing] new terms," "adding back in," "filling the empty space," "augment[ing]," and "draft[ing] new" language). But that is mistaken. Change often (usually?) involves or necessitates replacements. So when the Secretary uses his statutory power to remove some conditions on loan cancellation, he can under that same power replace them with others. The majority itself must ultimately concede that point. See *ante*, at 13, 17–18. So it falls back on arguing that the "additions" allowed cannot be "substantial[]" because the statute uses the word "modify." *Ante*, at 16; see *ante*, at 17–18. But that just doubles down on the majority's most basic error: extracting "modify" from the "waive or modify" phrase in order to confine the Secretary to making minor changes. As just shown, the phrase as a whole says the opposite—tells the Secretary that he can make changes along a spectrum, from modest to substantial. See *supra*, at 19. And so he can make additions along that spectrum as well. In particular, if he entirely removes existing conditions on loan discharge, he can substitute new ones; he does not have to leave gaping holes.

Indeed, other language in the statute makes that substitution authority perfectly clear. As noted earlier, the statute refers expressly to "the terms and conditions to be applied in lieu of such [modified or waived] statutory and regulatory provisions." §1098bb(b)(2); see *supra*, at 16. In other words, the statute expects the Secretary's waivers and modifications to involve replacing the usual provisions with different ones. The majority rejoins that the "in lieu

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of" language is a "wafer-thin reed" for the Secretary to rely on because it appears in a "humdrum reporting requirement." *Ante*, at 17. But the adjectives are by far the best part of that response. It is perfectly true that the language instructs the Secretary to "include" his new "terms and conditions" when he provides notice of his "waivers or modifications." §1098bb(b)(2). But that is because the statute contemplates that there will be new terms and conditions to report. In other words, the statute proceeds on the premise that the usual waiver or modification will, contra the majority, involve adding "new substantive" provisions. *Ante*, at 17. The humdrum reporting requirement thus confirms the expansive extent of the Secretary's waiver/modification authority.

The majority's opposing construction makes the Act inconsequential. The Secretary emerges with no ability to respond to large-scale emergencies in commensurate ways. The creation of any "novel and fundamentally different loan forgiveness program" is off the table. *Ante*, at 14. So, for example, the Secretary could not cancel student loans held by victims of the hypothetical terrorist attack described above. See *supra*, at 16–17. That too would involve "the introduction of a whole new regime" by way of "draft[ing] new substantive" conditions for discharging loans. *Ante*, at 17–18. And under the majority's analysis, new loan *forbearance* policies are similarly out of bounds. When COVID struck, Secretary DeVos immediately suspended loan repayments and interest accrual for all federally held student loans. See *ante*, at 5. The majority claims it is not deciding whether that action was lawful. *Ante*, at 18, n. 5. Which is all well and good, except that under the majority's reasoning, how could it not be? The suspension too offered a significant new benefit, and to an even greater number of borrowers. (Indeed, for many borrowers, it was worth much more than the current plan's $10,000 discharge.) So the

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suspension could no more meet the majority's pivotal definition of "modify"—as make a "minor change[]"—than could the forgiveness plan. *Ante*, at 13. On the majority's telling, Congress thought that in the event of a national emergency financially harming borrowers—under a statute gearing potential relief to the measure of that harm, so that affected borrowers end up no less able to repay their loans—the Secretary can do no more than fiddle. He can, the majority says, "reduc[e] the number of tax forms borrowers are required to file." *Ibid.* Or he can "waive[] the requirement that a student provide a written request for a leave of absence." *Ante*, at 15. But he can do nothing that would ameliorate an emergency's economic impact on student-loan borrowers.

That is not the statute Congress wrote. The HEROES Act was designed to deal with national emergencies—typically major in scope, often unpredictable in nature. It gave the Secretary discretionary authority to relieve borrowers of the adverse impacts of many possible crises—as "necessary" to ensure that those individuals are not "in a worse position financially" to make repayment. §1098bb(a)(2). If all the Act's triggers are met, the Secretary can waive or modify the usual provisions relating to student loans, and substitute new terms and conditions. That power extends to the varied provisions governing loan repayment and discharge. Those provisions are, indeed, the most obvious candidates for alteration under a statute drafted to leave borrowers no worse off, in relation to their loans, than before an emergency struck. But the majority will not accept the statute's meaning. At every pass, it "impos[es] limits on an agency's discretion that are not supported by the text." *Little Sisters of the Poor Saints Peter and Paul Home* v. *Pennsylvania*, 591 U. S. ___, ___ (2020) (slip op., at 16). It refuses to apply the Act in accordance with its terms. Explains the majority: "However broad the meaning of 'waive or modify'"—meaning however much power Congress gave the

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Secretary—this program is just too large. *Ante*, at 18.

