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.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL REGAN, ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY.

THE NORTH AMERICAN COAL CORPORATION, PETITIONER

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL REGAN, ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY.

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

BRIEF FOR THE POWER COMPANY RESPONDENTS

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January 18, 2022

Additional Captions Listed on Inside Cover

WESTMORELAND MINING HOLDINGS LLC, PETITIONER
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL REGAN, ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY.

NORTH DAKOTA, PETITIONER
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL REGAN, ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY.

QUESTION PRESENTED

Whether the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, unambiguously restricts the Environmental Protection Agency to considering only measures that can be applied "at and to" individual power plants, when EPA determines the "best system of emission reduction [BSER]," § 7411(a)(1), that has been adequately demonstrated for reducing carbon dioxide from the listed existing stationary source category of fossil fuel-fired power plants (which must be reflected in the relevant standards of performance developed by States, § 7411(d)).

AMENDED CORPORATE DISCLOSURE STATEMENTS

Pursuant to this Court's Rule 29.6, Power Company Respondents—Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, and Sacramento Municipal Utility District—provide the following disclosure statements.

Consolidated Edison, Inc. states that it is a holding company that has outstanding shares and debt held by the public and may issue additional securities to the public. It has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Exelon Corporation states that it is a holding company. It has no parent corporation and no publicly held company owns 10 percent or more of its stock.

National Grid USA states that it is a holding company. All of the outstanding shares of common stock of National Grid North America Inc. are owned by National Grid (US) Partner 1 Limited. All of the outstanding ordinary shares of National Grid (US) Partner 1 Limited are owned by National Grid (US) Investments 4 Limited. All of the outstanding ordinary shares of National Grid (US) Investments 4 Limited are owned by National Grid (US) Holdings Limited. All of the outstanding ordinary shares of National Grid (US) Holdings Limited are owned by National Grid plc. National Grid plc is a public limited company organized under the laws of England and Wales. No publicly held corporation directly owns

10 percent or more of National Grid plc's outstanding ordinary shares.

New York Power Authority states that it is a New York State public-benefit corporation. It has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Sacramento Municipal Utility District states that it is a community-owned, not-for-profit electric service provider, has no parent corporation and no publicly held company owns 10 percent or more of its stock.

Power Companies Climate Coalition states that it is an unincorporated association of companies engaged in the generation and distribution of electricity and natural gas. Its members include, in addition to each of the foregoing Respondents, the following entities:

Los Angeles Department of Water and Power states that it is a vertically integrated publicly owned electric utility of the City of Los Angeles.

Pacific Gas and Electric Company states that it is a public utility incorporated in the state of California and a wholly owned subsidiary of PG&E Corporation. No publicly held corporation directly owns more than 10 percent of PG&E Corporation's shares.

Puget Sound Energy, Inc. states that it is a public utility incorporated in the State of Washington. All of the outstanding shares of voting stock of Puget Sound Energy, Inc. are held by Puget Energy, Inc. All

of the outstanding shares of voting stock of Puget Energy, Inc. are held by Puget Equico, LLC, an indirect wholly-owned subsidiary of Puget Holdings LLC. No publicly held corporation directly owns more than 10 percent of Puget Holdings LLC.

Seattle City Light states that it is a public utility providing electricity to Seattle, Washington, and parts of its metropolitan area and is a department of the City of Seattle.

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INTRODUCTION

Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d), creates a framework under which the Environmental Protection Agency ("EPA") and States work together to limit emissions of greenhouse gases and certain other air pollutants emitted by categories of existing stationary sources listed by EPA, including fossil fuel-fired power plants.

Under that framework, States are responsible for "establish[ing] standards of performance for any existing source" for such pollutants and "provid[ing] for the implementation and enforcement of such standards." 42 U.S.C. § 7411(d)(1). Those standards must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction ["BSER"] which," taking into account cost and other factors, EPA "determines has been adequately demonstrated." § 7411(a)(1). EPA may establish standards of performance if a State fails to submit a satisfactory plan or to enforce its plan. § 7411(d)(2).

In 2019, EPA promulgated the Affordable Clean Energy ("ACE") Rule.[1] The ACE Rule repealed a prior rule issued in 2015, the Clean Power Plan ("CPP") Rule, which was stayed by this Court and never went

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[1] Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019) (JA1725).

into effect.[2] The CPP Rule would have prescribed guidelines for carbon dioxide emissions for the source category of fossil fuel-fired power plants.

The ACE Rule's repeal of the CPP Rule was not attributed to a shift in policy or to revised scientific or technical judgment, but instead relied on the view that EPA was legally compelled to withdraw the CPP Rule. JA1746. The CPP Rule had identified the "best system of emission reduction [BSER]" for fossil fuel-fired power plants as encompassing emissions trading and other strategies that incentivize power producers to scale up generation by cleaner natural gas-fired and renewable sources, while reducing generation from more carbon-intensive sources. The ACE Rule concluded, however, that the statutory text of the Clean Air Act unambiguously prohibits EPA from considering such means as part of the BSER for the source category because it viewed the statute to limit the BSER to considering only technologies and techniques that can be implemented *at* and *to* each individual source. Indeed, the ACE Rule went further, prohibiting States themselves from allowing producers and utilities such as the Power Company Respondents the flexibility even to *comply with* standards of performance by obtaining emissions credits or taking other actions not confined to measures "at and to" an individual source. JA1893.

The Power Company Respondents here include several of the nation's largest public and private

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[2] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (JA273).

power companies. They collectively own or operate nearly 75,000 megawatts of electric generating-capacity from coal, oil, natural gas, nuclear, wind, solar, hydropower, geothermal and biofuel resources. They have operations in 49 States and the District of Columbia, and collectively provide electricity service to more than 20 million homes and businesses, amounting to a total service population of more than 40 million. The Power Company Respondents petitioned for judicial review of the ACE Rule in the U.S. Court of Appeals for the D.C. Circuit.

The court of appeals held that EPA erred in concluding that the Clean Air Act unambiguously limits the agency's determination of the BSER to only measures that can be installed "at and to" each individual power plant. None of the seven merits briefs for or supporting Petitioners identifies any statutory text that could clearly limit the BSER to such source-specific measures. And for good reason—the statutory text and structure do not support such a limitation. To the contrary, the language of Sections 7411(a) and 7411(d) contrasts sharply with neighboring provisions of the Clean Air Act—notably, with Section 7412, which regulates stationary-source emissions of certain air pollutants listed as "hazardous"—that have long been understood to require source-specific measures. The language here also contrasts sharply with other provisions of Section 7411 that specify that, in circumstances not applicable here, EPA may prescribe a standard reflecting the "best *technological* system of continuous emission reduction" § 7411(h)(i) (emphasis added). An "at and to" limitation also would undermine the Act's purpose and fail to reflect the reality of what systems of emission reduction are

"adequately demonstrated" in the market for electric power. Electricity producers do not operate in isolation, but regularly work together with grid operators to satisfy real-time consumer demand at the lowest cost, shifting between producers at different times.

These cases do not require the Court to opine on the legality of the CPP Rule or to demarcate the outer bounds of EPA's authority under Section 7411(d)—questions on which the Power Company Respondents take no position. EPA does not challenge the judgment below, and has indicated that it does not intend to implement the CPP Rule (which is, in any event, a nullity given the extent to which market participants already have achieved the emission reduction that Rule contemplated). The agency has not issued a new rule or other agency action embodying a particular view of the agency's authority under Section 7411(d).

Indeed, there are, at a minimum, serious questions about whether appellate standing remains because of the lack of injury to Petitioners from the judgment below. Before it was repealed by the ACE Rule, the CPP Rule was stayed and did not go into effect, and there is no indication that it will be resurrected. The court of appeals' vacatur of the ACE Rule and remand to the agency to reconsider its authority under Section 7411(d) did not ratify the CPP or require EPA to adopt any view of its authority that would injure Petitioners. Even if these cases remain justiciable, affirmance of the court of appeals' judgment vacating the ACE Rule and remanding it to the EPA is appropriate because the Rule had relied on the erroneous view that the statute unambiguously limits the BSER to "at and to" measures. *See Negusie v. Holder*, 555 U.S. 511,

522-23 (2009); *SEC v. Chenery Corp.*, 318 U.S. 80, 95 (1943). Vacatur and remand is especially appropriate because the agency does not view the ACE Rule interpretation as accurate, and it is considering anew its responsibilities under Section 7411(d).

