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

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS

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THE NORTH AMERICAN COAL CORPORATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE STATE OF NORTH DAKOTA, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

QUESTIONS PRESENTED

1. Whether petitioners have standing to invoke this Court's appellate jurisdiction.

2. Whether the Clean Air Act, 42 U.S.C. 7401 *et seq.*, unambiguously limits the measures that the Environmental Protection Agency may consider in determining the "best system of emission reduction," 42 U.S.C. 7411(a)(1), for existing sources to measures that can be applied to and at the level of an individual regulated source.

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In the Supreme Court of the United States

No. 20-1530

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OPINION BELOW

The opinion of the court of appeals (J.A. 53-255) is reported at 985 F.3d 914.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2021. The petitions for writs of certiorari were filed on April 29, 2021 (No. 20-1530), April 30, 2021 (No. 20-1531), and June 18, 2021 (Nos. 20-1778 and 20-1780). The petitions were granted on October 29, 2021. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-15a.

STATEMENT

In 2019, the Environmental Protection Agency (EPA) repealed a 2015 rule regulating power plants' emissions of greenhouse gases. Although some regulated plants had made dire predictions that the emission limits in the 2015 rule would transform the power industry, the rule was stayed before it had any effect, and those limits were swiftly achieved through market-based forces alone. In the decision at issue here, the court of appeals vacated the repeal of the 2015 rule, but stayed the vacatur indefinitely pending further rulemaking because the rule was obsolete. As a result, *no* regulation currently applies. Petitioners, who oppose stricter regulation, are not injured by that status quo and do not ask this Court to change it. Instead, they urge the Court to constrain EPA's authority in *future* rulemakings.

A. The Clean Air Act

The Clean Air Act (CAA), 42 U.S.C. 7401 *et seq.*, "establishes a series of regulatory programs to control air

pollution from stationary sources." *Michigan* v. *EPA*, 576 U.S. 743, 747 (2015). Under one such program, the EPA Administrator identifies "categories of stationary sources" that "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7411(b)(1)(A). Once EPA lists a source category, Section 7411(b) requires the agency to establish "Federal standards of performance for new sources within such category." 42 U.S.C. 7411(b)(1)(B). New sources are stationary sources constructed after an applicable Section 7411 "standard of performance" has been proposed. 42 U.S.C. 7411(a)(2). A "standard of performance" is

> a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. 7411(a)(1).

When EPA establishes a standard for emissions of an air pollutant from new sources within a category, it must also regulate emissions of that pollutant from *existing* sources within the same category, unless the pollutant is regulated under the National Ambient Air Quality Standards (NAAQS) program, 42 U.S.C. 7408-7410, or the National Emission Standards for Hazardous Air Pollutants (NESHAP) program, 42 U.S.C. 7412. See 42 U.S.C. 7411(d)(1)(A)(i) and (ii).

Section 7411(d) establishes a framework of "cooperative federalism for the regulation of existing sources." J.A. 74. For each source category subject to regulation

under Section 7411(d), EPA first identifies the "system[s] of emission reduction" that are "adequately demonstrated"; next determines the "best" of those systems, "taking into account" factors including "cost," "nonair quality health and environmental impact," and "energy requirements"; and finally derives from that system an "achievable" "degree of emission limitation." 42 U.S.C. 7411(a)(1). EPA promulgates "emission guidelines" that identify the degree of emission limitation achievable through the application of the best system of emission reduction (BSER) as determined by the Administrator. J.A. 74.

Each State must then "submit to the Administrator a plan" to achieve the degree of emission limitation identified by EPA. 42 U.S.C. 7411(d)(1). That plan must "(A) establish[] standards of performance for any existing source for [the] air pollutant," and "(B) provide[] for the implementation and enforcement of such standards of performance." *Ibid.* Although such standards must "reflect[] the degree of emission limitation achievable through the application of the [BSER]," 42 U.S.C. 7411(a)(1), States need not compel regulated sources to adopt the particular components of the BSER itself, J.A. 144. And EPA's emission guidelines must also permit a State, "in applying a standard of performance to any particular source," to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. 7411(d)(1). If a State elects not to submit a plan, or submits a plan that EPA does not find "satisfactory," EPA must promulgate a plan that establishes federal standards of performance for the State's existing sources. 42 U.S.C. 7411(d)(2)(A).

B. The Clean Power Plan

In the 1970s, pursuant to Section 7411, EPA identified fossil-fuel-fired power plants as stationary sources that cause, or contribute significantly to, air pollution. 80 Fed. Reg. 64,510, 64,527 (Oct. 23, 2015). In 2015, EPA promulgated two rules—the New Source Rule and the Clean Power Plan (CPP)—that addressed carbon-dioxide (CO_2) emissions from power plants. The New Source Rule established standards of performance for new fossil-fuel-fired power plants. *Id.* at 64,510. EPA noted its prior finding that "[greenhouse-gas] air pollution may reasonably be anticipated to endanger public health or welfare," *id.* at 64,530, and emphasized that power plants are "by far the largest emitters" of greenhouse gases among stationary sources in the United States, *id.* at 64,522.

Because CO_2 is not regulated under either the NAAQS or the NESHAP program, EPA was also required to regulate CO_2 emissions from *existing* fossil-fuel-fired power plants. J.A. 496. To establish emission guidelines for state plans, see J.A. 273, EPA first identified the BSER. After considering the statutory criteria and "the types of strategies that [S]tates and owners and operators of [power plants] are already employing to reduce [CO_2] from affected sources," J.A. 298; see J.A. 542-551, EPA found that the BSER included three types of measures: (1) improving heat rate (*i.e.*, the amount of fuel that must be burned to generate a unit of electricity) at coal-fired steam plants; (2) substituting increased generation from lower-emitting natural-gas combined-cycle plants for generation from higher-emitting steam plants (which are primarily coal-fired); and (3) substituting increased generation from new zero-emitting renewable energy sources for generation from fossil-fuel-

fired plants. J.A. 86, 299. The latter two measures are known as "generation shifting" because they involve shifting electricity generation from higher-emitting sources to lower-emitting ones. J.A. 583.

EPA determined the amount of heat-rate improvement and generation shifting in the BSER—also known as the "level of stringency," J.A. 590—based on what existing sources had historically accomplished, J.A. 946. EPA adjusted the stringency downward, to a "reasonable" rather than the "maximum possible" level, to give affected sources "headroom" to achieve the prescribed emission reductions. J.A. 590. EPA then determined the "degree of emission limitation achievable through the application of the [BSER]," 42 U.S.C. 7411(a)(1), expressed as two emission performance rates: 1305 pounds of CO_2 per megawatt-hour for fossil-fuel-fired steam plants, and 771 pounds of CO_2 per megawatt-hour for stationary combustion turbines. J.A. 300.

EPA explained that a State would "have to ensure, through its plan, that the emission standards it establishes for its sources individually, in the aggregate, or in combination with other measures undertaken by the [S]tate, represent the equivalent of" those performance rates. J.A. 302-303. EPA emphasized, however, that its guidelines did not mandate any particular approach to compliance. J.A. 299-300. Thus, neither States nor sources were required to apply the specific measures identified in the BSER "to their maximum extent, or even at all." J.A. 300.

The CPP required States to submit their plans in 2018, J.A. 486, and established an eight-year period, from 2022 to 2030, for States to "achieve the full required reductions to meet the CO_2 performance rates," J.A. 487. EPA projected that, by 2030, nationwide CO_2

power-plant emissions would be 32% lower than 2005 levels. J.A. 290.

Numerous States and private parties petitioned for review of the CPP. J.A. 88. This Court stayed the rule pending review. *West Virginia* v. *EPA*, 577 U.S. 1126 (2016). After the en banc court of appeals heard oral argument, the "litigation was held in abeyance and ultimately dismissed as the EPA reassessed its position." J.A. 88.

C. The CPP Repeal And Affordable Clean Energy Rules

In 2019, EPA finalized the two rulemakings at issue here. J.A. 1725.

First, EPA promulgated the CPP Repeal Rule. J.A. 1725. Based on its reassessment of Section 7411, J.A. 1739-1740, EPA determined that the statutory "text and reasonable inferences from it" make "clear" that a "system" of emission reduction under Section 7411(a)(1) "is limited to measures that can be applied to and at the level of the individual source," J.A. 1769. EPA concluded that generation shifting is not such a measure and that the CPP therefore "contravene[d] the plain language of [Section 7411(a)(1)]." J.A. 1763. Based on its view that the CPP was a "major rule," EPA further determined that, absent "a clear-statement from Congress," the term "'system of emission reduction'" should not be read to encompass "generation-shifting measures." J.A. 1770-1771. EPA acknowledged, however, that "[m]arket-based forces ha[d] already led to significant generation shifting in the power sector," J.A. 1785, and that there was "likely to be no difference between a world where the CPP is implemented and one where it is not," J.A. 1921; see J.A. 1672-1678.

Second, EPA promulgated the Affordable Clean Energy (ACE) Rule, a new set of emission guidelines for

existing coal-fired steam plants. J.A. 1787. In light of "the legal interpretation adopted in the repeal of the CPP," J.A. 1787—which "limit[ed] 'standards of performance' to systems that can be applied at and to a stationary source," J.A. 1796—EPA found the BSER to be heat-rate improvement alone, J.A. 1800. EPA listed various technologies that could improve heat rate, J.A. 1803-1809, and identified the "degree of emission limitation achievable" by "providing ranges of expected [emission] reductions associated with each of the technologies," J.A. 1811.

EPA stated that, under the ACE Rule, States would have "discretion in setting standards of performance," and that affected sources would "have flexibility in how they comply with those standards." J.A. 1892. But EPA determined that compliance measures "should correspond with the approach used to set the standard in the first place," J.A. 1894, and therefore must "apply at and to an individual source and reduce emissions from that source," J.A. 1893. EPA concluded that various measures besides generation shifting—namely, biomass co-firing (*e.g.*, burning trees or energy crops with coal), averaging (*i.e.*, allowing multiple sources to average their emissions to meet an emission-reduction goal), and trading (*i.e.*, allowing sources to exchange emission credits or allowances)—did "not meet" that requirement. *Ibid.* EPA therefore barred States from using such measures in their plans. *Ibid.*

D. Proceedings Below

1. Numerous States and private parties petitioned for review of the CPP Repeal and ACE Rules. J.A. 95-96. North American Coal Corp. (NACC) and Westmoreland Mining Holdings LLC challenged the ACE Rule, arguing that EPA cannot regulate CO_2 emissions

from coal-fired power plants under Section 7411(d) at all. See J.A. 96. West Virginia, North Dakota, and other States intervened in support of the CPP Repeal and ACE Rules.

a. The court of appeals vacated both the CPP Repeal Rule and the ACE Rule and remanded to the agency for further proceedings. J.A. 53-255.

