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

IN THE

Supreme Court of the United States

WEST VIRGINIA, *et al.*,

Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

(For Continuation of Caption See Inside Cover)

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DC CIRCUIT

BRIEF IN OPPOSITION OF NON-GOVERNMENTAL ORGANIZATION AND TRADE ASSOCIATION RESPONDENTS

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THE NORTH AMERICAN COAL CORPORATION,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

WESTMORELAND MINING HOLDINGS LLC,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

NORTH DAKOTA,

Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

QUESTIONS PRESENTED

The Clean Air Act provides for "standards of performance" to limit stationary sources' emissions of dangerous air pollutants. Such standards must reflect the degree of emission limitation achievable through application of the "best system of emission reduction" the EPA Administrator determines to be "adequately demonstrated," considering cost and other factors. 42 U.S.C. § 7411(a)(1), (d). In 2019, EPA repealed a 2015 regulation addressing carbon dioxide emissions from existing power plants known as the Clean Power Plan, and promulgated a substitute regulation. The repeal's sole basis was EPA's claim that the "best system of emission reduction" excludes the principal measures power-plant operators actually employ to limit emissions. The court of appeals rejected EPA's interpretation and set aside the 2019 action. The new Administration has since announced that it will conduct a fresh rulemaking and that it will not implement either the 2015 or 2019 rule, neither of which is in effect. The questions presented are:

(1) Whether, before EPA completes a new rulemaking based on a fresh technical record, the Court should review EPA's 2019 interpretation of "best system of emission reduction."

(2) Whether petitioner Westmoreland Mining has met its burden to demonstrate Article III standing to litigate its claim that EPA may regulate existing power plants' carbon dioxide emissions only under the Clean Air Act's hazardous air

pollutant program, 42 U.S.C. § 7412, and, if so, whether that claim, rejected by every presidential administration since 1990, has merit.

RULE 29.6 STATEMENT

American Lung Association; American Public Health Association; Appalachian Mountain Club; Center for Biological Diversity; Chesapeake Bay Foundation, Inc.; Clean Air Council; Clean Wisconsin; Conservation Law Foundation; Environmental Defense Fund; Environmental Law & Policy Center; Minnesota Center for Environmental Advocacy; Natural Resources Defense Council; and Sierra Club, all of which were petitioners and respondent-intervenors in the court of appeals, are non-profit public health and environmental organizations. Advanced Energy Economy; American Clean Power Association (successor of the American Wind Energy Association); and Solar Energy Industries Association, all of which were petitioners in the court of appeals, are nonprofit trade associations. None of these entities has any corporate parent, and no publicly held corporation owns an interest in any of them.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-203a) is reported at 985 F.3d 914.[1]

JURISDICTION

The court of appeals' judgment was entered on January 19, 2021. Each of the four petitions was timely under the Court's order of March 19, 2020. Each petition invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

The background is described in the briefs in opposition of the federal and state respondents.

REASONS FOR DENYING THE WRIT

1. The four petitions for certiorari do not provide any "compelling reasons" to grant review, S. Ct. Rule 10, and should be denied. No federal regulation of carbon dioxide emissions from existing power plants is in effect. EPA has formally stated that it will not implement either the 2015 Clean Power Plan, 80 Fed. Reg. 64,662 (Oct. 23, 2015), or its replacement, the 2019 Affordable Clean Energy ("ACE") rule, 84 Fed.

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[1] References to the appendix are to that accompanying the petition in No. 20-1530.

Reg. 32,520 (July 8, 2019). *See* Resp'ts' Mot. for a Partial Stay of Issuance of the Mandate, at 4-5 & Decl. of Joseph Goffman ¶¶ 12-16, *Am. Lung Ass'n v. EPA*, No. 19-1140 (D.C. Cir. Feb. 12, 2021), ECF No. 1885168. Instead, the Agency intends to undertake a new rulemaking, working from a "clean slate."[2]

Not a single owner or operator of any electric power generation facility—that is, not a single regulated entity—has petitioned for certiorari. Petitioners are states and fuel suppliers who focus their objections principally on the regulatory approach taken in the Clean Power Plan, a six-year-old EPA rule that Petitioner North American Coal Corporation characterizes as a "relic," Pet. 18, and that Petitioners acknowledge never has gone into effect and never will. No court has issued a merits judgment on judicial review of that rule; this Court stayed the 2015 rule in February 2016, Order, No. 15A773 (Feb. 9, 2016); and in 2017 the D.C. Circuit, at EPA's request and with the support of Petitioners, placed the litigation challenging the 2015 rule in abeyance. After EPA repealed the Clean Power Plan in 2019, the en banc D.C. Circuit dismissed the litigation over it as moot. Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Sept. 17, 2019), ECF No. 1806952.

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[2] *Hearing on the Nomination of Michael S. Regan to be Administrator of the Environmental Protection Agency Before the S. Comm. on Envt. & Pub. Works*, 117th Cong. 42-43 (2021).