To affirm the judgment below, the Court need recognize only that Sections 7411(a) and 7411(d) do not *unambiguously* restrict the BSER to "at and to" measures at individual plants. The Power Company Respondents urge the Court to reject Petitioners' request that the Court issue an advisory opinion about whether speculative abuses of power by an imagined future EPA Administrator would fall within the powers Congress lawfully granted to the agency.

STATEMENT OF THE CASE

A. Statutory Framework

Electrification transformed American life by powering factories, lighting and cooling homes, and enabling now-omnipresent electronic consumer appliances and entertainment devices. Generation of the power that fueled that transformation—along with the adoption of the automobile—also filled the country's air with smog and other airborne pollutants.

In response to adverse public health and environmental consequences caused by these emissions, Congress adopted and has repeatedly strengthened the Clean Air Act "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare and the productive capacity of its population." 42 U.S.C. § 7401(b)(1); *see also* Clean Air Act of 1963, Pub. L. 88-206, 77 Stat. 392; Air

Quality Act of 1967, Pub. L. 90-148, 81 Stat. 485; Clean Air Amendments of 1970, Pub. L. 91-604, 84 Stat. 1676; Clean Air Act Amendments of 1977, Pub. L. 95-95, 91 Stat. 685; Clean Air Act Amendments of 1990, Pub. L. 101-549, 104 Stat. 2399.

The Act, one of the pillars of American environmental law, created "a comprehensive national program that made the States and the Federal Government partners in the struggle against air pollution." *Gen. Motors Corp. v. United States*, 496 U.S. 530, 532 (1990).

The Clean Air Act provides for an interlocking set of programs for controlling emission of air pollutants through a range of regulatory authorities. Among other things, the Act addresses airborne concentrations of "criteria" pollutants in 42 U.S.C. §§ 7408-7409; emissions by mobile sources such as motor vehicles and airplanes, as well as fuels and additives, in §§ 7521-7590; and emissions by stationary sources of certain "hazardous air pollutants" in § 7412.

The statute also addresses emissions by certain listed categories of stationary sources (such as factories and power plants) in 42 U.S.C. § 7411, which is the provision at issue here. Section 7411 "ensure[s] that the Act achieves comprehensive pollution control by guaranteeing that there are 'no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.'" JA119 (quoting S. Rep. No. 91-1196, at 20 (1970)).

Under Section 7411, EPA must publish a list of each category of stationary source that "causes, or

contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A). For each listed category of stationary source, Section 7411(b)(1)(B) requires EPA to prescribe federal "standards of performance" for *new* sources. The statute defines "standard of performance" as:

> 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 ["BSER"] which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the [EPA] determines has been adequately demonstrated.

§ 7411(a)(1).

For such new stationary sources, EPA may enforce such standards of performance or delegate its authority to a State that has developed and submitted an adequate procedure to implement and enforce the determined standards. § 7411(c)(1), (2).

For *existing* stationary sources, Section 7411(d) establishes a cooperative-federalism approach. It directs EPA to prescribe regulations for a "procedure similar to that provided by section 7410" (regarding ambient air quality standards) for States to submit plans for standards of performance for any existing

source for any air pollutant (other than "criteria" pollutants addressed under Sections 7408-7410[3] and "hazardous air pollutants" listed under Section 7412[4]). Under this framework, EPA issues emissions guidelines, 40 C.F.R. § 60.21(e), reflecting the emission reduction achievable for the particular category of stationary source through application of the BSER that the agency finds has "been adequately demonstrated," 42 U.S.C. § 7411(a)(1). States then issue standards of performance for each stationary source within their jurisdiction and may, when applying those standards to particular sources, "take into consideration, among other factors, the remaining

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[3] In 42 U.S.C. § 7408(a), Congress provided for EPA and the States to cooperate in addressing concentrations in ambient air of "criteria" pollutants that "cause or contribute to air pollution which may reasonably be anticipated to endanger public health or welfare." Section 7409 tasks EPA with prescribing a national ambient air quality standard (a "NAAQS") for each of those "criteria" pollutants and vests States with primary responsibility for developing State Implementation Plans, or "SIPs," for achieving the standards. §§ 7409(a), 7410(a); *see Union Elec. Co. v. EPA*, 427 U.S. 246, 249 (1976). EPA is charged with reviewing and if necessary revising the SIPs. 42 U.S.C. § 7410(c), (*o*). EPA has prescribed NAAQS for six "criteria" pollutants: carbon monoxide, lead, nitrogen dioxide, ozone, particle pollution, and sulfur dioxide. EPA, NAAQS Table, https://www.epa.gov/criteria-air-pollutants/naaqs-table (last visited Jan. 14, 2022).

[4] Section 7412 requires EPA to identify "hazardous air pollutants"—pollutants that "present, or may present, through inhalation or other routes of exposure, a threat of adverse human health effects . . . or adverse environmental effects," 42 U.S.C. § 7412(b)(2)—and specifically lists more than 180 such pollutants. Section 7412 further requires EPA to publish a list of "all categories and subcategories of major sources and area sources" of the listed hazardous air pollutants and "establish emission standards" for each. § 7412(c)(1), (2).

useful life of the existing source to which [the] standard applies." § 7411(d)(1). EPA regulations must provide for implementation and enforcement of the standards of performance by the States. § 7411(d)(1)(B). If a State fails to submit a satisfactory plan or to enforce its plan for existing stationary sources, EPA may prescribe and enforce a federal plan for such State. § 7411(d)(2).

B. Factual Background

Due in large part to human activities, notably the combustion of fossil fuels, atmospheric concentrations of greenhouse gases such as carbon dioxide and methane have increased at unprecedented rates, and are now higher than Earth has experienced in several million years. These particular gases are referred to as "greenhouse gases" because they trap heat in the atmosphere and warm the planet, akin to a greenhouse structure warming the air and plants within. EPA, Overview of Greenhouse Gases, https://www.epa.gov/ghgemissions/overview-greenhouse-gases (last visited Jan. 14, 2022). An overwhelming scientific consensus recognizes that, as a result, global temperatures are rising at unprecedented rates. *See, e.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 504-05 (2007); Intergovernmental Panel on Climate Change, Climate Change 2021: The Physical Science Basis at SPM-7 (2021); U.S. Global Change Res. Prog., Fourth National Climate Assessment 35-36 (2017).

Any effective approach for curtailing greenhouse-gas emissions requires curbing the volume of emissions produced by fossil fuel-fired power plants, such as coal-fired and gas-fired plants. These plants play a

significant role in powering American homes, businesses, factories, and infrastructure. They produce approximately 60 percent of the country's electric power, with nuclear and renewable energy sources responsible for the balance. U.S. Energy Info. Admin., FAQs: What is U.S. electricity generation by energy source? (last updated Nov. 2, 2021), https://www.eia.gov/tools/faqs/faq.php?id=427&t=3.

Fossil fuel-fired power plants are "far and away the largest stationary source of greenhouse gases," JA85, numbering 18 of the 20 largest single emitters of carbon dioxide in the country, EPA, 2020 Greenhouse Gas Emissions from Large Facilities, https://www.epa.gov/ghgreporting (Aug. 7, 2020). They are responsible for one-quarter of all greenhouse gases emitted in the United States. EPA, Sources of Greenhouse Gas Emissions https://www.epa.gov/ghgemissions/sources-greenhouse-gas-emissions (last visited Jan. 14, 2022). Fossil fuel-fired power plants have long been listed by EPA under Section 7411 as a category of stationary sources that cause, or contribute significantly to, air pollution. *See* Air Pollution Prevention & Control: List of Categories of Stationary Sources, 36 Fed. Reg. 5,931 (Mar. 31, 1971).

C. Procedural History

1. Regulation Under Section 7411 of Greenhouse Gases Emitted by Stationary Sources

This Court held in *Massachusetts v. EPA* that greenhouse gases are "air pollutant[s]" for purposes of provisions of the Clean Air Act governing emissions

by motor vehicles. 549 U.S. at 528. EPA subsequently found that six greenhouse gases endanger public health and the public welfare.[5] This Court then concluded in *American Electric Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) ("*AEP*"), that greenhouse-gas emissions constitute statutory "air pollutant[s]" not only when emitted by motor vehicles, but also when emitted by stationary sources. 564 U.S. at 424-25. The Court concluded that it was "plain" that Section 7411 "'speaks directly' to the emissions of carbon dioxide from [power] plants." *Id.* at 424.