The court of appeals stated that "the sole ground on which the EPA defends its abandonment of the [CPP] in favor of the ACE Rule is that the text of Section 7411 is clear and unambiguous in constraining the EPA to use only improvements at and to existing sources in its [BSER]." J.A. 103. The court found "nothing in the text, structure, history, or purpose of Section 7411 that compels the reading the EPA adopted." J.A. 131. The court likewise rejected the view that the CPP's use of generation shifting implicated a "major question" requiring unambiguous authorization by Congress. J.A. 135-153. Having rejected the CPP Repeal Rule's view that Section 7411 unambiguously requires that the BSER be "one that can be applied to and at the individual source," the court also "reject[ed] the ACE Rule's exclusion from Section 7411(d) of compliance measures" that do not meet that requirement. J.A. 132.

The court of appeals concluded that, because EPA had relied on an "erroneous legal premise," both the CPP Repeal Rule and the ACE Rule should be vacated. J.A. 214. The court did not decide, however, "whether the approach of the ACE Rule is a permissible reading of the statute as a matter of agency discretion," J.A. 102-103, and instead "remanded to the EPA so that the Agency may 'consider the question afresh,'" J.A. 214 (citations omitted).

b. Judge Walker concurred in part, concurred in the judgment in part, and dissented in part. J.A. 216-255. He would have upheld the CPP Repeal Rule but would have vacated the ACE Rule on other grounds. J.A. 254.

2. In February 2021, EPA moved to stay the court of appeals' mandate with respect to vacatur of the CPP Repeal Rule while the agency pursued a new rulemaking on remand. J.A. 256-259. An accompanying agency declaration noted that the deadline for States to submit their plans under the CPP had "long since passed" and that, because of "ongoing changes in electricity generation," "the emissions reductions that the CPP was projected to achieve have already been achieved." J.A. 265. EPA urged that, to "promote regulatory certainty and to avoid the possibility of administrative disruption," "no Section 7411(d) rule should go into effect until [the agency's new rulemaking] is completed." J.A. 258.

No party opposed EPA's motion, J.A. 256, and the court of appeals "with[e]ld issuance of the mandate with respect to the vacatur of the [CPP] Repeal Rule until the EPA responds to the court's remand in a new rulemaking action," J.A. 270-271. The court issued its mandate with respect to vacatur of the ACE Rule. J.A. 272. Accordingly, although the court invalidated the CPP Repeal Rule, the court's partial stay of the mandate produces the same practical effect as if that Rule had been *upheld*: No Section 7411(d) rule governing CO_2 emissions from existing power plants is currently in effect, and no regulation will occur until EPA completes a new rulemaking. J.A. 268-269.

SUMMARY OF ARGUMENT

I. Petitioners lack standing to invoke this Court's jurisdiction because they are not injured by the court of

appeals' decision. The court's partial stay of its mandate ensured that the CPP will never have any effect. The court's vacatur of the ACE Rule, and the consequent absence of *any* currently applicable Section 7411(d) regulation of greenhouse-gas emissions from existing power plants, does not harm petitioners. Petitioners' real concern is that EPA might incorporate some features of the CPP into a future Section 7411(d) rule. But the contours of such a rule are uncertain. Petitioners in substance request an advisory opinion about the types of measures a future rule could permissibly contain—but federal courts are not authorized to render advisory opinions.

The Court therefore should dismiss the certiorari petitions based on petitioners' lack of standing. In the alternative, the Court may wish to vacate the D.C. Circuit's holding that Section 7411 does not unambiguously limit EPA, in determining the BSER, to inside-the-fenceline measures—*i.e.*, "measures that apply at and to an individual source and reduce emissions from that source." J.A. 1893. Vacatur would be consistent with this Court's disposition of prior cases where changed circumstances beyond the challenging parties' control rendered further review unavailable.

II. The CPP Repeal and ACE Rules were premised on the view that the only measures States may incorporate into their plans, and the only measures EPA may include in the BSER, are inside-the-fenceline measures. The Rules viewed Section 7411 as unambiguously prohibiting not just generation shifting, but also other outside-the-fenceline measures such as biomass cofiring, averaging, and trading. That reading of the statute is erroneous.

A. As to States, Section 7411(d)(1)(A) does not limit state plans to inside-the-fenceline measures. Petitioners themselves emphasize the need for state flexibility in determining which measures will best achieve compliance with EPA's emission limitations. Such flexibility is consistent with the framework of cooperative federalism that Section 7411(d) establishes, which vests States with substantial discretion. Section 7411(d)(1)(A) thus permits States, when appropriate, to adopt measures like biomass co-firing and trading in formulating "standards of performance for any existing source."

Under Section 7411(a)(1), EPA likewise is not limited to inside-the-fenceline measures in developing the BSER used to determine overall emission limitations. Nothing in the phrase "best system of emission reduction" excludes all outside-the-fenceline measures. Measures like biomass co-firing and trading could naturally be characterized as elements of a "system." Other CAA provisions use the term "system" or similar language to describe outside-the-fenceline measures. And the sequence of amendments to Section 7411 demonstrate that Congress did not intend to constrain the measures that EPA could consider in determining the BSER.

B. Petitioners offer various text-based arguments to support their view that a BSER may include only inside-the-fenceline measures and that generation shifting in particular is impermissible. Those arguments lack merit.

Petitioners rely in part on Section 7411(d)(1)(A)'s reference to "standards of performance for any existing source." That language, however, addresses the contents of States' plans, not of EPA's BSER. Narrowly construing that language to preclude outside-the-

fenceline measures would thus unduly limit state discretion. A state plan that specifies how each source can achieve compliance is naturally characterized as establishing "standards of performance for" each source, even if measures like biomass co-firing and trading are identified as potential compliance measures.

Petitioners are likewise wrong in inferring an inside-the-fenceline limit from the phrase "application of the best system of emission reduction" in Section 7411(a)(1). Although a "system of emission reduction" consists of measures that individual sources apply, those measures need not be utilized by all sources equally. Under a trading program, for example, if one source achieves compliance by reducing its emissions and another by purchasing allowances, the "system" is still being applied to both, and the "best system" is the one that best reduces *aggregate* emissions.

Petitioners' arguments focused on generation shifting are likewise unsound. Even the most conventional emission-reduction measures are likely to have generation-shifting *effects*; most electricity is generated by diversified utilities that can and regularly do shift generation within their own assets; and the interconnected electricity grid ensures that reduced production at one facility will be offset by increased production at another, rather than leading to diminished production overall. Given those unique features of the power sector, Section 7411 does not categorically exclude generation shifting as a component of the BSER for existing power plants.

C. Petitioners' reliance on various interpretive canons is misplaced. Petitioners assert that the CPP addressed a "major question" and thus required specific congressional authorization. But while particular

generation-shifting (or other outside-the-fenceline) measures in a BSER could sometimes have large practical consequences, such measures do not inherently have that effect (or any greater effect than inside-the-fenceline measures) and should not be deemed categorically impermissible. Indeed, hindsight shows that the emission limitations in the CPP would not have produced major consequences, as those limits were readily achieved in the absence of *any* regulation. And other Section 7411 requirements guard against transformative emission guidelines. The constitutional-avoidance and federalism canons likewise are inapplicable.

ARGUMENT

In promulgating the CPP Repeal and ACE Rules, EPA determined that Section 7411 clearly limits both state plans and EPA's BSER to inside-the-fenceline measures—"measures that apply at and to an individual source and reduce emissions from that source." J.A. 1893. The D.C. Circuit initially vacated both Rules, holding that Section 7411 does not unambiguously impose that limitation. At EPA's request, however, the court stayed the vacatur of the CPP Repeal Rule pending a new EPA rulemaking, effectively allowing the CPP to be repealed.

After the change in Administration and those intervening developments, EPA has reconsidered its position and has concluded that the text of Section 7411 does not unambiguously compel the interpretation adopted in the CPP Repeal and ACE Rules. Petitioners disagree with EPA on that abstract legal question. But petitioners lack standing to invoke this Court's jurisdiction because they are not injured by the decision below. The Court therefore should dismiss the certiorari petitions or, in the alternative, vacate the D.C. Circuit's

holding that Section 7411 does not unambiguously preclude use of outside-the-fenceline measures. If the Court reaches the merits, it should affirm.

I. PETITIONERS LACK STANDING TO INVOKE THIS COURT'S APPELLATE JURISDICTION

To ensure that federal courts decide only "'Cases' or 'Controversies,'" a litigant that invokes the court's jurisdiction must demonstrate its "standing" to do so. *Hollingsworth* v. *Perry*, 570 U.S. 693, 704 (2013) (citation omitted). To establish standing, a litigant must show that (1) it has suffered an "'actual or imminent'" injury that is "concrete and particularized"; (2) the injury is "'fairly traceable to the challenged action'"; and (3) the injury is "'likely'" to be "'redressed by a favorable decision.'" *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992) (brackets, citations, and ellipsis omitted).

"Most standing cases consider whether a plaintiff has satisfied the requirement when filing suit, but Article III demands that an 'actual controversy' persist throughout all stages of litigation." *Hollingsworth*, 570 U.S. at 705 (citation omitted). "That means that standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Ibid.* (citation omitted).

At this juncture, the relevant Article III question is whether the petitioners in this Court can establish an actual or imminent injury that is traceable to the D.C. Circuit's judgment and would be redressed by reversal of that judgment. See *Hollingsworth*, 570 U.S. at 705-707; *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 64-65 (1997); *Diamond* v. *Charles*, 476 U.S. 54, 61-71 (1986). Petitioners might contend that they have standing based on (a) the possibility that the D.C. Circuit's

decision could cause the CPP to take effect; (b) the D.C. Circuit's vacatur of the ACE Rule; or (c) the possibility that an upcoming EPA greenhouse-gas rule might include outside-the-fenceline measures. None of those theories has merit. Gov't Br. in Opp. 17-20.

A. The Court Of Appeals' Decision Will Not Cause The CPP To Take Effect

By vacating the CPP Repeal Rule, the court of appeals' decision initially created a theoretical risk that, when the mandate issued, the CPP would take effect. Subsequent agency and judicial actions, however, eliminated any such possibility.

In February 2021, the government sought a stay of the mandate with respect to "the vacatur of the [CPP] Repeal Rule." J.A. 259. The motion explained that a stay "would remove any doubt about states' and regulated entities' obligations under the CPP during th[e] interim period" while the agency was promulgating a new rule governing power plants' greenhouse-gas emissions. J.A. 258. The motion stated that "EPA strongly believes that no Section 7411(d) rule should go into effect until such action is completed." *Ibid.* EPA's submission further explained that "reinstatement of the CPP would not make sense" because "[t]he deadline for states to submit State Plans under the CPP has already passed and, in any event, ongoing changes in electricity generation mean that the emission reduction goals that the CPP set for 2030 have already been achieved." J.A. 269 (footnote omitted). No party opposed the government's motion. J.A. 256.