B

The tell comes in the last part of the majority's opinion. When a court is confident in its interpretation of a statute's text, it spells out its reading and hits the send button. Not this Court, not today. This Court needs a whole other chapter to explain why it is striking down the Secretary's plan. And that chapter is not about the statute Congress passed and the President signed, in their representation of many millions of citizens. It instead expresses the Court's own "concerns over the exercise of administrative power." *Ante*, at 19. Congress may have wanted the Secretary to have wide discretion during emergencies to offer relief to student-loan borrowers. Congress in fact drafted a statute saying as much. And the Secretary acted under that statute in a way that subjects the President he serves to political accountability—the judgment of voters. But none of that is enough. This Court objects to Congress's permitting the Secretary (and other agency officials) to answer so-called major questions. Or at least it objects when the answers given are not to the Court's satisfaction. So the Court puts its own heavyweight thumb on the scales. It insists that "[h]owever broad" Congress's delegation to the Secretary, it (the Court) will not allow him to use that general authorization to resolve important issues. The question, the majority helpfully tells us, is "who has the authority" to make such significant calls. *Ibid.* The answer, as is now becoming commonplace, is this Court. See, *e.g.*, *West Virginia*, 597 U. S. ___; *Alabama Assn. of Realtors* v. *Department of Health and Human Servs.*, 594 U. S. ___ (2021); see also *Sackett* v. *EPA*, 598 U. S. ___ (2023) (using a similar judicially manufactured tool to negate statutory text enabling regulation).

The majority's stance, as I explained last Term, prevents Congress from doing its policy-making job in the way it

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thinks best. See *West Virginia*, 597 U. S., at ___–___, ___–___ (dissenting opinion) (slip op., at 13–19, 28–33). The new major-questions doctrine works not to better understand—but instead to trump—the scope of a legislative delegation. See *id.*, at ___ (slip op., at 32). Here is a fact of the matter: Congress delegates to agencies often and broadly. And it usually does so for sound reasons. Because agencies have expertise Congress lacks. Because times and circumstances change, and agencies are better able to keep up and respond. Because Congress knows that if it had to do everything, many desirable and even necessary things wouldn't get done. In wielding the major-questions sword, last Term and this one, this Court overrules those legislative judgments. The doctrine forces Congress to delegate in highly specific terms—respecting, say, loan forgiveness of certain amounts for borrowers of certain incomes during pandemics of certain magnitudes. Of course Congress sometimes delegates in that way. But also often not. Because if Congress authorizes loan forgiveness, then what of loan forbearance? And what of the other 10 or 20 or 50 knowable and unknowable things the Secretary could do? And should the measure taken—whether forgiveness or forbearance or anything else—always be of the same size? Or go to the same classes of people? Doesn't it depend on the nature and scope of the pandemic, and on a host of other foreseeable and unforeseeable factors? You can see the problem. It is hard to identify and enumerate every possible application of a statute to every possible condition years in the future. So, again, Congress delegates broadly. Except that this Court now won't let it reap the benefits of that choice.

And that is a major problem not just for governance, but for democracy too. Congress is of course a democratic institution; it responds, even if imperfectly, to the preferences of American voters. And agency officials, though not them-

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selves elected, serve a President with the broadest of all political constituencies. But this Court? It is, by design, as detached as possible from the body politic. That is why the Court is supposed to stick to its business—to decide only cases and controversies (but see *supra*, at 3–13), and to stay away from making this Nation's policy about subjects like student-loan relief. The policy judgments, under our separation of powers, are supposed to come from Congress and the President. But they don't when the Court refuses to respect the full scope of the delegations that Congress makes to the Executive Branch. When that happens, the Court becomes the arbiter—indeed, the maker—of national policy. See *West Virginia*, 597 U. S., at ___ (KAGAN, J., dissenting) (slip op., at 32) ("The Court, rather than Congress, will decide how much regulation is too much"). That is no proper role for a court. And it is a danger to a democratic order.