2. Promulgation of the Clean Power Plan ("CPP") Rule

In October 2015, EPA established standards of performance for carbon dioxide emissions from *new* fossil fuel-fired power plants, as a category of "stationary sources" under 42 U.S.C. § 7411(b).[6] In that rulemaking, EPA determined, for example, that by deploying new technology (including for capturing and storing carbon dioxide), such power plants could, at reasonable cost, limit emissions to 1,400 lbs. of carbon dioxide per megawatt/hour. 80 Fed. Reg. at 64,512. EPA's new-source rule took effect and is not at issue here.

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[5] Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496 (Dec. 15, 2009).

[6] Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,527, 64,529-31 (Oct. 23, 2015).

At the same time, EPA issued the Clean Power Plan ("CPP") Rule, which would have provided carbon dioxide emission guidelines for State standards of performance for the category of *existing* fossil fuel-fired power plants. *See* JA273. EPA explained that the CPP Rule reflected the fact that carbon dioxide diffuses throughout the atmosphere and lingers for decades, and the fact that power plants are connected to a shared grid, such that "[g]eneration from one generating unit can be and routinely is substituted for generation from another generating unit in order to keep the complex machine [of the grid] operating while observing the machine's technical, environmental, and other constraints and managing its costs." JA567.

As part of the CPP Rule, EPA determined that the "best system of emission reduction [BSER] for carbon dioxide from the category of existing fossil fuel-fired electric generating units combines three features: "operational improvements and equipment upgrades that such plants may take to improve heat rate;" increasing lower-emitting natural-gas generation substituted for higher-emitting coal-fired steam plants; and increasing zero-emitting renewable generation substituted for fossil fuel-fired plants—all three of which were "consistent with current trends in the electricity sector." JA491-92. EPA determined that if existing coal and gas plants were to use this best system involving these three features, they could, at reasonable cost, reduce by 2030 their carbon dioxide emissions to 1305 pounds and 771 pounds, respectively, per megawatt-hour. JA643.

EPA noted that the features underlying its BSER are "available to all affected" units through direct investment, operational shifts, or emissions trading, but that also "there are numerous *other* measures available to reduce CO2 emissions from affected" units. The EPA specified that its "determination of the BSER does *not* necessitate the use of the three building blocks to their maximum extent, or even at all." JA299-300 (emphasis added).

The CPP Rule never took effect because this Court stayed its implementation pending the D.C. Circuit's review. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). The D.C. Circuit held the litigation in abeyance while the agency reconsidered its position, then dismissed the petitions as moot in light of the agency's repeal in 2019 of the CPP Rule. JA88.

3. Promulgation of the Affordable Clean Energy ("ACE") Rule

At the same time that the agency repealed the CPP Rule, the agency issued a new BSER for carbon dioxide from the category of existing fossil fuel-fired electricity generating units, and promulgated both agency actions through the Affordable Clean Energy ("ACE") Rule. *See* JA1725.[7]

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[7] The ACE Rule also amended Section 7411(d)'s implementing regulations to delay significantly the time before existing sources became subject to new emissions controls. *E.g.*, JA1936; *compare* 40 C.F.R. § 60.23(a)(1), *with* § 60.23a(a)(1), *and* § 60.27(b), *with* § 60.27a(b). The D.C. Circuit concluded that this aspect of the ACE Rule was arbitrary and capricious, JA72, a conclusion that Petitioners have not challenged in this Court.

The ACE Rule based its repeal of the CPP Rule solely on its reading of the Clean Air Act as forbidding the CPP Rule. The ACE Rule read Section 7411 to "unambiguously limit[] the [BSER] to those systems that can be put into operation at a building, structure, facility, or installation," such as "add-on controls" and "inherently lower emitting processes/practices/designs." JA1746. Because the CPP Rule had contemplated the use of generation-shifting measures that in the agency's view could not be implemented at specific sources, the ACE Rule concluded that it was "obliged to repeal the [CPP Rule] to avoid acting unlawfully." JA1786.

The ACE Rule's new BSER for carbon dioxide from coal-fired power plants[8] included seven different "technologies and techniques" for achieving minor increases in the efficiency with which such plants convert coal into electric power. JA1803-07 & tbl. 1. The Rule found that each of these technologies and techniques "c[ould] be applied *at and to* certain existing coal-fired [power plants]." JA1787 (emphasis added). Although the ACE Rule instructed States to "utilize" these efficiency ranges in preparing standards of performance, it expressly authorized States to submit standards of performance more lenient than these ranges. JA1807 tbl. 1.

The ACE Rule excluded from consideration in the determination of the BSER other means of reducing emissions. For example, the agency rejected co-firing

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[8] The ACE Rule declined to identify any BSER for gas-fired plants. JA1791.

biofuels, which can be carbon-neutral because it releases carbon that was trapped when the biofuels were grown, rather than carbon from subterranean fossil-fuel sources. The ACE Rule determined that would reduce emissions generally, but not at the level of specific power plants. JA1849-53. And the Rule rejected co-firing gas along with coal. The Rule opined that such an approach was not already in widespread use and was not, in the agency's view, "adequately demonstrated." JA1840-44. And the Rule rejected carbon capture and storage technology because, among other things, it deemed the technology too expensive for use at existing sources. JA1853-65.

The ACE Rule extended its narrow reading of the statute to restrict the means that States in their own plans can allow power plants to use to meet standards of performance. The Rule did not express a view as to whether States could allow power plants to meet standards through gas co-firing or carbon capture and storage. JA1893. It forbade States, however, from allowing power plants to meet the standards through emissions trading or through biofuel co-firing. JA1895-1904.

4. Lower Court Proceedings

Several petitions for judicial review of the ACE Rule were filed in the D.C. Circuit, including by the Power Company Respondents, numerous States, and various environmental groups, as well as by the coal industry, on various grounds. The court of appeals consolidated the petitions and ultimately vacated the ACE Rule. JA213-15.

The court of appeals ruled that the ACE Rule could not stand because it "rested critically on a mistaken reading of the Clean Air Act." JA215. Nothing in the text, structure, history, or purpose of the Act plainly or unambiguously restricts the EPA to considering only measures that can be imposed "at and to" individual plants when the agency determines the BSER for carbon dioxide that has been adequately demonstrated for the category of existing fossil fuel-fired power plants. *E.g.*, JA104. The court of appeals recognized that EPA has "ample discretion" to identify BSERs for purposes of Section 7411, but rejected EPA's attempt to "shirk its responsibility by imagining new limitations that the plain language of the statute does not clearly require." JA118. The court of appeals also rejected, as ungrounded in Section 7411, the ACE Rule's attempt to restrict States, in devising standards of performance and identifying means for power plants to comply with State implementation plans, to allowing plants to use only measures applied "at and to" individual sources.

EPA filed an unopposed motion with the court of appeals to withhold issuance of the mandate with respect to the court's vacatur of the repeal of the CPP Rule. The court granted that motion, meaning that the CPP Rule did not go into effect. JA270-72. Accordingly, neither the now-vacated ACE Rule nor the CPP Rule is in effect.

Two coal-mining companies (Nos. 20-1531 and 20-1778) and numerous States (Nos. 20-1530 and 20-1780) petitioned for writs of certiorari. The Court granted the petitions, except insofar as Petitioner Westmoreland Mining Holdings LLC contested

whether coal-fired power plants are subject to regulation under Section 7411.

SUMMARY OF ARGUMENT

I. The major questions doctrine is inapposite to these cases because there is no agency action in effect, or proposed to go into effect, that presents to the Court a statutory interpretation that raises any separation of powers concerns.

Application of the major questions doctrine in such circumstances would expand the doctrine far beyond this Court's precedents. Instead of reviewing an existing agency interpretation, it would require federal courts to issue advisory opinions about the most farfetched way an agency might try to misuse a particular statutory interpretation that it might adopt. Indeed, the Affordable Clean Energy ("ACE") Rule that was vacated by the judgment below was based on an agency interpretation that the statute unambiguously *limits* the agency's authority. The court of appeals rejected the agency's reading and remanded to the agency for further consideration without ratifying any expansive agency authority to make decisions of vast economic and political significance.

The provisions of the Clean Air Act at issue here, 42 U.S.C. § 7411(a) and § 7411(d), do not, on their face, raise separation of powers concerns implicating the major questions doctrine. They expressly authorize the EPA to set the "best system of emission reduction" (BSER)—a determination for which the agency has extensive expertise. The BSER is then to be reflected in standards of performance developed by the States.

And States retain broad authority and flexibility under Section 7411(d) to regulate existing sources by establishing and enforcing the standards of performance, leaving the agency no room beyond what Congress explicitly authorized.