The D.C. Circuit granted the government's motion, "withhold[ing] issuance of the mandate with respect to the vacatur of the [CPP] Repeal Rule *until the EPA responds to the court's remand in a new rulemaking*

action." J.A. 270-271 (emphasis added). Because that stay will remain in place until EPA promulgates a new rule, the CPP will not become operative—thus producing the same result as the CPP Repeal Rule, which petitioners supported below. These circumstances have mooted the prior dispute as to the CPP Repeal Rule's legality. Petitioners therefore cannot establish standing to invoke this Court's appellate jurisdiction based on any harm they might suffer if the CPP took effect. Gov't Br. in Opp. 17.

B. Petitioners Are Not Injured By The Court Of Appeals' Vacatur Of The ACE Rule

With respect to the court of appeals' vacatur of the ACE Rule, the government did not seek—and the court did not grant—a stay of the mandate. J.A. 258, 271. That approach ensured that States and regulated entities were not forced to adapt their operations to comply with ACE Rule requirements that might then be superseded by a new EPA rulemaking. The immediate effect of the court's decision is that greenhouse-gas emissions from existing power plants are not subject to *any* regulation under Section 7411(d). Gov't Br. in Opp. 17-18.

A decision of this Court upholding the inside-the-fenceline interpretation that underlay the CPP Repeal and ACE Rules could lead to reinstatement of the ACE Rule during the pendency of EPA's upcoming rulemaking. But petitioners cannot demonstrate injury from the D.C. Circuit's vacatur of the ACE Rule, and they would derive no practical benefit from the Rule's reinstatement.

1. The private petitioners have no concrete interest in bringing about that result. Those petitioners seek to prevent what they view as *over*-regulation of existing coal-fired power plants. Although they preferred the

ACE Rule to the CPP, the current absence of *any* federal greenhouse-gas regulation causes them no tangible harm.

2. The vacatur of the ACE Rule likewise causes no tangible injury to the state petitioners. States sometimes have standing to protect their sovereign or "quasi-sovereign" interests. See *Massachusetts* v. *EPA*, 549 U.S. 497, 518-520 (2007). But here, the D.C. Circuit's vacatur of the ACE Rule, and its decision not to stay that aspect of its mandate, relieved the States of their obligation to develop and enforce plans to implement that Rule, without imposing on them any alternative federal-law duty. The fact that no party opposed the government's motion for a partial stay of the court's mandate, or asked the D.C. Circuit to broaden the stay to encompass the court's vacatur of the ACE Rule, demonstrates that the vacatur did not injure the state petitioners. Absent any tangible effect on the state petitioners' regulatory prerogatives, their abstract disagreement with the D.C. Circuit's legal analysis does not confer standing. Cf. *Diamond*, 476 U.S. at 66 ("Article III requires more than a desire to vindicate value interests.").[1]

C. Petitioners Seek What Would In Substance Be An Impermissible Advisory Opinion Intended To Constrain EPA In Its Future Rulemaking

Petitioners' real concern is not with any extant EPA regulation, but with measures that the agency *might*

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[1] Because greenhouse-gas emissions in one State can contribute to environmental harms in other States, a State may in some circumstances have standing to challenge alleged EPA *under*-regulation of greenhouse-gas emissions. See *Massachusetts* v. *EPA*, 549 U.S. at 521-526. None of the state petitioners, however, has objected on that ground to the vacatur of the ACE Rule.

adopt in its upcoming rulemaking to limit greenhouse-gas emissions from existing power plants. See, *e.g.*, NACC Br. 26 ("If the agency is not limited to source-level and source-achievable systems, the next [CPP] could be the 'Green New Deal.'"); WV Pet. 21 (urging the Court to grant review "to clarify EPA's legal framework from the outset"). In seeking an anticipatory ruling as to the limits of EPA's regulatory authority, petitioners request the sort of advisory opinion that Article III courts are barred from providing. See, *e.g.*, *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021) (reaffirming that "federal courts do not issue advisory opinions" and "do not possess a roving commission to publicly opine on every legal question"); cf. *In re Murray Energy Corp.*, 788 F.3d 330, 334-336 (D.C. Cir. 2015) (Kavanaugh, J.) (holding that court lacked authority to review the proposed rule that was later finalized as the CPP because the proposed rule was not final agency action).

This Court has "repeatedly reiterated that 'threatened injury must be *certainly impending* to constitute injury in fact,' and that 'allegations of *possible* future injury' are not sufficient." *Clapper* v. *Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (brackets and citation omitted). EPA is legally obligated to promulgate a rule governing greenhouse-gas emissions from existing power plants, J.A. 258, but it is entirely speculative what specific measures that future rule will contain. Gov't Br. in Opp. 19-20; cf. J.A. 102-103 (D.C. Circuit leaves open the question "whether the approach of the ACE Rule is a permissible reading of the statute as a matter of agency discretion").

In determining anew the BSER, the agency will take into account this Court's decision to stay the CPP, see

West Virginia v. *EPA*, 577 U.S. 1126 (2016); "changed facts and circumstances in the electricity sector that have occurred over the last several years," J.A. 259; and public comments of interested parties, including petitioners here, 42 U.S.C. 7607(d)(5). The need for the agency to consider those intervening developments, and the possibility of further changed circumstances during the pendency of the rulemaking, render it wholly uncertain whether any particular features of the CPP will be incorporated into a new EPA rule. Cf. *Clapper*, 568 U.S. at 410-414 (holding that plaintiffs' allegations were insufficient to establish standing because they depended on speculation as to the steps that both governmental and private actors might take). The Court accordingly should "put aside the natural urge to proceed directly to the merits of an important dispute and to 'settle' it for the sake of convenience and efficiency." *Hollingsworth*, 570 U.S. at 704-705 (brackets and citation omitted).

This Court has indicated that in some circumstances, a "substantial risk" of future harm may be sufficient to establish standing. *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted). This case, however, would be an especially unsuitable occasion to relax the usual requirement that injury be "certainly impending." The plaintiffs in *Susan B. Anthony List* challenged the constitutionality of specific enacted laws, and the only uncertainty concerned the likelihood that the laws would be enforced against them. See *id.* at 154, 161-167. Here, by contrast, petitioners are not currently subject to any federal greenhouse-gas restrictions; there is substantial uncertainty about the contours of the upcoming EPA rule; and petitioners ask the Court to pronounce on the validity of hypothetical regulatory provisions that the agency *might*—but very

well *might not*—adopt. And when EPA ultimately promulgates a new rule governing greenhouse-gas emissions from existing power plants, that rule will be subject to immediate judicial review, see 42 U.S.C. 7607(b)(1), without the current need for speculation about its contents. See *Murray Energy*, 788 F.3d at 335 ("After EPA issues a final rule, parties with standing will be able to challenge that rule in a pre-enforcement suit, as well as to seek a stay of the rule pending judicial review."). In these circumstances, "[l]etting the Executive Branch's decisionmaking process run its course not only brings more manageable proportions to the scope of the parties' dispute, but also ensures that [the Members of this Court] act *as judges*, and do not engage in policymaking properly left to elected representatives." *Trump* v. *New York*, 141 S. Ct. 530, 536 (2020) (per curiam) (citations and internal quotation marks omitted).

D. This Court Should Dismiss The Certiorari Petitions For Lack Of Standing Or, In The Alternative, Vacate The D.C. Circuit's Holding That Section 7411 Does Not Unambiguously Preclude Outside-The-Fenceline Measures

Because petitioners cannot establish an injury that is traceable to the D.C. Circuit's decision and would be redressed by reversal of that court's judgment, the certiorari petitions should be dismissed "for want of jurisdiction." *Diamond*, 476 U.S. at 71 (dismissing because the appellant in this Court had not suffered any cognizable injury from the lower court's judgment).

In the alternative, the Court may wish to vacate the D.C. Circuit's holding that Section 7411 does not unambiguously bar outside-the-fenceline measures when EPA devises a BSER. Petitioners had a concrete stake in that issue at an earlier stage of this litigation, when

vacatur of the CPP Repeal Rule might have caused the CPP to take effect. The changed circumstances that eliminated that possibility—in particular, the industry developments that rendered the specifics of the CPP obsolete, see J.A. 265, 269; EPA's decision to conduct a new rulemaking, see J.A. 258, 265; and the resulting partial stay of the court of appeals' mandate at the government's request, see J.A. 270-271—were outside petitioners' control.

This Court's "equitable tradition of vacatur" reflects the understanding that "[a] party who seeks review of an adverse ruling, but is frustrated by the vagaries of circumstance, ought not in fairness be forced to acquiesce in the judgment." *U.S. Bancorp Mortg. Co.* v. *Bonner Mall P'ship*, 513 U.S. 18, 25 (1994). This Court has most often employed vacatur to prevent that result when cases have become moot on appeal through "happenstance." *Id.* at 23 (citation omitted); see *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950). The Court also has "broad power" to vacate "'any judgment, decree, or order'" of a lower court and to remand for proceedings "'as may be just under the circumstances.'" *Lawrence* v. *Chater*, 516 U.S. 163, 166 (1996) (per curiam) (quoting 28 U.S.C. 2106).

Here, the changed circumstances described above have deprived petitioners of their prior stake in the validity of the CPP Repeal Rule. And even if this Court's review on the merits could lead to reinstatement of the ACE Rule, petitioners lack any interest in producing that result. If this Court agrees that resolving the merits would be inappropriate, petitioners' efforts to obtain review of the disputed statutory interpretation will have been "frustrated by the vagaries of circumstance." *Bancorp*, 513 U.S. at 25; see *Biden* v. *Sierra Club*, 142

S. Ct. 46, 46 (2021) (vacating the judgment below in light of "changed circumstances"). Vacatur of the D.C. Circuit's holding that Section 7411 does not unambiguously preclude outside-the-fenceline measures would ensure that judicial review of a future EPA greenhouse-gas rule is unconstrained by the precedential effect of the decision below, without the issuance by this Court of any anticipatory ruling on the merits of the disputed legal issues.[2]

II. THE CPP REPEAL AND ACE RULES RESTED ON AN ERRONEOUS VIEW OF SECTION 7411

The D.C. Circuit in this case did not review the CPP itself, but rather reviewed EPA's subsequent *repeal* of the CPP and its promulgation of the ACE Rule. Those regulatory actions rested on the view that the only measures EPA may consider in developing emission guidelines—and the only measures that States may include in their own plans—are so-called inside-the-fenceline measures. J.A. 1769, 1893. The Rules stated

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[2] The D.C. Circuit relied on substantially the same analysis in vacating the ACE Rule, but vacatur of that analysis should not cause the ACE Rule to become operative given EPA's position that "no Section 7411(d) rule should go into effect until" the future rulemaking concludes. J.A. 258. That issue could be addressed on remand. In addition, this Court should not vacate the D.C. Circuit's holding that EPA has authority under Section 7411 to regulate greenhouse-gas emissions from existing power plants. J.A. 176-198. As to that holding, petitioners were not deprived of further review by "happenstance." Rather, only the petitioner in No. 20-1778 sought review of that holding, and this Court denied review. Cf. *Camreta* v. *Greene*, 563 U.S. 692, 714 & n.11 (2011) (vacating the "part of the Ninth Circuit's opinion" that found the defendant officers' conduct unconstitutional, while leaving "untouched" the holding that the officers had qualified immunity).

that the CAA's text unambiguously imposed that limitation, which would prohibit not just generation shifting, but also other outside-the-fenceline measures such as biomass co-firing, averaging, and trading. J.A. 103.