The HEROES Act is a delegation both purposive and clear. Recall that Congress enacted the statute after passing two similar laws responding to specific crises. See *supra*, at 14. Congress knew that national emergencies would continue to arise. And Congress decided that when they did, the Secretary should have the power to offer relief without waiting for another, incident-specific round of legislation. Emergencies, after all, are emergencies, where speed is of the essence. For similar reasons, Congress replicated its prior (two-time) choice to leave the scope and nature of the loan relief to the Secretary, so that he could respond to varied conditions. As the House Report noted, Congress provided "the authority to implement waivers" that were "not yet contemplated" but might become necessary to deal with "any unforeseen issues that may arise." H. R. Rep. No. 108–122, pp. 8–9 (2003). That delegation is at the statute's very center, in its "waive or modify" language. And the authority it grants goes only to the Secretary—the offi-

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cial Congress knew to hold the responsibility for administering the Government's student-loan portfolio and programs. See §1082. Student loans are in the Secretary's wheelhouse. And so too, Congress decided, relief from those loan obligations in case of emergency. That delegation was the entire point of the HEROES Act. Indeed, the statute accomplishes nothing else.

The majority is therefore wrong to say that the "indicators from our previous major questions cases are present here." *Ante*, at 23 (internal quotation marks omitted). Compare the HEROES Act to other statutes containing broad delegations that the same majority has found to raise major-questions problems. Last Term, for example, the majority thought the trouble with the Clean Power Plan lay in the EPA's use of a "long-extant" and "ancillary" provision addressed to other matters. *West Virginia*, 597 U. S., at ___ (slip op., at 20). Before that, the majority invalidated the CDC's eviction moratorium because the agency had asserted authority far outside its "particular domain." *Alabama Assn. of Realtors*, 594 U. S., at ___ (slip op., at 6). I thought both those decisions wrong. But assume the opposite; there is, even on that view, nothing like those circumstances here. (Or, to quote the majority quoting me, those "case[s are] distinguishable from this one." *Ante*, at 23.) In this case, the Secretary responsible for carrying out the student-loan programs forgave student loans in a national emergency under the core provision of a recently enacted statute empowering him to provide student-loan relief in national emergencies.[3] Today's decision thus moves the

[3] The nature of the delegation here poses a particular challenge for JUSTICE BARRETT, given her distinctive understanding of the major-questions doctrine. In her thoughtful concurrence, she notes the "importance of *context* when a court interprets a delegation to an administrative agency." *Ante*, at 2 (emphasis in original). I agree, and have said so; there are, indeed, some significant overlaps between my and JUSTICE

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goalposts for triggering the major-questions doctrine. Who knows—by next year, the Secretary of Health and Human Services may be found unable to implement the Medicare program under a broad delegation because of his actions' (enormous) "economic impact." *Ante*, at 21.

To justify *this* use of its heightened-specificity requirement, the majority relies largely on history: "[P]ast waivers and modifications," the majority argues, "have been extremely modest." *Ante*, at 20. But first, it depends what you think is "past." One prior action, nowhere counted by the majority, is the suspension of loan payments and interest accrual begun in COVID's first days. That action cost the Federal Government over $100 billion, and benefited many more borrowers than the forgiveness plan at issue. See *supra*, at 21. And second, it's all relative. Past actions were more modest because the precipitating emergencies were more modest. (The COVID emergency generated, all told, over $5 *trillion* in Government relief spending.) In providing more significant relief for a more significant emergency—or call it unprecedented relief for an unprecedented emergency—the Secretary did what the HEROES Act contemplates. Imagine asking the enacting Congress: Can the Secretary use his powers to give borrowers more

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BARRETT's views on properly contextual interpretation of delegation provisions. See *West Virginia*, 597 U. S., at ___–___ (dissenting opinion) (slip op., at 14–19). But then consider two of the contextual factors JUSTICE BARRETT views as "telltale sign[s]" of whether an agency has exceeded the scope of a delegation. *Ante*, at 12. First, she asks, is there a "mismatch[]" between a "backwater provision" or "subtle device" and an agency's exercise of power? *Ibid.* And second, is the agency official operating within or "outside [his] wheelhouse"? *Ante*, at 12–13. Here, for the reasons stated above, there is no mismatch: The broadly worded "waive or modify" delegation IS the HEROES Act, not some tucked away ancillary provision. And as JUSTICE BARRETT agrees, "this is not a case where the agency is operating entirely outside its usual domain." *Ante*, at 15. So I could practically rest my case on JUSTICE BARRETT's reasoning.