II. The court of appeals correctly held that the Clean Air Act does not require the ACE Rule's interpretation. The statute does not unambiguously require that EPA, in determining the BSER that has been adequately demonstrated for a particular source category, consider only measures that are applied "at and to" an individual source.

The plain language of Section 7411 places no such limitation on the means EPA may consider in determining the BSER. Section 7411(a)'s requirement that EPA determine the best "*system*" evinces no restriction to "at and to" measures. The ordinary meaning of "system" is not so limited, and neighboring provisions in Sections 7411(h) and 7412(d) confirm that Congress knew how to include more limiting provisions through language used there, which it did not use in Section 7411(a).

A limitation of the BSER to "at and to" measures would be at odds with the statute's textual requirement that EPA determine the BSER that has been "adequately demonstrated." The power sector is unique because its responsibility for delivering its service to the public—a constant supply of electricity—depends on all producers orchestrating their behavior to balance supply and demand on an instantaneous basis, given economic, environmental, and transmission constraints. Because of the uniquely

interconnected nature of the electricity grid, utilities, many States, and EPA have all recognized that the "best system of emission reduction" for the listed source category of fossil fuel-fired power plants includes the means used at a systemic level and is not restricted to measures "at and to" each individual plant operated in isolation from one another. The ACE Rule's contrary reading also unduly restricts the ability of the States and power plants to meet standards of performance though cost-effective means long demonstrated for the category of fossil fuel-fired power plants.

III. Sections 7411(a) and 7411(d) do not violate the nondelegation doctrine. They detail and limit EPA's authority over emissions by listed categories of existing stationary sources. Those restraints provide intelligible principles that render the statute constitutional under any formulation of the nondelegation doctrine. This Court need not adopt an artificially narrow construction of the statute to avoid hypothetical constitutional problems that could result from an implausibly broad construction that the court of appeals did not adopt and EPA is not asserting.

ARGUMENT

I. THE MAJOR QUESTIONS DOCTRINE IS INAPPOSITE IN THE CIRCUMSTANCES OF THESE CASES.

A. Application of the Doctrine Here Would Be Based on Speculation and Yield an Advisory Opinion Because There Is No Agency Action in Effect or Proposed to Go Into Effect That Adopts Any Purportedly Overbroad Statutory Interpretation.

Petitioners ask this Court to transform the major questions doctrine into a vehicle for federal courts to issue advisory opinions based on abstract speculation about what agencies might do in the future. Petitioners' approach would invite courts to opine on the most farfetched way an agency might try to misuse a particular statutory interpretation that it might adopt. It is a recipe for courts to get bogged down in abstruse hypothetical concerns, which, in these cases, might still be alleviated through agency action on the remand ordered by the judgment under review.

Indeed, the judgment under review presents the Court with only vacatur and remand of an agency action (the ACE Rule) because that action was based on an erroneous interpretation that the statute unambiguously *limits* the agency's authority in certain ways. The judgment did not ratify any expansive agency authority to make decisions of vast economic and political significance. The ruling does not present any ripe separation of powers concern.

B. Application of the Doctrine Absent an Agency Action Claiming Overbroad Authority Would Depart from Precedent and Pose Administrability Problems.

This Court applies the major questions doctrine only when it reviews an agency's interpretation of a statute that is reflected in a broad exercise of agency authority. *See King v. Burwell*, 576 U.S. 473, 485-86 (2015). The Court has thus held in a series of exceptional cases that Congress had not, through "vague terms or ancillary provisions," conferred on an agency the authority to "alter the fundamental details of a regulatory scheme." *Whitman v. Am. Trucking Assns., Inc.*, 531 U. S. 457, 468 (2001).

Critically, in these cases the Court reviewed actual action taken by the respective agency that was challenged as in excess of the agency's claim of authority. For example, in *King*, the Court reviewed an Internal Revenue Service regulation authorizing availability of billions of dollars in tax credits on federal exchanges affecting health insurance under the Affordable Care Act. 576 U.S. at 485-86. In other cases, the Court similarly reviewed actual agency action that relied on the agency's claim of particular statutory authority. *See NFIB v. Dep't of Labor*, No. 21A244, 2022 WL 120952, at *1, *3 (U.S. Jan. 13, 2022) (per curiam) (reviewing Occupational Safety and Health Administration regulation mandating vaccination); *Ala. Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021) (per curiam) (reviewing Centers for Disease Control and Prevention regulation promulgating and extending Congress's eviction moratorium); *Util. Air Regul. Grp. v. EPA*, 573 U.S.

302, 323-24 (2014) (reviewing EPA adoption of its own Tailoring Rule thresholds for permitting obligations); *Gonzales v. Oregon*, 546 U.S. 243, 265-69 (2006) (reviewing Department of Justice Interpretative Rule declaring use of controlled substances for physician-assisted suicide a crime); *Whitman*, 531 U.S. at 468-71 (reviewing EPA published implementation policy determining whether implementation costs should moderate national air quality standards); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159-61 (2000) (reviewing Food and Drug Administration regulation of the tobacco industry); *MCI Telecommc'ns Corp. v. Am. Tel. & Tel. Co.*, 512 U.S. 218, 221, 231-32 (1994) (reviewing Federal Communications Commission's Fourth Report and Order exempting tariffs from nondominant carriers).

Petitioners seek to apply the major questions doctrine in a far more expansive way. Rather than considering whether an agency's actual exercise of power falls within the authority Congress vested in the agency, Petitioners ask this Court to speculate and indulge implausible imagining about how an agency might try to abuse its authority at some unknown time in the future.

Application of the major questions doctrine in this manner would expand that doctrine far beyond this Court's precedents. It would conflict with this Court's longstanding principle of "avoid[ing] premature adjudication, from entangling [itself] in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging

parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967). Even when final agency action has been taken, the Court refrains from reviewing an agency rule if "further factual development would significantly advance [the Court's] ability to deal with the legal issues presented." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003).

Application of the major questions doctrine in these circumstances would create the sort of administrability problems that have bedeviled the Court in other contexts. For example, this Court has repeatedly grappled with the inartfully worded Armed Career Criminal Act, which enlists federal courts to determine whether various state criminal laws "ha[ve] as an element the use, attempted use, or threatened use of physical force against the person of another" or "otherwise involve[] conduct that presents a serious potential risk of physical injury to another." 18 U.S.C. § 924(e)(2)(B). This Court has rejected as "indetermina[te]," "unpredictable," and "arbitrary" speculation about "the hypothetical risk posed by an abstract generic version of [an] offense" under the ACCA and similar statutes. *Welch v. United States*, 578 U.S. 120, 124-25 (2016). The Court should avoid adopting another doctrine that would "tie[] the judicial assessment of risk to a judicially imagined" agency interpretation, "not to real-world facts or statutory elements." *Johnson v. United States*, 576 U.S. 591, 597 (2015).

C. Sections 7411(a) and 7411(d) Do Not, on Their Face, Implicate the Major Questions Doctrine.

Sections 7411(a) and 7411(d) do not, on their face, raise separation of powers concerns implicating the major questions doctrine. They expressly authorize implementation of a statute in a particular manner by EPA, an agency with extensive expertise in that area. And they direct EPA to answer the specific question of what is the BSER that has been adequately demonstrated for a given category of existing stationary sources, so that the degree of achievable emission limitation can be determined and reflected in standards of performance established by the States. This specific authority "fits neatly within the language of the statute." *See Biden v. Missouri*, No. 21A240, 2022 WL 120950, at *2–3 (U.S. Jan. 13, 2022) (per curiam) (staying injunctions against Department of Health and Human Services' vaccination mandate for health workers at facilities receiving Medicare and Medicaid funding because "the Secretary's rule falls within the authorities that Congress has conferred upon him").

Section 7411 is also clear about specific limits on EPA's authority. The EPA's BSER must "take[] into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements." § 7411(a)(1). EPA determines only the BSER, and it is the *States* that must then develop standards of performance for existing sources that reflect the degree of emission limitation achievable through application of the BSER. § 7411(d)(1). EPA does not directly regulate existing sources. The States retain broad authority and flexibility under

Section 7411(d) to impose and enforce standards of performance for the existing sources within their respective boundaries, leaving the agency no room beyond what Congress explicitly authorized.