Neither Section 7411's text nor any applicable canon of construction compels that interpretation. The D.C. Circuit therefore correctly held that the Rules rested on an erroneous view of the law.

A. Section 7411 Does Not Unambiguously Compel The Interpretation In The CPP Repeal And ACE Rules

The CPP Repeal and ACE Rules adopted an interpretation of Section 7411 that applies to both States and EPA. No party here explicitly defends the view that Section 7411 unambiguously limits *States* to inside-the-fenceline measures. The statutory text likewise does not limit EPA to such measures.

1. The CPP Repeal and ACE Rules rest on an interpretation that limits both States and EPA to inside-the-fenceline measures

Under the interpretation adopted in the CPP Repeal Rule, the only measures that EPA may include in its BSER for existing sources are inside-the-fenceline measures—"measures that apply at and to an individual source and reduce emissions from that source." J.A. 1893; see J.A. 1769. In the ACE Rule, EPA determined that state plans "should correspond with the approach used to set the standard in the first place," J.A. 1894, and therefore likewise may include only inside-the-fenceline measures, J.A. 1893.

EPA nevertheless recognized that some off-site conduct might be essential to particular emission-control techniques. For example, the ACE Rule identified carbon capture and sequestration as a permissible inside-

the-fenceline measure. J.A. 1733. But while that technique involves the on-site *capture* of CO_2, the *sequestration* of the captured gas occurs at off-site locations. J.A. 1854.

Under the inside-the-fenceline interpretation, what must occur at an individual source is the *reduction in emissions*. That was the ACE Rule's primary basis for excluding biomass co-firing as a permissible measure. J.A. 1850-1851, 1903-1904. Biomass captures and sequesters CO_2 while it grows off-site, J.A. 1851, and biomass co-firing involves using biomass as a secondary fuel on-site, cf. J.A. 1840. Despite increasing CO_2 emissions at a source's smokestack, biomass co-firing may, in certain circumstances, result in net CO_2 reductions if emissions are considered over the entire life cycle of the fuel. J.A. 1851. Although biomass co-firing occurs on-site, the ACE Rule deemed it an impermissible outside-the-fenceline measure because the CO_2 capture—and thus any attendant emission reduction—occurs elsewhere. J.A. 1904.

In addition, the inside-the-fenceline interpretation requires that a measure reduce emissions at *every* source. The ACE Rule therefore rejected averaging and trading as permissible measures. J.A. 1899-1903. An averaging program, for example, might require a group of facilities to reduce their average emissions to a particular level; so long as some facilities reduced their emissions sufficiently below that level, it would not be necessary for every facility to reduce its emissions. Cf. *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837, 863 n.37 (1984) (explaining the "'bubble' or 'netting' concept"). Similarly, a trading program might allocate allowances authorizing a particular level

of emissions, J.A. 1103; a facility would not need to reduce its emissions so long as it traded for sufficient allowances. See J.A. 1902 (observing that "some sources would not need to apply any pollution control techniques at all in order to comply with a cap-and-trade scheme"). Although averaging and trading programs give regulated sources flexibility to meet emission-reduction goals at the lowest possible cost, the ACE Rule deemed such programs impermissible because they would not require emission reductions from every source. J.A. 1901.

2. Section 7411(d)(1)(A) should not be construed to limit state plans to inside-the-fenceline measures

a. States have "traditional authority" over "in-state generation" of electricity. *Hughes* v. *Talen Energy Mktg., LLC*, 578 U.S. 150, 165 (2016). "Interstate air pollution," by contrast, is principally a matter of federal rather than state concern. J.A. 156.

Section 7411(d) reflects Congress's effort to strike an appropriate balance between federal and state prerogatives. For existing sources, "the Act adopts a cooperative-federalism approach that leaves the States discretion in determining how their State and industry can best meet quantitative emissions guidelines established by the EPA." J.A. 98. Section 7411(d) "envisions extensive cooperation between federal and state authorities, generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain." *American Elec. Power Co.* v. *Connecticut*, 564 U.S. 410, 428 (2011) (*AEP*) (citation omitted).

b. Petitioners do not explicitly dispute that States may include outside-the-fenceline measures in the plans they develop to achieve EPA's emission limitations.

Thus, NACC accepts (Br. 48) that state plans may include provisions for "emissions-trading or the like." North Dakota likewise recognizes that "States have 'wide discretion' in formulating their plans." ND Br. 38 (citation omitted); see WV Br. 27 (emphasizing States' "wide discretion").

Petitioners' emphasis on the need for state flexibility is consistent with the framework of cooperative federalism described above. It is inconsistent, however, with the ACE Rule's conclusion that the only measures States may use in their plans are inside-the-fenceline measures. J.A. 1893. It is also inconsistent with some petitioners' suggestion that Section 7411(d)(1)(A)'s reference to "standards of performance for any existing source" precludes reliance on outside-the-fenceline measures as the BSER. See NACC Br. I, 13, 33-34; WV Br. 31, 39. That language identifies the required contents of *state plans*, not of the BSER.

An artificially narrow construction of Section 7411(d)(1)(A) therefore would constrain state discretion and disserve the federalism values that petitioners emphasize, without furthering federal objectives. If particular outside-the-fenceline mechanisms are authorized by state law and would achieve compliance with EPA's emission guidelines, there is no sound basis to read Section 7411(d)(1)(A) as precluding those measures.

c. Nothing in Section 7411(d)(1) bars States from including outside-the-fenceline measures in their plans. Under Section 7411(d)(1), States must "establish[]," "implement[]," and "enforce[]" "standards of performance for any existing source." 42 U.S.C. 7411(d)(1). A state plan that specifies what each existing source must do to satisfy plan requirements is naturally characterized as establishing "standards of performance for

[each] existing source," even if measures like biomass co-firing and trading are identified as potential means of compliance.

For example, assuming the existence of circumstances in which biomass co-firing could reduce CO_2 emissions, a State could allow each coal-fired plant the option of satisfying its standard of performance by co-firing with biomass. Any resulting reductions in emissions would rely on CO_2 capture that occurs during biomass growth, beyond each plant's fenceline. See p. 25, *supra*. But the State could still "implement[]" and "enforce[]" the "standard of performance for [each] existing source" by accounting for those reductions when determining whether a particular source had satisfied the standard. 42 U.S.C. 7411(d)(1).

A State likewise could allow each plant the option of satisfying its standard through trading. Numerous eastern States, for example, have created the Regional Greenhouse Gas Initiative, which allocates tradeable CO_2 emission allowances to regional power plants. See https://rggi.org. If Section 7411(d)(1) limited States to inside-the-fenceline measures, States could not rely on such trading programs to achieve EPA's emission limitations.

Section 7411(d) authorizes each State, "in applying a standard of performance to any particular source," to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. 7411(d)(1). That provision allows a State to "find that the costs" of a particular emission-reduction measure "are not reasonable when consideration is given to the timeframe for the planned retirement of the source." J.A. 1827. Trading programs likewise help to ensure that costs are reasonable by

enabling market forces to identify the facilities whose emissions can be reduced most cost-effectively, J.A. 605-606, and nothing in Section 7411(d) precludes States from considering a source's acquisition of allowances in implementing and enforcing a standard of performance for that particular source.

d. Section 7411(d) requires a "procedure similar to that provided by section 7410." 42 U.S.C. 7411(d)(1). Consideration of the Section 7410 framework reinforces the absence of any inside-the-fenceline limit on the measures States may employ under Section 7411(d). Section 7410 is a provision of the NAAQS program, under which EPA promulgates national standards for certain air pollutants. 42 U.S.C. 7408(a); see 42 U.S.C. 7409(a). Each State then submits a plan that "provides for implementation, maintenance, and enforcement of such" standards, 42 U.S.C. 7410(a)(1), and "include[s] enforceable emission limitations and other control measures, means, or techniques (including economic incentives such as fees, marketable permits, and auctions of emissions rights)," 42 U.S.C. 7410(a)(2)(A).

"States have 'wide discretion' in formulating their plans" under Section 7410. *Alaska Dep't of Envtl. Conservation* v. *EPA*, 540 U.S. 461, 470 (2004) (citation omitted); see *Union Elec. Co.* v. *EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent."); *Train* v. *Natural Res. Def. Council, Inc.*, 421 U.S. 60, 79 (1975) ("[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission

limitations it deems best suited to its particular situation."). Exercising that discretion, States have included outside-the-fenceline measures in their Section 7410 plans. See, *e.g.*, J.A. 430-435 (discussing NO_X and SO_2 trading programs in which States may participate to comply with Section 7410(a)(2)(D)(i)(I), the "Good Neighbor Provision"). Section 7410 thus does not distinguish between inside- and outside-the-fenceline measures, and there is no sound reason to read Section 7411's comparably broad language differently. See p. 37, *infra*.

3. Nothing in Section 7411(a)(1) unambiguously limits EPA's BSER to inside-the-fenceline measures

For the reasons stated above, Section 7411(d)(1)(A)'s requirement that each state plan "establish[] standards of performance for any existing source" does not limit state plans to inside-the-fenceline measures. So too nothing in Section 7411 unambiguously limits *EPA* to inside-the-fenceline measures in identifying the BSER used to determine overall emission limitations.

a. The standards of performance that States establish under Section 7411(d) must "reflect[] the degree of emission limitation," 42 U.S.C. 7411(a)(1), determined by EPA.[3] Section 7411(a) specifies that "the degree of

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[3] North Dakota contends (Br. 36) that EPA lacks authority to "determine what emission limitations are 'achievable' by existing sources." That contention, which was not addressed below, lacks merit. Unless EPA specifies "the degree of emission limitation achievable through application of" the BSER, 42 U.S.C. 7411(a)(1), States would lack meaningful guidance on what plans EPA would find "satisfactory," 42 U.S.C. 7411(d)(2)(A). EPA's regulations therefore require the agency to specify the degree of emission limitation achievable, 40 C.F.R. 60.22a(b)(5), and the ACE Rule itself

emission limitation" be that degree "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 Administrator determines has been adequately demonstrated." *Ibid.* EPA thus determines the degree of emission limitation achievable based on "application of the best system of emission reduction." *Ibid.*

A "system" is "[a]n aggregation or assemblage of objects united by some form of regular interaction or interdependence," or "a definite or set plan of ordering, operating, or proceeding." *Webster's New International Dictionary of the English Language* 2562 (2d ed. 1959) (emphasis omitted); see J.A. 108. That definition encompasses inside- and outside-the-fenceline measures alike, including biomass co-firing and trading. Cf. *EPA* v. *EME Homer City Generation, L. P.*, 572 U.S. 489, 503 n.10 (2014) (describing a "'cap-and-trade'" program as a "system" that "cuts costs while still reducing pollution to target levels").