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relief when an emergency has inflicted greater harm? I can't believe the majority really thinks Congress would have answered "no." In any event, the statute Congress passed does not say "no." Delegations like the HEROES Act are designed to enable agencies to "adapt their rules and policies to the demands of changing circumstances." *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U. S. 120, 157 (2000). Congress allows, and indeed expects, agencies to take more serious measures in response to more serious problems.

Similarly unavailing is the majority's reliance on the controversy surrounding the program. Student-loan cancellation, the majority says, "raises questions that are personal and emotionally charged," precipitating "profound debate across the country." *Ante*, at 22. I have no quarrel with that description. Student-loan forgiveness, and responses to COVID generally, have joined the list of issues on which this Nation is divided. But that provides yet more reason for the Court to adhere to its properly limited role. There are two paths here. One is to respect the political branches' judgments. On that path, the Court recognizes the breadth of Congress's delegation to the Secretary, and declines to interfere with his use of that granted authority. Maybe Congress was wrong to give the Secretary so much discretion; or maybe he, and the President he serves, did not make good use of it. But if so, there are political remedies—accountability for all the actors, up to the President, who the public thinks have made mistakes. So a political controversy is resolved by political means, as our Constitution requires. That is one path. Now here is the other, the one the Court takes. Wielding its judicially manufactured heightened-specificity requirement, the Court refuses to acknowledge the plain words of the HEROES Act. It declines to respect Congress's decision to give broad emergency powers to the Secretary. It strikes down his lawful use of that authority to provide student-loan assistance. It

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does not let the political system, with its mechanisms of accountability, operate as normal. It makes itself the decisionmaker on, of all things, federal student-loan policy. And then, perchance, it wonders why it has only compounded the "sharp debates" in the country? *Ibid.*

III

From the first page to the last, today's opinion departs from the demands of judicial restraint. At the behest of a party that has suffered no injury, the majority decides a contested public policy issue properly belonging to the politically accountable branches and the people they represent. In saying so, and saying so strongly, I do not at all "disparage[]" those who disagree. *Ante*, at 26. The majority is right to make that point, as well as to say that "[r]easonable minds" are found on both sides of this case. *Ante*, at 25. And there is surely nothing personal in the dispute here. But Justices throughout history have raised the alarm when the Court has overreached—when it has "exceed[ed] its proper, limited role in our Nation's governance." *Supra*, at 1. It would have been "disturbing," and indeed damaging, if they had not. *Ante*, at 25. The same is true in our own day.

The majority's opinion begins by distorting standing doctrine to create a case fit for judicial resolution. But there is no such case here, by any ordinary measure. The Secretary's plan has not injured the plaintiff-States, however much they oppose it. And in that respect, Missouri is no different from any of the others. Missouri does not suffer any harm from a revenue loss to MOHELA, because the two entities are legally and financially independent. And MOHELA has chosen not to sue—which of course it could have. So no proper party is before the Court. A court acting like a court would have said as much and stopped.

The opinion ends by applying the Court's made-up major-

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questions doctrine to jettison the Secretary's loan forgiveness plan. Small wonder the majority invokes the doctrine. The majority's "normal" statutory interpretation cannot sustain its decision. The statute, read as written, gives the Secretary broad authority to relieve a national emergency's effect on borrowers' ability to repay their student loans. The Secretary did no more than use that lawfully delegated authority. So the majority applies a rule specially crafted to kill significant regulatory action, by requiring Congress to delegate not just clearly but also micro-specifically. The question, the majority maintains, is "who has the authority" to decide whether such a significant action should go forward. *Ante*, at 19; see *supra*, at 23. The right answer is the political branches: Congress in broadly authorizing loan relief, the Secretary and the President in using that authority to implement the forgiveness plan. The majority instead says that it is theirs to decide.

So in a case not a case, the majority overrides the combined judgment of the Legislative and Executive Branches, with the consequence of eliminating loan forgiveness for 43 million Americans. I respectfully dissent from that decision.

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