States are authorized to apply standards of performance to individual existing plants based on EPA's emission guidelines; they need *not* use the means considered by EPA in determining the BSER. Section 7411 states that EPA "shall prescribe regulations which shall establish a procedure . . . under which each State shall submit to the [agency] a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . and (B) provides for the implementation and enforcement of such standards of performance." § 7411(d)(1). Only if a State fails to submit a satisfactory plan or to enforce it does EPA fill that role. § 7411(d)(2). Such a framework does not impermissibly override state choices, as this Court has observed in interpreting other similar provisions of the Clean Air Act. *See Train v. Nat. Res. Def. Council, Inc.*, 421 U.S. 60, 79, (1975) (Clean Air Act "gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of [42 U.S.C. § 7410]"); *see also Massachusetts v. EPA*, 549 U.S. at 530-31 (rejecting major-questions challenge to EPA's "statutory authority to regulate the emission of [greenhouse] gases from new motor vehicles" because "greenhouse gases fit well within the Clean Air Act's capacious definition of 'air pollutant'"; "EPA would only *regulate* emissions" consistent with technological constraints; and no congressional action "conflict[ed] in any way" with that authority).

D. The Emission Reduction Envisioned by the CPP Rule Occurred a Decade Early Without the Rule Taking Effect, Defeating Any Major Questions Concern.

There is no sudden transformation of agency action or exceptional economic impact here beyond statutory authority to implicate the major questions doctrine, and certainly not before the EPA has revisited on remand its authority under the statute.

Until the adoption of the ACE Rule, the EPA had consistently and "routinely," under Administrations of both political parties, concluded that it has the authority under the statute, and exercised that authority, to determine the BSER that is adequately demonstrated under Sections 7411(a) and 7411(d) for each listed category of existing sources and that, in making that determination, could consider means other than installation of control technology "at and to" each individual source. *See Biden v. Missouri*, 2022 WL 120950, at *4; *infra* Section II.E.

Moreover, the CPP Rule would not, in fact, have had the profound impact or costs imagined by Petitioners. *See* West Virginia Br. 20 ("Implementing even the CPP's vision would have cost hundreds of billions of dollars"); North Am. Coal Corp. Br. 29 ("the CPP [Rule] was projected to 'cost billions of dollars and eliminate thousands of jobs'"); Westmoreland Br. 20, 30 ("the CPP [Rule] would impose billions in price increases" and was projected to result in "billions in compliance costs . . . and hundreds of billions in foregone economic growth"). The ACE Rule explained that the reduction the CPP Rule would have required

to occur by 2030 had occurred on a nationwide basis a decade earlier, even though the CPP Rule never went into effect. The ACE Rule concluded that repealing the CPP Rule resulted in $0 of savings for industry and no greater emissions, such that "there is likely to be no difference between a world where the CPP [Rule] is implemented and one where it is not." JA1921. Far from being radically transformative, the CPP Rule would have required no more than what occurred in the absence of federal regulation. Petitioners' exaggerations of its drastic consequences and costs are without merit.

II. THE CLEAN AIR ACT DOES NOT UNAMBIGUOUSLY REQUIRE THAT, IN DETERMINING THE BSER, EPA CONSIDER ONLY MEASURES APPLIED "AT AND TO" AN INDIVIDUAL PLANT.

The ACE Rule's interpretation of Section 7411 is contrary to the text, structure, and purpose of the statute. Petitioners have identified nothing in any of those aspects of the statute that could clearly limit the BSER to only measures that can be implemented "at and to" an individual source.

A. The Statute's Use of "System" in Section 7411 Demonstrates That EPA's BSER Determination Is Not Limited to Measures "at and to" an Individual Plant.

1. Congress used the term "system" in Section 7411(a) to direct EPA to determine the "best system of emission reduction [BSER]" that is adequately demonstrated for each category of stationary sources that EPA lists. Congress then provided that, in light

of that "best system," the standards of performance must reflect the emission reduction that is achievable through application of the BSER. Thus, the best system must be determined to identify the rate of achievable emission reduction, but it does not limit the means that can be considered in determining BSER or that can be used by States and power plants to meet the standard of performance set by the States.

EPA identifies the best system by considering systems that use various means to reduce emissions for the relevant category of stationary sources, here fossil fuel-fired plants. After considering those systems that have been adequately demonstrated for the source category, EPA determines the best of those systems.

The statute does not define the term "system," so it is interpreted according to its ordinary meaning. *See Sandifer v. U.S. Steel Corp.*, 571 U.S. 220, 227 (2014). As the EPA has previously concluded, the ordinary meaning of "system" is "a set of things or parts forming a complex whole; a set of principles or procedures according to which something is done; an organized scheme or method; and a group of interacting, interrelated, or interdependent elements." JA273, JA542-43 & n.314 (citing, *inter alia*, Oxford Dictionary of English (3d ed. 2010)); *see also System*, Merriam-Webster, https://www.merriam-webster.com/dictionary/system (last visited Jan. 14, 2022) (defining "system" as "a regularly interacting or interdependent group of items forming a unified whole").

The ordinary meaning of "system" in BSER in Section 7411(a) thus does not contain any limitation of

systems that are "at and to" an individual source. Indeed, the ordinary meaning of system wholly supports the methodology of the CPP Rule wherein the agency identified three elements that would be part of a best system, which would interact and interrelate. Regardless of whether there would be debate about the BSER determination, there is nothing in the statute to limit the best system or the elements therein to measures "at and to" an individual plant.

2. The ACE Rule stripped the term "system" of substance. Ignoring a fundamental canon of statutory construction, the ACE Rule asserted that the dictionary definition of the term "system" does not matter, but instead purported to rely on the "permissible bounds of the *legal* meaning of the word." JA1764. The ACE Rule concluded that "system" cannot be read to encompass "*any* 'set of measures' that would—through some chain of causation—lead to a reduction in emissions," because, "on its own," that could lead to "unbounded discretion" for EPA. *Id.* The ACE Rule's misunderstanding of the statute was apparent when it relied on far-fetched suggestions, including that, unless further cabined, the term "system" could allow EPA to impose "minimum wage requirements." Section 7411 places numerous limits on agency authority, not to mention, of course, limits on the agency's determination of the BSER imposed by the Clean Air Act's prohibition on arbitrary or capricious rulemaking. *See* 42 U.S.C. § 7607(d)(9).

And contrary to Petitioner West Virginia's suggestion that the court of appeals did not consider the context of the term "system," the court carefully considered the context surrounding the term in Section

7411(a), including the requirement for a "best" system of emission reduction, which the court of appeals reasoned "plainly places a high priority on efficiently and effectively reducing emissions." JA109; West Virginia Br. 36-37.

3. Section 7411(a)'s use of the word "system" is also informed by the text and structure of other provisions of the statute. They confirm that best "system" as used in Section 7411(a) is not limited to "at and to" measures.

a. For example, in 1977, Congress amended Section 7411 to limit EPA's authority to set standards of performance for *new* sources (not *existing* sources) to the degree achievable through application of the "best *technological* system of continuous emission reduction." Pub. L. No. 95-95, § 109, 91 Stat. at 699-700 (amending Section 111(a)(1) of the Clean Air Act, codified at 42 U.S.C. § 7411(a)(1) (1982)) (emphasis added). The addition of the term "technological" and Congress's definition of that phrase evidence a different type of system.[9] That is the type of terminology that Congress could have used in Section 7411(a)'s reference to "best system of emission reduction," but did not, if it had wanted to limit the BSER to only certain

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[9] Congress defines "technological system of continuous emission reduction" to mean: "(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" 42 U.S.C. § 7411(a)(7).

measures that focused more on technology applied to a particular plant.

Moreover, at that same time, Congress also amended Section 111 of the Act to require that *new* sources (not *existing* sources) demonstrate that such a "technological system of continuous emission reduction" "which is to be used *at* such source" will enable the new source to comply with the standards of performance. Pub. L. No. 95-95, § 109(e), 91 Stat. at 701 (adding Section 111((j) to the Clean Air Act) (emphasis added). Congress's reference to the technological system as a system that "is to be used *at* such source" finds no parallel in the text of Sections 7411(a) and 7411(d) relating to the BSER that EPA determines for existing sources, which is then reflected in State standards of performance. "System" as used in BSER in Section 7411(a) is broader than "technological system" and contains no limitation that it be only a measure installed "at such source."

Congress subsequently repealed these limitations for new sources.[10] Those limitations demonstrate, however, that when Congress wants to limit EPA's authority with respect to emission reduction systems—*e.g.*, to limit these to "technological" systems, or by requiring sources to comply with applicable standards

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[10] *See* Pub. L. No. 101-549, § 403(a), 104 Stat. at 2631 (adopting the current definition of "standard of performance" for new sources as well as existing sources); Safe Drinking Water Amendments of 1977, Pub. L. No. 95-190, § 14(8), 91 Stat. 1393, 1399 (striking subsection (j) and redesignating subsequent subsections).

of performance through utilization of the system "*at* such source"—it knows how to do so.