Other CAA provisions use "system" and similar words to describe outside-the-fenceline measures. For example, a provision establishing the Acid Rain Program uses the phrase "emission allocation and transfer system" to describe a trading program for reducing sulfur- and nitrogen-oxide emissions from power plants. 42 U.S.C. 7651(b). And Section 7410 specifies that "control measures, means, or techniques" "includ[e] economic incentives such as" "marketable permits" and "auctions of emissions rights." 42 U.S.C. 7410(a)(2)(A).

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recognized that EPA must do so "as part of the BSER determination," J.A. 1811.

b. Some CAA provisions have explicitly limited the permissible components of a particular "system." In 1977, Congress amended Section 7411 to create separate definitions of "standard of performance" for new and existing sources. CAA Amendments of 1977, Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 700. The definition applicable to new sources used the phrase "best *technological* system of *continuous* emission reduction." *Ibid.* (emphases added). And the definition applicable to existing sources used the phrase "best system of *continuous* emission reduction." *Ibid.* (emphasis added). In 1990, Congress amended Section 7411 to return to a single "standard of performance" definition that omitted those qualifiers. CAA Amendments of 1990, Pub. L. No. 101-549, § 403(a), 104 Stat. 2631; see Clean Air Amendments of 1970, Pub. L. No. 91-604, § 4(a), 84 Stat. 1683. But the phrase "technological system of continuous emission reduction" remains in certain Section 7411 provisions that do not apply here. *E.g.*, 42 U.S.C. 7411(a)(7), (g)(4)(B), (h)(1) and (j)(1)(C). That statutory history and context suggest a conscious congressional rejection of any "technological, at-the-source limitation" on the measures that EPA may include in the BSER for existing sources. J.A. 125.

Other CAA provisions similarly underscore the "comparative generality of Section 7411(a)'s reference to the 'best system of emission reduction.'" J.A. 120. In the Nitrogen Oxides Emission Reduction Program, Congress directed EPA to establish emission limitations based on the "degree of reduction achievable through the retrofit application of the best system of continuous emission reduction, taking into account available technology, costs and energy and environmental impacts." 42 U.S.C. 7651f(b)(2). And in a program for preventing

visibility impairment, Congress directed state implementation plans to require use of the "best available retrofit technology." 42 U.S.C. 7491(b)(2)(A) and (g)(2). The absence of similar limiting language here indicates that Congress did not intend such limits.

B. Petitioners' Text-Based Arguments Lack Merit

In challenging the decision below, petitioners rely principally on various non-textual canons of statutory construction. See, *e.g.*, WV Br. 14-31, 44-49; NACC Br. 16-32. Statutory interpretation, however, "always" begins with the text. *Van Buren* v. *United States*, 141 S. Ct. 1648, 1654 (2021).

Petitioners' text-based arguments fall into two categories: (1) arguments that EPA, in determining the BSER, is categorically barred from considering outside-the-fenceline measures; and (2) arguments that EPA specifically may not consider generation shifting. Neither set of arguments has merit.

1. Petitioners' arguments do not support a categorical rule against inclusion of outside-the-fenceline measures in the BSER

a. In defending a categorical rule that EPA cannot include outside-the-fenceline measures as components of its BSER, petitioners make several arguments based on the text of Section 7411(d). See, *e.g.*, WV Br. 39-41; NACC Br. 33-36. But the language on which they principally rely is directed at *States*, not EPA. Under Section 7411(d)(1), "each State" must submit a plan that "establishes standards of performance for any existing source" and "provides for the[ir] implementation and enforcement." 42 U.S.C. 7411(d)(1). Petitioners do not explain how that language could limit EPA to inside-the-fenceline measures without imposing the same limit

on States, in derogation of both petitioners' own arguments and the States' broad discretion under the framework of cooperative federalism that Section 7411(d) establishes. See pp. 26-27, *supra*.

In any event, petitioners' effort to infer an inside-the-fenceline limit from the language of Section 7411(d) fails. Petitioners emphasize that States must establish "standards of performance for any existing *source*" (singular). 42 U.S.C. 7411(d)(1) (emphasis added); see WV Br. 34, 39-41; NACC Br. 33-35. But as explained above, that language simply means that States must hold each source (singular) to a particular "standard for emissions of [the] air pollutant[]." 42 U.S.C. 7411(a)(1); see pp. 27-28, *supra*. Nothing about that requirement distinguishes measures like heat-rate improvements and carbon capture and sequestration, on one hand, from measures like biomass co-firing and trading, on the other. See pp. 27-29, *supra*.

Petitioners also emphasize that the statute defines "stationary source" as a "building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. 7411(a)(3); see WV Br. 40; NACC Br. 36. Based on that definition, petitioners argue that any standard of performance must apply to the building itself rather than to its "owner or operator," which is a separately defined phrase, 42 U.S.C. 7411(a)(5). But as explained above, inside- and outside-the-fenceline measures alike are compatible with a State's establishment, implementation, and enforcement of standards for each regulated facility. See pp. 27-29, *supra*. That the standards must be "for" a source does not mean that all emission reductions must occur *at* the source.

Section 7411's definition of "stationary source" likewise does not imply that States may rely only on

measures that physically occur within the facility itself. After all, the ACE Rule regarded carbon capture and sequestration as an inside-the-fenceline measure, even though the sequestration occurs off-site. J.A. 1733; see pp. 24-25, *supra*. And Section 7411 itself identifies "pre-combustion cleaning or treatment of fuels" as a type of "system" of "emission reduction," even though such cleaning or treatment may be conducted off-site by third parties. 42 U.S.C. 7411(a)(7)(B); see J.A. 751-752.

b. Petitioners view an inside-the-fenceline limitation as implicit in the phrase "application of the best system of emission reduction." 42 U.S.C. 7411(a)(1). They contend that the unstated indirect object of that phrase is an existing source; that the phrase therefore should be read to refer to the application of the best system of emission reduction *to* or *for* an existing source; and that outside-the-fenceline measures lack the requisite connection to any particular source. WV Br. 37-38; NACC Br. 36-37. That contention lacks merit.

A "system of emission reduction" consists of measures that individual sources apply—whether those measures are heat-rate improvements or trading. But contrary to petitioners' suggestion, those measures need not be utilized by all sources equally. The BSER may reflect the agency's determination that overall emissions can best be reduced by taking account of the ways in which different sources are differently situated. Under a trading program, for example, market forces can identify the facilities whose emissions can be reduced most cost-effectively. J.A. 605-606. If one source achieves compliance by reducing its emissions and another by purchasing allowances, the "system" is still being applied to both, and the "best system" is the one that best reduces *aggregate* emissions.

Notably, when EPA "tak[es] into account" "cost" and "any nonair quality health and environmental impact and energy requirements," it does so by considering the "application of the best system of emission reduction" across the board—*i.e.*, to all existing regulated sources in the aggregate. 42 U.S.C. 7411(a)(1); see, *e.g.*, J.A. 1843-1844. Even in promulgating the ACE Rule, EPA recognized that "energy requirements" could be considered on a "sector-wide, region-wide or nationwide basis." J.A. 1795 n.152. EPA then rejected natural-gas co-firing as a possible component of the BSER in part because co-firing natural gas in coal-fired plants is not the "best" use of the country's natural-gas supply, which would be put to "more efficient use" in "underutilized" natural-gas combined-cycle plants. J.A. 1843.

Petitioners' reliance on the word "achievable" (*e.g.*, WV Br. 35-36) is likewise misplaced. It is the "degree of emission limitation" that must be "achievable." 42 U.S.C. 7411(a)(1). And the "degree of emission limitation achievable"—like "cost," "nonair quality health and environmental impact," and "energy requirements"—is evaluated based on "application of the best system of emission reduction" across the board. *Ibid.*

c. Petitioners argue (NACC Br. 42) that, if Congress had intended to "grant the EPA power to institute industry-wide 'systems' like cap-and-trade regimes," it would have used more specific language, as it did in the Acid Rain Program. But EPA's authority to determine the BSER does not encompass the power to institute any industry-wide system. Rather, EPA's determination of the BSER is merely an intermediate step in its identification of overall emission limitations, and the ultimate decision whether to use trading programs to

achieve those limitations is made by States in developing their own plans, whether or not EPA includes such programs in its BSER. In that respect, determination of the BSER differs fundamentally from the Acid Rain Program, which directly instituted a federal trading system of nationwide scope. See 42 U.S.C. 7651b(a)(1). For similar reasons, petitioners' reliance (NACC Br. 26-27) on various bills proposed in Congress is misplaced. Because those bills would have directly instituted federal trading or other programs, Congress's failure to enact them does not suggest anything about either States' discretion under Section 7411(d)(1) or EPA's determination of the BSER under Section 7411(a)(1).

Petitioners also contend that, when Congress wished to "approve[] market-based trading options" under Section 7410, it "sa[id] so directly." WV Br. 42. But Section 7410 requires state plans to contain "enforceable emission limitations and other control measures, means, or techniques (*including* economic incentives such as fees, marketable permits, and auctions of emissions rights)." 42 U.S.C. 7410(a)(2)(A) (emphasis added). The "term 'including' * * * connotes simply an illustrative application of the general principle." *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941). Section 7410(a)(2)(A)'s language thus demonstrates that Congress viewed "economic incentives" as "control measures, means, or techniques" within the meaning of that provision. Section 7410 accordingly provides no sound basis to read the comparably broad term "system of emission reduction" to exclude market-based trading regimes.

d. Petitioners are likewise wrong in asserting (NACC Br. 47-48) that the CPP was the first time EPA had included outside-the-fenceline measures in a BSER

under Section 7411. In the 2005 Clean Air Mercury Rule, EPA determined that a "cap-and-trade program" is a "'system of emission reduction.'" 70 Fed. Reg. 28,606, 28,616 (May 18, 2005). EPA noted that it had previously "authorized emissions trading under [Section 7411(d)]" in emission guidelines for existing municipal waste combustors. *Id.* at 28,617; see 40 C.F.R. 60.33b(d)(2) ("A State plan may establish a program to allow owners or operators of municipal waste combustor plants to engage in trading of nitrogen oxides emission credits."). EPA then determined that "a cap-and-trade program based on control technology * * * is the best system for reducing [mercury] emissions from existing coal-fired Utility Units," 70 Fed. Reg. at 28,617, emphasizing that such a program would ensure that reductions "will be achieved with the least cost," *id.* at 28,619.