Indeed, Congress has maintained the possible use of a "technological system of continuous emission reduction" in circumstances where EPA determines it is "not feasible to prescribe or enforce a standard of performance." 42 U.S.C. § 7411(h)(1). Such circumstances include where "the application of measurement methodology to a particular class of sources is not practicable due to technological or economic limitations." § 7411(h)(2). In such circumstances, EPA "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 has been adequately demonstrated. § 7411(h)(1). Congress specified that if EPA "promulgates a design or equipment standard under this subsection," it "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." *Id.*

The BSER that EPA determines generally for existing sources under Sections 7411(a) and 7411(d) contains no such directives. And Congress was explicit in the limited nature of Section 7411(h). That provision specifies that any design, equipment or the like under that subsection shall be treated as a standard of performance for purposes of the provisions of the Clean Air Act "*other than* the provisions of subsection (a) and this subsection." § 7411(h)(5) (emphasis added). And in Section 7411(b)(5), Congress provided that "[e]xcept 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." Congress knew how to make clear where standards of performance must be met through technological systems installed at the source and how to ensure that they would not mandate use of any particular technological system. EPA's determination of the BSER in Sections 7411(a) and 7411(d) contains no similar limitations.

b. The meaning of best "system" in Section 7411(a)(1) also is informed by the language Congress used in Section 7412(d) with regard to emissions of certain air pollutants that are specifically listed as "hazardous." The text of Section 7412(d) includes provisions for source-specific measures, confirming that the BSER that EPA determines for existing sources under Sections 7411(a) and 7411(d), which use different text, does not so provide.

Section 7412(d) requires that EPA "promulgate regulations establishing emission standards" for the listed sources of hazardous air pollutants. Congress was explicit that, for such hazardous pollutants, those emission standards "shall require the maximum degree of reduction in emissions" that is achievable "through application of measures, processes, methods, systems or techniques, including, but not limited to," a list of specific measures. 42 U.S.C. § 7412(d)(2).

Thus, unlike Section 7411(a), Section 7412(d) focuses not on what is achievable through application of

a "best system" that EPA identifies, but rather requires EPA to establish what are known as "maximum achievable control technology" standards based on application of a range of means. And it includes in the list "systems" in addition to "measures, processes, methods, . . . or techniques," confirming that "systems" are not limited to certain measures or techniques. 42 U.S.C. § 7412(d)(2).

Moreover, in the list of illustrative "measures" that Congress provides, 42 U.S.C. § 7412(d)(2)(A)-(E), Congress included the type of terminology that it could have used in Section 7411(a) (but did not) had it wanted to limit the BSER to measures "at and to" an individual plant. For example, Section 7412(d) expressly encompasses measures that "*collect*, *capture* or *treat* such pollutants *when released* from a process, stack, storage or fugitive emissions point." § 7412(d)(2)(C) (emphasis added).[11] By contrast, Section 7411(a) includes no such language that could

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[11] The illustrative list of measures is broad: "measures which—

(A) reduce the volume of, or eliminate emissions of, such pollutants through process changes, substitution of materials or other modifications,

(B) enclose systems or processes to eliminate emissions,

(C) collect, capture or treat such pollutants when released from a process, stack, storage or fugitive emissions point,

(D) are design, equipment, work practice, or operational standards (including requirements for operator training or certification) as provided in subsection (h), or

(E) are a combination of the above."

42 U.S.C. § 7412(d)(2)(A)-(E).

limit the BSER to consideration of only such measures.

The measures and methods of emission reduction authorized by Section 7412(d) are restricted—as they necessarily must be due to the harm from the hazardous pollutants they are controlling—to source-specific controls.[12] Sections 7411(a) and 7411(d) contain no similar restriction on the BSER and, as such, the best "system" under Section 7411(a) for existing stationary sources under Section 7411(d) is not limited to control technologies that can be installed "at and to" an individual source.

B. The Statutory Text Requiring That EPA Determine the BSER That Is "Adequately Demonstrated" Establishes That EPA Looks to Means Already Used for the Source Category and, for Fossil Fuel-Fired Plants, Those Are Not Limited to "at and to" Measures.

1. Petitioners' arguments that EPA must confine the BSER to measures that can be implemented "at

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[12] *See* National Emission Standards for Hazardous Air Pollutants from Coal and Oil-Fired Electric Utility Steam Generating Units and Standards of Performance for Fossil-Fuel-Fired Electric Utility, Industrial-Commercial-Institutional, and Small Industrial-Commercial-Institutional Steam Generating Units, 77 Fed. Reg. 9,304, 9,444 (Feb. 16, 2012) (regulating hazardous air pollutants from power plants under Section 7412 and noting that because "[t]his is an air toxics rule . . . it does not permit emissions trading among sources" but instead "place[s] a limit on the rate of [mercury] and other [hazardous air pollutants] emitted from each affected [power plant]").

and to" specific power plants conflict with Section 7411(a)(1)'s requirement that EPA determine a BSER that has been "adequately demonstrated." That phrase directs EPA, when it determines the best system, to consider what methods actually *have been used* by the category of sources in question to reduce emissions.

The category of source in question here—fossil fuel-fired plants—has long used shifting of the location and timing of power generation to meet consumer demand and most effectively reduce emissions. It would make little sense for EPA to disregard these commonly used means when determining what is the "best system of emission reduction" that has been "adequately demonstrated."

The category of fossil fueled-fired power plants presents unique circumstances because electricity differs from other products in key respects, including that most producers and consumers of electricity are tied into shared grids. Electricity cannot presently be stored at large scale, but must instead be generated at practically the instant it is needed. JA77. To maintain the uninterrupted supply of electricity to consumers' constantly changing demand, electric power grids—"vast pool[s] of energy"—connect producers and consumers. *New York v. FERC*, 535 U.S. 1, 7 (2002). The continental United States contains three such regional grids. JA77 n.2. Multiple generation facilities supply power into each grid. To synchronize the supply of electric power with consumer demand, grid operators shift among different producers in real time to have them increase or scale back the energy they are delivering to the grid.

To manage this feat of generation coordination at the lowest cost to consumers, grid operators use some form of "constrained least-cost dispatch" approach. JA87. Under that approach, grid operators typically fulfill actual or anticipated demand by turning first to producers with the lowest variable cost, subject to adjustment based on transmission limits, environmental considerations, and other factors. This approach keeps consumers' utility bills down, and also provides an incentive to rely first on power plants with lower variable costs, such as renewable producers, whose production costs are lower because they do not need to pay for fuel. *See* Br. of Amici Curiae Grid Experts, Doc. No. 1839544, No. 19-1140 (D.C. Cir. filed Apr. 23, 2020) ("Grid Experts Br.").

In this interconnected system, shifting from one producer to another occurs constantly throughout the day, to meet marginal consumer demand and to compensate when other plants are inoperative. It is not a novel tool, as Petitioners would have it, *cf.* Nat'l Mining Ass'n Br. 39, but simply reflects how the power grid works to ensure a reliable supply of electricity for consumers at least cost to them.

Some degree of generation-shifting is the inevitable result of applying even "at and to" measures to control emissions from existing power plants. Any measure that increases the variable costs for one facility to produce power will make that facility less competitive as compared to other facilities, rendering it less attractive to utilities and grid operators.

For example, a coal-fired power plant that uses technology to scrub some of the carbon dioxide from

its flue gases must redirect some of its energy output to power its scrubber, which increases the variable costs of generating each megawatt-hour of electricity it delivers to consumers. As a result, the grid operator will call on ("dispatch") this power plant marginally less, and call more on other—cheaper and cleaner—producers. Due to dynamics inherent in the market for electric power, "generation-shifting" will thus result from any emission control measure that changes producers' respective operational costs.

2. Leveraging these unique aspects of the dynamic and interconnected market for electric power, EPA, States and industry have long demonstrated that measures shifting generation from some producers to others are part of an effective emission-reduction system. *See* Grid Experts Br. 13-15.

For example, in 2005, EPA promulgated its Clean Air Mercury Rule (the "Mercury Rule").[13] That Rule interpreted "best system of emission reduction" to encompass emission-trading programs and incorporated into the BSER for existing power plants a program for capping and trading mercury emissions under Section 7411. 70 Fed. Reg. at 28,616. EPA's emission guidelines reflecting "the degree of emission limitation achievable through the application of the [BSER]," 42 U.S.C. § 7411(a)(1), were premised on its projection that coal-fired units for which it was "not cost effective to install controls" would comply through "other approaches . . . including buying allowances, switching

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[13] Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606 (May 18, 2005).

fuels, or *making dispatch changes*"—*i.e.*, shifting generation to better-controlled units. 70 Fed. Reg. at 28,619 (emphasis added). EPA understood that some existing sources could not or would not be able to cost-effectively install the available controls. It did not provide emission guidelines based on a level that each and every individual source could cost-effectively achieve. Instead, EPA provided emission guidelines with the expectation that some sources would install the required controls and some would buy allowances from those which did or would shift generation to cleaner units.

While generation-shifting may have figured differently in the Mercury Rule's and CPP Rule's respective BSER determinations, the ACE Rule's categorical rejection of generation-shifting was based not upon the agency's consideration of any such differences, but upon its newfound view that Section 7411 unambiguously forbade anything other than measures that could be applied "at and to" an individual source. As the court of appeals found, it was not generation-shifting that was novel, but the ACE Rule's interpretation that forbade any best system premised on "both on-site and system-wide elements." JA127.

Petitioners provide no meaningful basis to distinguish the Mercury Rule. Most Petitioners do not even acknowledge the Mercury Rule. Although the National Mining Association attempts to distinguish that Rule on grounds that the D.C. Circuit invalidated it for other reasons, *see New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008), that fact does not undermine that *EPA* understood it had authority to incorporate measures as part of the mercury BSER

that were not "at and to" a particular source. Nat'l Mining Ass'n Br. 40-41. When the D.C. Circuit invalidated the Rule, it did so because EPA had failed to follow certain steps prescribed by Section 7412 when delisting coal- and oil-fired power plants from the lists of sources of certain "hazardous" pollutants, whose emissions are regulated under Section 7412. *New Jersey*, 517 F.3d at 578. Indeed, Section 7412(d)'s "maximum achievable control technology" standards were what the Mercury Rule attempted to evade by instead addressing power plants' emissions under Section 7411 (under which sources would be subject to the BSER). *See* 70 Fed. Reg. at 28,608.[14]

Arguments by the National Mining Association (Br. 41) and North American Coal Corporation (Br. 47-48) that sources could have achieved mercury-emission limits under the Mercury Rule solely through source-specific control technology likewise offer no basis to support their effort to limit BSER under Sections 7411(a) and 7411(d) to "at and to" measures. Petitioners point to nothing showing that it would not be possible for coal-fired power plants to meet the CPP Rule's emission guidelines solely through source-specific control technologies such as carbon capture and storage. Rather, use of such technologies would be—as the CPP Rule recognized—less cost-effective than purchasing emission credits from and shifting generation to cleaner sources. JA578-79. But the Mercury Rule likewise recognized that some sources could not have installed the referenced technology cost-effectively and, as a practical matter, would have bought emission credits or shifted generation to cleaner

[14] *See supra* at pages 33-35.

sources instead. *See, e.g.*, 70 Fed. Reg. at 28,619 ("units that are not cost effective to install controls" would achieve reductions by buying credits or "making dispatch changes").

Given that the Mercury Rule's emission guidelines were predicated upon projected shifts in generation to cleaner sources, Petitioner Westmoreland is incorrect that no prior rule under Section 7411 "premised emission rates on reduced utilization of existing sources, through 'shifting' or otherwise." Westmoreland Br. 29. And because any formulation of the BSER that changes power plants' relative costs will cause reduced utilization of some, Petitioners' arguments that the statute forbids consideration of systems that "forc[e] the reduced utilization" of certain facilities (*id.* at 35) or "diminish[] [their] capacity" (North Am. Coal Corp. Br. 35) must be based on an implicit distinction between means that will cause generation-shifting *as a purely incidental effect* and means considered as a candidate for the BSER *because* they will cause such generation-shifting. But nothing in the text announces such a categorical distinction between permissible and impermissible systems of emission reduction.

In the context of the electricity grid—where maintaining the power sector's ultimate service of a reliable electricity supply necessarily requires power plants to increase and reduce their generation of electricity as consumer demand and other plants' availability changes throughout the day—it makes no sense to suggest that the statute categorically bars *any* system of emission reduction that ultimately

causes an individual power plant to reduce its generation.

C. The ACE Rule's Interpretation Would Undermine the Statutory Purpose of Emission Reduction.

Sections 7411(a) and 7411(d) provide for determination of the "*best* system of *emission reduction*" adequately demonstrated, considering cost and other factors, thus reflecting Congress's overarching purpose of achieving cost-effective emission reduction. But the crabbed reading advocated by Petitioners and reflected by the ACE Rule would result in substantially lower and less cost-effective emission reduction than could be achieved under an approach in which the BSER considers generation-shifting.

The ACE Rule identified a series of measures that could increase the efficiency of coal-fired power plants by between 0.1 and 2.9 percent. Even assuming that States chose to implement these essentially voluntary measures *and* that these measures caused only a minimal "rebound effect,"[15] the agency still estimated that the ACE Rule would reduce U.S. carbon dioxide emissions by less than 1 percent. *Compare* JA1920 tbl. 3 *with, e.g.*, JA1722.

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[15] The "rebound effect" reflects that measures intended to increase the efficiency of coal-fired power plants will—by lowering the marginal cost of operating those plants—lead to increased utilization of those plants as compared to gas-fired plants and other sources, thereby *increasing* emissions. *See* JA92; JA659-60 (CPP Rule); JA1832-36 (ACE Rule).

By contrast, an approach that considers generation-shifting could achieve nearly 30 times the total reduction in carbon dioxide emissions than would occur under the ACE Rule, at no greater cost per ton of carbon dioxide abated. Grid Experts Br. 21-22. The inferiority of Petitioners' preferred system in comparison to an adequately demonstrated alternative system signals that their restriction is contrary to the purpose of determining the "best system of emission reduction" for power plants.

D. The ACE Rule's Grammatical Theory of "Application" Is Unsound.

The ACE Rule's interpretation of Section 7411 centered on a new reading of the word "application" in Section 7411(a)(1)'s definition of "standard of performance." JA1745. The ACE Rule reasoned that the CPP Rule incorrectly treated "application" as a synonym of "implementation," which it viewed as "send[ing] different signals." JA1761-62. The distinction, according to the ACE Rule, is that "application" of the BSER requires an indirect object, which must, and can *only*, be the physical confines of an individual plant. JA1746.

But "application" does not require an indirect object when it is used in the sense of applying a principle or process to achieve a result or outcome, such as a judge's application of precedent. JA113. The text of Section 7411(a)(1) provides for "application" generally of the BSER. The agency does that in the context of the category of stationary source at issue, here that is the application of the BSER to the source category of

fossil fuel-fired plants, not to a particular individual plant.

Moreover, as the court of appeals noted, Congress did not use the verb "apply," but rather the noun "application," which does not require an indirect object. JA112-13. Congress regularly uses such nominalizations "with the full awareness that their use preserves flexibility." JA114. West Virginia contends that even as a nominalization, the best system of emission reduction must be used "*for* something." West Virginia Br. 37. But the text of Section 7411 answers what the BSER must be used for: it must be applied to identify the achievable degree of emission limitation, which can in turn be reflected in the standards of performance States establish for existing sources.

Even proceeding from the incorrect premise that "application" must have an indirect object, the ACE Rule's reading fails. The Rule purportedly located in Section 7411(d) an indirect object for Section 7411(a)'s use of "application." Under that view, because Section 7411(d)(1) provides that "standards of performance" be "*for* an existing source," Section 7411 limits the BSER to systems that can be put into operation at and to an individual existing source. *E.g.*, JA1839. The Rule reasoned that because Section 7411 defines an "existing source" as "any stationary source other than a new source," and a "stationary source" as "any building, structure, facility, or installation which emits or may emit any air pollutant," Section 7411 limits the BSER to systems that can be put into operation at and to a particular building, structure, facility, or installation. *Id.*

But that reasoning conflates two distinct statutory provisions and their respective functions. The "for" provision in Section 7411(d)(1) addresses standards of performance *"for"* any existing source that *States* must submit to EPA. By contrast, Section 7411(a)(1) addresses *EPA's* responsibility to determine the BSER that has been adequately demonstrated for the particular category of stationary source at issue. The ACE Rule disregarded the distinct text and functions of these two provisions to manufacture an indirect object that does not exist in Section 7411(a)(1).