Petitioners observe that the "emission cap" in that cap-and-trade program was based on the availability of certain "technologies necessary to achieve" that cap. 70 Fed. Reg. at 28,620; see NACC Br. 47-48. But under the inside-the-fenceline approach adopted in the CPP Repeal Rule, any trading program would be invalid regardless of how EPA calculated the cap. See J.A. 1899-1900 & n.251 (acknowledging a departure from "EPA's interpretation" in the Clean Air Mercury Rule); cf. *New Jersey* v. *EPA*, 517 F.3d 574, 583-584 (D.C. Cir. 2008) (vacating the Rule on other grounds).

2. Petitioners' arguments focused on generation shifting are unsound

Petitioners' remaining text-based arguments rest on the understanding that the words "performance" and "existing" in Section 7411(d)(1)(A) presume that an existing source will continue to exist and to perform, and that the words "limitation" and "reduction" in Section

7411(a)(1) imply the lowering, but not the elimination, of emissions from an existing source. See NACC Br. 35, 39-41; WV Br. 34-36. Those arguments have no bearing on whether the BSER may include measures like biomass co-firing, averaging, and trading—each of which can reduce overall emissions even if every existing source continues to produce the same amount of electricity. Those arguments consequently do not support the categorical rule against outside-the-fenceline measures adopted in the CPP Repeal and ACE Rules. Rather, those arguments are specific to whether generation shifting is a permissible component of the BSER—and they are unpersuasive as a basis to bar *all* generation-shifting measures.

a. Given the unique features of the power sector, Section 7411 does not categorically exclude generation shifting as a component of the BSER for existing power plants. That is so for three principal reasons.

First, "[*a*]*ny* regulation of power plants—even the most conventional, at-the-source controls—may cause a relative increase in the cost of doing business for particular plants but not others, with some generation-shifting effect." J.A. 151. "[A]lmost all electricity flows * * * through an interconnected 'grid' of near-nationwide scope." *FERC* v. *Electric Power Supply Ass'n*, 577 U.S. 260, 267 (2016) (*EPSA*). "On the grid, there is no coal-generated electricity or renewable-generated electricity; there is just electricity." J.A. 78. And within the grid's dispatch system, "production from 'generators with the lowest variable costs' will be dispatched 'first, as system operational limits allow, until all demand is satisfied.'" J.A. 87 (citation omitted); see *EPSA*, 577 U.S. at 268-269. Thus, if a given emission-reduction

measure makes one power plant's operations more expensive than those of other sources, that will cause generation to shift, as the grid draws more heavily on those other sources for electricity. J.A. 897.

If EPA were foreclosed from including in its BSER any measure that would predictably cause some facilities to "diminish[] [their] capacity" (NACC Br. 35) or engage in "reduced utilization" (Westmoreland Br. 19), it could not formulate a BSER for power plants at all. Petitioners' argument thus must rest on the premise that Section 7411 unambiguously distinguishes between (a) measures that will predictably cause some generation shifting but that are included in the BSER for other reasons and (b) measures that EPA includes in a BSER *because of* their expected generation-shifting effects. But petitioners identify no statutory language that mandates that distinction. Measures that fall in the latter category can be just as compatible with a State's establishment, implementation, and enforcement of "standards of performance" that specify how each "existing source" can comply. 42 U.S.C. 7411(d)(1). And nothing in the phrase "system of emission reduction" suggests a categorial bar against generation-shifting measures. 42 U.S.C. 7411(a)(1).

Second, even in the absence of regulation, generation shifting is ubiquitous in the power sector because "most electricity is generated by diversified utilities" that can and regularly do shift generation simply by "reassessing the dispatch priority of their own assets." J.A. 87; see J.A. 937-939. For example, many natural-gas combined-cycle plants "are owned by the same companies or affiliates that also own steam units." J.A. 898. In such circumstances, the steam units can shift generation to the lower-emitting natural-gas combined-cycle

plants "without the need to engage in separate market transactions with outside parties." *Ibid.* Nothing in the statutory language requires EPA to ignore that such generation-shifting measures are routinely undertaken by diversified utilities to "ensur[e] delivery of a reliable source of power at least cost to consumers." Power Company Respondents Br. in Opp. 21.

Third, based on the unique features of the interconnected electricity grid, a categorical bar on generation shifting is not necessary to avoid reducing overall production of electricity. In promulgating the CPP, EPA recognized that in prior Section 7411 rulemakings, "the focus for the BSER has been on how to most cleanly produce a good, not on limiting how much of the good can be produced." J.A. 809; see J.A. 813-814 (explaining that EPA has interpreted Section 7411 to "target[] supply-side activities," rather than "consumer-oriented behavior," and rejecting demand-side energy-efficiency measures as part of the BSER). With respect to many source categories, requirements that are intended to reduce some sources' production might have the predictable effect of reducing *overall* production. With respect to the particular source category at issue here, however, "[t]he physical properties of electricity and the highly integrated nature of the electricity system," J.A. 805, ensure that decreased production at some sources will be offset by increased production at others, thereby reducing overall emissions "without reducing overall electricity generation," J.A. 812.

b. Petitioners contend (NACC Br. 24) that the logical implication of allowing generation shifting to be a component of the BSER is that EPA could determine that the BSER is to "cancel coal entirely" or to "reduce the[] operations" of "gas-fired plants" to "two hours per

day." Although petitioners are correct that those hypothetical BSERs would be impermissible, it is not because they would contravene any inside-the-fenceline limit; instead, it is because they would contravene the express constraints Congress wrote into the statute.

Section 7411(d) does not require the maximum degree of pollution control. See *Sierra Club* v. *Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981). It instead requires EPA to balance "the environmental benefit potentially achievable" against "our Nation's energy needs and the possibility of economic disruption." *AEP*, 564 U.S. at 427. Accordingly, a "system of emission reduction" must be "adequately demonstrated," 42 U.S.C. 7411(a)(1)—that is, "reasonably reliable," "reasonably efficient," and "reasonably" "expected to serve the interests of pollution control without becoming exorbitantly costly in an economic or environmental way." *Essex Chem. Corp.* v. *Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973), cert. denied, 416 U.S. 969 (1974). And in determining which among "adequately demonstrated" systems is "best," EPA must weigh "cost" and "energy requirements." 42 U.S.C. 7411(a)(1); see J.A. 1795 n.152, 1826. The cost of the system must not be "unreasonable" or "greater than the industry could bear and survive." J.A. 1826 (citations omitted).

Those statutory criteria would rule out petitioners' hypothetical BSERs. Petitioners' imagined BSERs would not be "adequately demonstrated" or "best" because, among other things, they would be exorbitantly costly for ratepayers, J.A. 311-312; would threaten the reliability of the grid, J.A. 1260; and would violate EPA's longstanding view that closures cannot be the basis for pollution-control requirements, J.A. 819-820.

In any event, to the extent petitioners' concern is that some levels of generation shifting could be unduly stringent, that concern provides no sound basis for categorically excluding *all* generation shifting as a permissible component of the BSER. There is no inherent connection between including generation shifting in the BSER and any particular "level of stringency." J.A. 590. Rather, the level of stringency will depend on the amount of generation shifting that EPA determines to be "adequately demonstrated" and part of the "best" system. 42 U.S.C. 7411(a)(1). Thus, a rulemaking could include generation-shifting measures in the BSER, yet conclude that the statutory criteria justified overall emission limitations that were relatively undemanding—creating no risk of the consequences that petitioners imagine.

c. Petitioners also contend (NACC Br. 25) that, unless this Court rejects generation shifting as a permissible component of the BSER, EPA could adopt generation-shifting measures for "*other* parts of the economy." For example, petitioners hypothesize (*ibid.*) emission guidelines for existing "homes" based on a BSER involving the replacement of gas furnaces with solar-powered units. But petitioners' imagined BSER operates entirely within a home's fenceline, involving the substitution of one technology for another. Thus, petitioners' own inside-the-fenceline interpretation would not preclude their hypothetical rule.

Petitioners' hypothetical rule is problematic not because it contravenes any supposed inside-the-fenceline limit, but rather because it violates the constraints in the statutory text. EPA could not issue emission guidelines for "homes" under Section 7411 in the first place. Cf. *Utility Air Regulatory Group* v. *EPA*, 573 U.S. 302,

324 (2014) (*UARG*) (declining to interpret the CAA in a manner that would require permits for the operation of millions of previously unregulated "small sources nationwide"); J.A. 815. But even if homes could be regulated, the constraints in Section 7411(a)(1)—namely, the requirements that a system be "adequately demonstrated" and of reasonable "cost"—would preclude a BSER involving the installation of solar panels on tens of millions of homes. Petitioners' hypotheticals accordingly provide no support for their interpretation of the statute.

C. Petitioners' Reliance On Various Interpretive Canons Is Misplaced

In defending the CPP Repeal Rule, petitioners also rely on several canons of construction. None of those canons can justify reading "additional, extratextual, and inflexibly categorical limitations into [the] statute." J.A. 146.

1. Petitioners cannot support their interpretation by characterizing the CPP as involving a "major question"

Petitioners contend that what measures EPA may consider in determining the BSER raises a major question of economic and political significance, and that Congress must specifically authorize the agency to consider outside-the-fenceline measures for EPA to do so. See, *e.g.*, WV Br. 14-26. For six principal reasons, that argument lacks merit.

First, the assertion that the CPP involved a major question could not justify a narrowing construction of Section 7411(d)(1)(A)'s reference to "standards of performance for any existing source." That language is not

directed at EPA, but instead specifies the required contents of *state* plans. This Court has never constrained the *States'* discretion based on the economic and political consequences of a federal regulation. And given petitioners' (appropriate) emphasis on Congress's intent that States have flexibility in implementing EPA's Section 7411 emission guidelines, it would be perverse to resolve any ambiguities in Section 7411(d)(1)(A) in a way that *restricts* state discretion. See pp. 26-30, *supra*.

Second, EPA's task of determining the BSER is an interstitial one that involves fact-finding of a type well suited to EPA. Congress has enacted a definition of "air pollutant" that unambiguously encompasses CO_2. See *Massachusetts* v. *EPA*, 549 U.S. at 528-529. Congress has spoken "'directly' to emissions of carbon dioxide from [existing power] plants." *AEP*, 564 U.S. at 424. And Congress has established the framework through which such emissions shall be regulated, requiring EPA to announce overall emission limitations based on "scientific, economic, and technological" judgments that EPA is well equipped to make, *id.* at 428, while giving States broad flexibility to decide how compliance can best be achieved. 42 U.S.C. 7411(a)(1) and (d)(1).

As an intermediate step in EPA's identification of the overall emission limitations, determining the BSER involves no direct regulation of private conduct. EPA's identification of the BSER is not a "mandate" (NACC Br. 1) to use the particular measures identified therein. The BSER "assures that there is at least one pathway" that States and affected sources can take to "achieve[] the requisite level of emission reductions." J.A. 560. But States need only adopt standards of performance that "*reflect*[] *the degree of emission limitation achievable* through the application of the [BSER]." 42 U.S.C.