In addition to that maladaptation of "for," the ACE Rule erroneously replaced that "for" with yet other prepositions ("at" and "to") that do not appear even in that provision. Section 7411(d)(1) provides that States must set standards of performance "for" any existing source, not "at" or "to" any existing source. 42 U.S.C. § 7411(d); *see also* JA117. Section 7411(a) also does not use "at" to define either a "standard of performance," an "existing source," or a "stationary source." § 7411(a)(1), (3), (6).

The ACE Rule and Petitioners' textual argument thus fail on their own terms.

E. The ACE Rule Compounded Its Erroneous Reading by Unnecessarily Expanding It to Eliminate the Flexibility Congress Accorded States and Power Plants.

The ACE Rule is wholly contrary to the Clean Air Act's provisions affording States flexibility in developing and enforcing standards of performance for existing sources, and power plants in meeting such standards.

The ACE Rule expanded the impact of its erroneous statutory reading by declaring that not only is EPA limited to "at and to" measures in determining the BSER, but also that the authority of States to determine standards of performance also is somehow limited to "at and to" measures. That contorted view of the statute would bar States and power plants from utilizing flexible compliance mechanisms that have become part and parcel of emission limitations in the industry.

Neither the text nor the structure of the Clean Air Act supports the ACE Rule's reading. As the court of appeals observed, "[t]he [Clean Air Act] says nothing about the measures that sources may use to comply with the standards States establish under Section [7411]." JA133.

Indeed, for nearly half a century, Democratic and Republican Administrations alike have relied on the fact that power plants may meet emissions provisions under the Clean Air Act through emission-trading systems. In promulgating the Mercury Rule (*see* Part II.B.2, *supra*), the Bush Administration relied on the assumption that power plants that could be most efficiently retrofitted with control technology would overcontrol their own mercury emissions and sell emission credits to other plants, 70 Fed. Reg. at 28,619. Likewise, the Clinton Administration's rule governing nitrous oxide emissions from municipal solid waste combustors relied on States allowing sources to satisfy emission limits by averaging emissions from different units within one plant and trading credits with other plants. Standards of Performance for New Stationary Sources and Emission Guidelines for Existing

Sources: Municipal Waste Combustors, 60 Fed. Reg. 65,387, 65,402 (Dec. 19, 1995).

In stark contrast, the ACE Rule's insistence that each source must achieve and implement standards of performance without averaging or trading, JA1895-99, was a marked departure from the tools that States and power plants have long utilized.

Power companies, including the Power Company Respondents, favor emission-reduction approaches that allow for trading because these market-driven approaches enable the greatest emission reduction at the lowest cost. Even if BSER were limited to "at and to" measures, there is no basis whatsoever to restrict State authority to allow power plants to use other measures for compliance purposes.

III. THE COURT NEED NOT ADOPT AN ARTIFICIALLY NARROW READING OF SECTION 7411 TO AVOID VIOLATION OF THE NONDELEGATION DOCTRINE.

A. Some Petitioners argue in passing that Section 7411 must be read to avoid constitutional problems that would result from giving EPA unbounded authority to regulate greenhouse-gas emissions. Nat'l Mining Ass'n Br. 48; West Virginia Br. 44-49; Westmoreland Br. 41-44. The court of appeals, however, did not bestow, and EPA does not claim, unbounded authority.

Petitioners in effect ask this Court to choose between, on the one hand, embracing their atextual "at and to" reading of BSER and, on the other hand, giving EPA unrestrained authority, as one Petitioner

would have it, to "restructur[e] (or condemn[]) entire sectors of the economy according to its own policy objectives." Westmoreland Br. 43. But that is a false dichotomy.

The court of appeals did not uphold the CPP Rule; it vacated the ACE Rule that had repealed the CPP Rule, and remanded the matter to EPA "to interpret the statutory language anew." JA104. That is just what EPA is doing. *See* U.S. Br. in Opp'n 33. The court of appeals also did not hold that there were "no limits" on EPA's exercise of its authority regarding emissions under Section 7411(d). North Am. Coal Br. 37; North Dakota Br. 31; West Virginia Br. 13, 19, 47; Westmoreland Br. 17. The court of appeals recognized that Section 7411(a)(1) requires EPA to take into account "cost, any nonair quality health and environmental impacts, and energy requirements" when determining what BSER has been "adequately demonstrated." JA108. Far from concluding that EPA had unbridled authority under Section 7411, the court of appeals properly concluded that these "limitations do not include the source-specific caveat" imposed by the ACE Rule, and that Section 7411(a)(1) imposes "no limits *beyond*" these restrictions. JA106, JA108.

It is unnecessary to avoid nondelegation problems that may lurk within an interpretation of the statute that the agency does not actually espouse. A challenger's argument that the broadest possible reading of a statute might pose nondelegation problems in no way requires skipping past sensible intermediary options. Far from avoiding constitutional issues, invocation of the canon of constitutional avoidance in

these circumstances would inject constitutional questions into a case presenting no such questions, and "*violate[]* [this Court's] general practice of avoiding the unnecessary resolution" of such questions. *See Gregory v. Ashcroft*, 501 U.S. 452, 479 (1991) (White, J., concurring in part).

B. The nondelegation doctrine is not violated, in any event, because the plain text of Sections 7411(a) and 7411(d) provides intelligible principles to guide the agency. Congress did not "fail[] to articulate any policy or standard that would serve to confine the [Agency's] discretion." *See Mistretta v. United States*, 488 U.S. 361, 373 n.7 (1989). Indeed, Congress specified a series of requirements that guide the agency in fulfilling its responsibilities under the Statute.

Sections 7411(a) and 7411(d), in particular, define *what* is regulated (harmful emissions from categories of existing stationary sources subject to standards of performance imposed by the States, 42 U.S.C. § 7411(a)(6)); *which* emissions are regulated (air pollutants not covered by NAAQS or Section 7412, § 7411(d)(1)(A)); and *how* those emissions are to be regulated (through a cooperative-federalism approach in which States establish standards of performance that reflect the degree of emission limitation achievable through application of what EPA has determined (after considering cost, other health and environmental impacts, and energy requirements) is the adequately demonstrated BSER, § 7411(a)(1)). Moreover, the Clean Air Act specifies *why* this statutory and regulatory scheme exists (among other things, "to protect and enhance the quality of the Nation's air resources so as to promote the public health and welfare

and the productive capacity of its population," § 7401(b)(1)). Far from entrusting others with the "legislative Power," Congress enacted a detailed statute that dictates essential policy, leaving States and EPA to identify which among the rapidly evolving means are most capable of limiting emissions while serving cost and electric-supply needs. *See* Section I.C, *supra*.

In enacting Section 7411, Congress enlisted the scientific and technical knowledge of an expert agency to track, among other things, the latest developments in rapidly evolving means of emission control and their costs, and the reduction in emission of various pollutants achievable through application of those means in complex, dynamic markets. Foisting on Congress a nondelegable responsibility for these intricate details is neither practically feasible nor constitutionally required.

Prior to the ACE Rule, EPA itself recognized that the phrase BSER places "significant constraints" when read in its statutory context. The agency concluded that it must (1) cause reduction from sources (ruling out emission offsets), (2) be limited to emission reduction means that sources themselves take or control (ruling out demand-side energy efficiency measures), (3) be "adequately demonstrated," based on a history of implementation and effectiveness, and (4) be "best," taking into account, among other things, emission reduction, "cost" and "energy requirements." 42 U.S.C. § 7411(a)(1); JA541, JA734. These statutory limitations not only provide EPA with an intelligible principle, but sufficiently make the key

policy decisions about how to limit emissions by existing stationary sources so EPA is appropriately tasked with "fill[ing] up the details" in the plan Congress has charted. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.); *id.* at 2139 (Gorsuch, J., dissenting). There is no need to misconstrue Section 7411 to avoid violating the nondelegation doctrine, because this provision raises no such constitutional problems.

Nothing in Article I requires limiting the BSER to measures that can be installed "at and to" specific existing sources. West Virginia concedes that allowing EPA to identify means for emission reduction "at and to" existing fossil fuel-fired power plants (*e.g.*, smokestack scrubbers) as part of the BSER for those plants does not implicate the nondelegation doctrine. West Virginia Br. 46. But the State insists that incorporating "outside the fenceline" emission controls (*e.g*, cofiring biofuels) in determination of the BSER violates the Constitution. *Id.* It is implausible that the separation of powers doctrine should dictate the answer to that choice between different means of controlling emissions from existing fossil fuel-fired power plants.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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