7411(a)(1) (emphasis added). States need not adopt, or compel regulated sources to adopt, the particular measures that the BSER describes. J.A. 144. Because determining the BSER involves no direct regulation of private conduct, it is unlike the power to issue an emergency temporary standard in *National Federation of Independent Business* v. *Department of Labor*, No. 21A244, 2022 WL 120952, at *1-*3 (U.S. Jan. 13, 2022) (*NFIB*) (per curiam), the power to impose an eviction moratorium in *Alabama Ass'n of Realtors* v. *Department of Health & Human Services*, 141 S. Ct. 2485, 2488 (2021) (per curiam), or the power to regulate assisted suicide in *Gonzales* v. *Oregon*, 546 U.S. 243, 267-268 (2006).

Third, EPA's inclusion or exclusion of outside-the-fenceline measures in determining the BSER bears no necessary connection to the stringency of the BSER and thus how impactful the emission guidelines will be. See p. 43, *supra*. The line that the ACE Rule drew between heat-rate improvements and carbon capture and sequestration, on one hand, and biomass co-firing, averaging, and trading, on the other, does not represent the line between ordinary and major consequences. A BSER that includes turbine upgrades as a heat-rate improvement, for instance, might well entail more costly emission limitations than a BSER that includes biomass co-firing. See J.A. 1820 (discussing the "economic[] feasib[ility]" of "turbine blade path upgrades" in light of the need for "capital investments"); cf. J.A. 1864 (rejecting carbon capture and sequestration as the BSER because of its "high costs"). And for any given level of overall emission reduction, implementation of a market-based trading scheme would help to reduce the cost of achieving compliance.

Fourth, to the extent petitioners expected the CPP to have significant effects on the power sector, that expectation arose from the specific emission limitations that the CPP established, which petitioners viewed as achievable only through major changes to the industry. In fact, even without the CPP in effect, by 2019 the power industry had *already* achieved the supposedly impossible emission reductions the CPP sought to produce by 2030. J.A. 265, 1785. Those reductions were achieved in a short period of time as a result of "significant generation shifting" due to "[m]arket-based forces." J.A. 1785; see J.A. 1672-1673, 1678-1680.

But even putting to one side that petitioners' predictions turned out to be wholly inaccurate, significant effects are not an inherent consequence of outside-the-fenceline measures generally, or of generation-shifting mechanisms in particular. See pp. 43, 46, *supra*. In that respect, this case is fundamentally different from *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 135-143 (2000), where the logical implication of the FDA's findings was that the governing statute would require the agency to ban tobacco products entirely, and *UARG*, 573 U.S. at 324, where the consequence of EPA's findings was that the CAA would "require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources nationwide."

Here, by contrast, recognizing EPA's *authority* to include some generation-shifting mechanisms (or outside-the-fenceline measures more generally) in its BSER would not *compel* the agency to utilize such measures at all, let alone to utilize the most impactful versions of them. Petitioners' argument is in essence that, because EPA's claimed power to include generation-shifting

mechanisms in a BSER was previously used in the CPP in a way that was expected (incorrectly) to have significant consequences, whether EPA has that power *at all* should be viewed as a major question. But the fact that *some* exercises of an agency's statutory power might be so consequential as to require specific authorization from Congress does not mean that *all* exercises of that authority are categorically impermissible. In *NFIB*, for example, the Court held that Congress had not clearly authorized the Occupational Health and Safety Administration (OSHA) to adopt measures applicable to all employers with at least 100 employees to prevent the workplace spread of COVID-19. 2022 WL 120952, at *3. But the Court "d[id] not doubt" that OSHA had authority to adopt such requirements "[w]here the virus poses a special danger because of particular features of an employee's job or workplace." *Id.* at *4. Petitioners accordingly err in urging this Court to hold that all outside-the-fenceline measures are impermissible, regardless of the practical significance or insignificance of the particular measures EPA will eventually adopt in the future rulemaking.

If regulated entities or States believe that the emission guidelines that are eventually adopted are too stringent in light of statutory criteria, they can challenge the guidelines on that ground. In such a challenge (unlike in petitioners' current request for an anticipatory ruling, see pp. 18-21, *supra*), the court could evaluate the likely practical consequences of EPA's choice of a BSER. Thus, even if petitioners' characterizations of the CPP are viewed as apt criticisms of the CPP itself, they provide no sound basis for categorically excluding *any* outside-the-fenceline measures as a permissible component of the BSER.

Fifth, the "numerous substantial and explicit constraints" that Section 7411 imposes already guard against the possibility of emission guidelines that have transformative consequences. J.A. 146. As noted, a "system of emission reduction" must be "adequately demonstrated," and EPA must consider, among other things, "cost" and "energy requirements" in determining which system is "best." 42 U.S.C. 7411(a)(1); see p. 42, *supra*.

Far from being "illusory," NACC Br. 29, those constraints have led EPA in prior rulemakings to exclude from the BSER several measures, including natural-gas repowering and refueling, J.A. 1795 n.152; natural-gas co-firing, J.A. 578, 1843-1844; carbon capture and sequestration, J.A. 578, 1864; and biomass co-firing, J.A. 708-709, 1852-1853. In the CPP, for instance, EPA declined to identify natural-gas co-firing or carbon capture and sequestration as part of the BSER because those measures were "more expensive than other available measures for existing sources." J.A. 578. Recent history thus refutes petitioners' assertion (WV Br. 48) that, without a categorical bar on outside-the-fenceline measures (or generation-shifting measures in particular), EPA's authority to define the BSER would be subject to no meaningful limit.

Sixth, the inclusion of outside-the-fenceline measures in the BSER is supported by historical precedent. Both Congress and States have relied on outside-the-fenceline measures to address air pollution from power plants. See p. 28, *supra* (discussing Regional Greenhouse Gas Initiative); p. 31, *supra* (discussing Acid Rain Program's trading system for power plants). And in the Clean Air Mercury Rule—the only Section 7411(d) emission guideline besides the CPP and the ACE Rule

ever issued for existing power plants—EPA likewise included an outside-the-fenceline measure (a trading program) in the BSER. See pp. 37-38, *supra*.

2. The constitutional-avoidance canon is inapplicable here

Petitioners also invoke the canon that statutes should be construed to avoid difficult constitutional issues. They argue that Section 7411 would raise serious nondelegation concerns if it were construed to allow outside-the-fenceline measures to be included in a BSER. WV Br. 47. This Court has long held, however, that "a delegation is constitutional so long as Congress has set out an 'intelligible principle' to guide the delegee's exercise of authority." *Gundy* v. *United States*, 139 S. Ct. 2116, 2129 (2019) (plurality opinion) (citation omitted). In *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457 (2001), this Court held that a neighboring CAA provision—42 U.S.C. 7409(b)(1)—had provided such a principle by "requiring the EPA to set air quality standards at the level that is 'requisite' * * * to protect the public health with an adequate margin of safety." 531 U.S. at 475-476.

The principle set out in Section 7411(a)(1) is no less intelligible. That provision requires EPA to determine the BSER, and ultimately the degree of emission limitation achievable by the BSER, by taking various enumerated factors into account. 42 U.S.C. 7411(a)(1). If Section 7409(b)(1) falls "well within the outer limits of [this Court's] nondelegation precedents," *Whitman*, 531 U.S. at 474, then so too does Section 7411(a)(1).

3. The federalism canon undermines, rather than supports, the interpretation adopted in the CPP Repeal and ACE Rules

Petitioners argue (WV Br. 29) that the CPP "upend[ed] the federal-state balance of power" by requiring "stringent, region-wide emission reductions that state plans could meet only by restructuring" the power sector. But petitioners' concerns about the perceived stringency of the CPP's emission limitations do not support a categorical rule excluding outside-the-fenceline measures from any BSER. See pp. 47-48, *supra*. The language in Section 7411(d)(1)(A) on which some petitioners rely, moreover, is directed at States, not EPA. Construing that language to foreclose inclusion of outside-the-fenceline measures in state plans would disserve federalism values and increase the burden on regulated entities. See pp. 26-30, *supra*.

CONCLUSION

The Court should dismiss the petitions for writs of certiorari or, in the alternative, vacate the D.C. Circuit's holding that Section 7411 does not unambiguously bar the use of outside-the-fenceline measures. If the Court reaches the merits, it should affirm the judgment below.

Respectfully submitted.

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APPENDIX

42 U.S.C. 7411 provides:

Standards of performance for new stationary sources

(a) Definitions

For purposes of this section:

(1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

(2) The term "new source" means any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing a standard of performance under this section which will be applicable to such source.

(3) The term "stationary source" means any building, structure, facility, or installation which emits or may emit any air pollutant. Nothing in subchapter II of this chapter relating to nonroad engines shall be construed to apply to stationary internal combustion engines.

(4) The term "modification" means any physical change in, or change in the method of operation of, a stationary source which increases the amount of any air pollutant emitted by such source or which results

in the emission of any air pollutant not previously emitted.

(5) The term "owner or operator" means any person who owns, leases, operates, controls, or supervises a stationary source.

(6) The term "existing source" means any stationary source other than a new source.

(7) The term "technological system of continuous emission reduction" means—

(A) a technological process for production or operation by any source which is inherently low-polluting or nonpolluting, or

(B) a technological system for continuous reduction of the pollution generated by a source before such pollution is emitted into the ambient air, including precombustion cleaning or treatment of fuels.

(8) A conversion to coal (A) by reason of an order under section 2(a) of the Energy Supply and Environmental Coordination Act of 1974 [15 U.S.C. 792(a)] or any amendment thereto, or any subsequent enactment which supersedes such Act [15 U.S.C. 791 et seq.], or (B) which qualifies under section 7413(d)(5)(A)(ii)[1] of this title, shall not be deemed to be a modification for purposes of paragraphs (2) and (4) of this subsection.

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[1] See References in text note below.

(b) List of categories of stationary sources; standards of performance; information on pollution control techniques; sources owned or operated by United States; particular systems; revised standards

(1)(A) The Administrator shall, within 90 days after December 31, 1970, publish (and from time to time thereafter shall revise) a list of categories of stationary sources. He shall include a category of sources in such list if in his judgment it causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.

(B) Within one year after the inclusion of a category of stationary sources in a list under subparagraph (A), the Administrator shall publish proposed regulations, establishing Federal standards of performance for new sources within such category. The Administrator shall afford interested persons an opportunity for written comment on such proposed regulations. After considering such comments, he shall promulgate, within one year after such publication, such standards with such modifications as he deems appropriate. The Administrator shall, at least every 8 years, review and, if appropriate, revise such standards following the procedure required by this subsection for promulgation of such standards. Notwithstanding the requirements of the previous sentence, the Administrator need not review any such standard if the Administrator determines that such review is not appropriate in light of readily available information on the efficacy of such standard. Standards of performance or revisions thereof shall become effective upon promulgation. When implementation and enforcement of any requirement of this chapter indicate that emission limitations and percent reductions

beyond those required by the standards promulgated under this section are achieved in practice, the Administrator shall, when revising standards promulgated under this section, consider the emission limitations and percent reductions achieved in practice.

(2) The Administrator may distinguish among classes, types, and sizes within categories of new sources for the purpose of establishing such standards.

(3) The Administrator shall, from time to time, issue information on pollution control techniques for categories of new sources and air pollutants subject to the provisions of this section.

(4) The provisions of this section shall apply to any new source owned or operated by the United States.

(5) Except as otherwise authorized under subsection (h), nothing in this section shall be construed to require, or to authorize the Administrator to require, any new or modified source to install and operate any particular technological system of continuous emission reduction to comply with any new source standard of performance.

(6) The revised standards of performance required by enactment of subsection (a)(1)(A)(i) and (ii) 1 shall be promulgated not later than one year after August 7, 1977. Any new or modified fossil fuel fired stationary source which commences construction prior to the date of publication of the proposed revised standards shall not be required to comply with such revised standards.

(c) State implementation and enforcement of standards of performance

(1) Each State may develop and submit to the Administrator a procedure for implementing and enforcing standards of performance for new sources located in such State. If the Administrator finds the State procedure is adequate, he shall delegate to such State any authority he has under this chapter to implement and enforce such standards.

(2) Nothing in this subsection shall prohibit the Administrator from enforcing any applicable standard of performance under this section.

(d) Standards of performance for existing sources; remaining useful life of source

(1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful

life of the existing source to which such standard applies.

(2) The Administrator shall have the same authority—

(A) to prescribe a plan for a State in cases where the State fails to submit a satisfactory plan as he would have under section 7410(c) of this title in the case of failure to submit an implementation plan, and

(B) to enforce the provisions of such plan in cases where the State fails to enforce them as he would have under sections 7413 and 7414 of this title with respect to an implementation plan.

In promulgating a standard of performance under a plan prescribed under this paragraph, the Administrator shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies.

(e) Prohibited acts

After the effective date of standards of performance promulgated under this section, it shall be unlawful for any owner or operator of any new source to operate such source in violation of any standard of performance applicable to such source.

(f) New source standards of performance

(1) For those categories of major stationary sources that the Administrator listed under subsection (b)(1)(A) before November 15, 1990, and for which regulations had not been proposed by the Administrator by November 15, 1990, the Administrator shall—

(A) propose regulations establishing standards of performance for at least 25 percent of such categories of sources within 2 years after November 15, 1990;

(B) propose regulations establishing standards of performance for at least 50 percent of such categories of sources within 4 years after November 15, 1990; and

(C) propose regulations for the remaining categories of sources within 6 years after November 15, 1990.

(2) In determining priorities for promulgating standards for categories of major stationary sources for the purpose of paragraph (1), the Administrator shall consider—

(A) the quantity of air pollutant emissions which each such category will emit, or will be designed to emit;

(B) the extent to which each such pollutant may reasonably be anticipated to endanger public health or welfare; and

(C) the mobility and competitive nature of each such category of sources and the consequent need for nationally applicable new source standards of performance.

(3) Before promulgating any regulations under this subsection or listing any category of major stationary sources as required under this subsection, the Administrator shall consult with appropriate representatives of the Governors and of State air pollution control agencies.

(g) Revision of regulations

(1) Upon application by the Governor of a State showing that the Administrator has failed to specify in regulations under subsection (f)(1) any category of major stationary sources required to be specified under such regulations, the Administrator shall revise such regulations to specify any such category.

(2) Upon application of the Governor of a State, showing that any category of stationary sources which is not included in the list under subsection (b)(1)(A) contributes significantly to air pollution which may reasonably be anticipated to endanger public health or welfare (notwithstanding that such category is not a category of major stationary sources), the Administrator shall revise such regulations to specify such category of stationary sources.

(3) Upon application of the Governor of a State showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2), the Administrator shall revise the list under subsection (b)(1)(A) to apply properly such criteria.

(4) Upon application of the Governor of a State showing that—

(A) a new, innovative, or improved technology or process which achieves greater continuous emission reduction has been adequately demonstrated for any category of stationary sources, and

(B) as a result of such technology or process, the new source standard of performance in effect under this section for such category no longer reflects the

greatest degree of emission limitation achievable through application of the best technological system of continuous emission reduction which (taking into consideration the cost of achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) has been adequately demonstrated,

the Administrator shall revise such standard of performance for such category accordingly.

(5) Unless later deadlines for action of the Administrator are otherwise prescribed under this section, the Administrator shall, not later than three months following the date of receipt of any application by a Governor of a State, either—

(A) find that such application does not contain the requisite showing and deny such application, or

(B) grant such application and take the action required under this subsection.

(6) Before taking any action required by subsection (f) or by this subsection, the Administrator shall provide notice and opportunity for public hearing.

(h) Design, equipment, work practice, or operational standard; alternative emission limitation

(1) For purposes of this section, if in the judgment of the Administrator, it is not feasible to prescribe or enforce a standard of performance, he may instead promulgate a design, equipment, work practice, or operational standard, or combination thereof, which reflects the best technological system of continuous emission reduction which (taking into consideration the cost of

achieving such emission reduction, and any non-air quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated. In the event the Administrator promulgates a design or equipment standard under this subsection, he shall include as part of such standard such requirements as will assure the proper operation and maintenance of any such element of design or equipment.

(2) For the purpose of this subsection, the phrase "not feasible to prescribe or enforce a standard of performance" means any situation in which the Administrator determines that (A) a pollutant or pollutants cannot be emitted through a conveyance designed and constructed to emit or capture such pollutant, or that any requirement for, or use of, such a conveyance would be inconsistent with any Federal, State, or local law, or (B) the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations.

(3) If after notice and opportunity for public hearing, any person establishes to the satisfaction of the Administrator that an alternative means of emission limitation will achieve a reduction in emissions of any air pollutant at least equivalent to the reduction in emissions of such air pollutant achieved under the requirements of paragraph (1), the Administrator shall permit the use of such alternative by the source for purposes of compliance with this section with respect to such pollutant.

(4) Any standard promulgated under paragraph (1) shall be promulgated in terms of standard of performance whenever it becomes feasible to promulgate and enforce such standard in such terms.

(5) Any design, equipment, work practice, or operational standard, or any combination thereof, described in this subsection shall be treated as a standard of performance for purposes of the provisions of this chapter (other than the provisions of subsection (a) and this subsection).

(i) Country elevators

Any regulations promulgated by the Administrator under this section applicable to grain elevators shall not apply to country elevators (as defined by the Administrator) which have a storage capacity of less than two million five hundred thousand bushels.

(j) Innovative technological systems of continuous emission reduction

(1)(A) Any person proposing to own or operate a new source may request the Administrator for one or more waivers from the requirements of this section for such source or any portion thereof with respect to any air pollutant to encourage the use of an innovative technological system or systems of continuous emission reduction. The Administrator may, with the consent of the Governor of the State in which the source is to be located, grant a waiver under this paragraph, if the Administrator determines after notice and opportunity for public hearing, that—

(i) the proposed system or systems have not been adequately demonstrated,

(ii) the proposed system or systems will operate effectively and there is a substantial likelihood that such system or systems will achieve greater continuous emission reduction than that required to be achieved under the standards of performance which would otherwise apply, or achieve at least an equivalent reduction at lower cost in terms of energy, economic, or nonair quality environmental impact,

(iii) the owner or operator of the proposed source has demonstrated to the satisfaction of the Administrator that the proposed system will not cause or contribute to an unreasonable risk to public health, welfare, or safety in its operation, function, or malfunction, and

(iv) the granting of such waiver is consistent with the requirements of subparagraph (C).

In making any determination under clause (ii), the Administrator shall take into account any previous failure of such system or systems to operate effectively or to meet any requirement of the new source performance standards. In determining whether an unreasonable risk exists under clause (iii), the Administrator shall consider, among other factors, whether and to what extent the use of the proposed technological system will cause, increase, reduce, or eliminate emissions of any unregulated pollutants; available methods for reducing or eliminating any risk to public health, welfare, or safety which may be associated with the use of such system; and the availability of other technological systems which may be used to conform to standards under this section without causing or contributing to such unreasonable risk. The Administrator may conduct such

tests and may require the owner or operator of the proposed source to conduct such tests and provide such information as is necessary to carry out clause (iii) of this subparagraph. Such requirements shall include a requirement for prompt reporting of the emission of any unregulated pollutant from a system if such pollutant was not emitted, or was emitted in significantly lesser amounts without use of such system.

(B) A waiver under this paragraph shall be granted on such terms and conditions as the Administrator determines to be necessary to assure—

(i) emissions from the source will not prevent attainment and maintenance of any national ambient air quality standards, and

(ii) proper functioning of the technological system or systems authorized.

Any such term or condition shall be treated as a standard of performance for the purposes of subsection (e) of this section and section 7413 of this title.

(C) The number of waivers granted under this paragraph with respect to a proposed technological system of continuous emission reduction shall not exceed such number as the Administrator finds necessary to ascertain whether or not such system will achieve the conditions specified in clauses (ii) and (iii) of subparagraph (A).

(D) A waiver under this paragraph shall extend to the sooner of—

(i) the date determined by the Administrator, after consultation with the owner or operator of the

source, taking into consideration the design, installation, and capital cost of the technological system or systems being used, or

(ii) the date on which the Administrator determines that such system has failed to—

(I) achieve at least an equivalent continuous emission reduction to that required to be achieved under the standards of performance which would otherwise apply, or

(II) comply with the condition specified in paragraph (1)(A)(iii),

and that such failure cannot be corrected.

(E) In carrying out subparagraph (D)(i), the Administrator shall not permit any waiver for a source or portion thereof to extend beyond the date—

(i) seven years after the date on which any waiver is granted to such source or portion thereof, or

(ii) four years after the date on which such source or portion thereof commences operation,

whichever is earlier.

(F) No waiver under this subsection shall apply to any portion of a source other than the portion on which the innovative technological system or systems of continuous emission reduction is used.

(2)(A) If a waiver under paragraph (1) is terminated under clause (ii) of paragraph (1)(D), the Administrator shall grant an extension of the requirements of this section for such source for such minimum period as

may be necessary to comply with the applicable standard of performance under this section. Such period shall not extend beyond the date three years from the time such waiver is terminated.

(B) An extension granted under this paragraph shall set forth emission limits and a compliance schedule containing increments of progress which require compliance with the applicable standards of performance as expeditiously as practicable and include such measures as are necessary and practicable in the interim to minimize emissions. Such schedule shall be treated as a standard of performance for purposes of subsection (e) of this section and section 7413 of this title.