Both the Clean Power Plan and ACE were based upon factual records that are now stale. Both rules failed to anticipate or reflect large and continuing changes in the makeup and emissions performance of a rapidly changing electric power sector. By 2019, annual power sector carbon dioxide emissions were already lower than the levels projected to be achieved under the Clean Power Plan by *2030*—even though the Clean Power Plan never went into effect.[3] When repealing the rule in 2019, EPA found that the Clean Power Plan would achieve *no* emission reductions beyond the business-as-usual scenario with no federal carbon dioxide regulation for existing power plants,

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[3] *Compare* EPA, Regulatory Impact Analysis for the Clean Power Plan Final Rule, at ES-2, tbl. 6 and ES-3, tbl. 7, EPA-HQ-OAR-2013-0602-36877 (Aug. 2015) (projecting power sector carbon dioxide emissions of 1,812-1,814 million short tons in 2030), https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-nsps-egus_2015-08.pdf, *with* EPA, Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019, at ES-7 tbl. ES-2 (Apr. 2021) (reporting power sector emissions of 1,606 million metric tons in 2019, equivalent to 1,770 million short tons), https://www.epa.gov/sites/default/files/2021-04/documents/us-ghg-inventory-2021-chapter-executive-summary.pdf. *See also* EPA, Regulatory Impact Analysis for the Repeal of the Clean Power Plan and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units, at 2–35, EPA-HQ-OAR-2017-0355-26743 (June 2019) ("ACE RIA") (noting Edison Electric Institute's 2018 comment that Clean Power Plan's emissions-reduction total for 2030 would be achieved before Plan's initial compliance date in 2022), https://www.epa.gov/sites/default/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf.

and that its repeal would secure no cost savings for the industry. The Agency's Regulatory Impact Analysis on the 2019 repeal stated:

> [I]t is abundantly clear that national existing-source power sector emissions even without the CPP [Clean Power Plan] in effect are below the requirements set forth under the CPP, when the goals of the CPP are viewed collectively. This is also true at the regional level. Considering the national emission trends, the regional trends, the flexibility of the CPP, and the delayed time-line of the CPP, it is likely that there would be no difference between a baseline that includes the CPP and one that does not. For all these reasons, the EPA believes that repeal of the CPP under current and reasonably projected market conditions and regulatory implementation is not anticipated to have a meaningful effect on emissions of [carbon dioxide,] other pollutants or regulatory compliance costs.[4]

For its part, ACE would have, at most, reduced emissions less than one percent below the business-as-usual trends already occurring in the market, according to EPA's analysis. ACE RIA at 3-11, tbls. 3-3 and 3-15, tbl. 3-8 (projections for 2025, 2030, and 2035).

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[4] ACE RIA, *supra*, n.3, at 2-35.

EPA is now developing a new rulemaking for existing coal- and natural gas-fired power plants.[5] In that proceeding, the Agency will take into account the substantial changes that have occurred in the power sector and examine afresh what should be considered the "best system of emission reduction." The Administrator's consideration of available systems of emission reduction will likely include options, including carbon capture technology and natural gas cofiring, that do not implicate the source-specific statutory limitation that Petitioners claim is imposed by the Clean Air Act (*e.g.*, W. Va. Pet. 30-31, 33). Indeed, during the prior rulemaking proceedings and in anticipation of EPA's new one, many stakeholders have advocated that EPA consider such measures, which can achieve significant emission reductions,[6] as well as forms of flexibility that reflect techniques power companies already use to manage emissions. At this juncture, however, it cannot be known whether

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[5] The 2019 ACE rule deferred Section 7411(d) regulation of natural gas-fired plants—now the largest part of the power sector—for future rulemaking. 84 Fed. Reg. at 32,534.

[6] *See*, *e.g.*, Maya Domeshek and Dallas Burtraw, Resources for the Future, *Reducing Coal Plant Emissions by Cofiring with Natural Gas* (May 18, 2021), https://media.rff.org/documents/RFF_IB_21-04.pdf; M.J. Bradley & Assoc. Pipeline Analysis 11-12, Att. to Environmental Defense Fund ACE Comments, EPA-HQ-OAR-2017-0355-24419 (Oct. 31, 2018); Clean Air Task Force, Comments on the Clean Power Plan 21-56, EPA-HQ-OAR-2013-0602-22612 (Dec. 1, 2014).

the new rule will include features that implicate the statutory interpretative questions on which Petitioners ask this Court to opine regarding the proper scope of "best system of emission reduction."

Petitioners are thus seeking an advisory opinion concerning regulations that they believe EPA *might adopt in the future*, which Petitioners fear may resemble a defunct rule that they opposed. But this Court does not sit to review past rules that will not be implemented, nor to pass upon possible future rules that have not been adopted. It does not take up "imaginary" cases, *Wash. State Grange Party v. Wash. State Republican Party*, 552 U.S. 442, 455 (2008); "adjudicate hypothetical or abstract disputes," *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021); or "possess a roving commission to publicly opine on every legal question," *id.* And even if, after reconsidering the approach on a "clean slate," the Agency had already made clear the statutory construction it intended to apply in the future, the Court would still properly await the promulgation of a new regulation to review, and "'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 v. Perry*, 570 U.S. 693, 704-05 (2013) (quoting *Raines v. Byrd*, 521 U.S. 811, 820 (1997)).

2. As this Court previously noted with respect to the very same statutory provision, source category, and air pollutant, "the first decider under the Act is

the expert administrative agency, the second, federal judges." *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 427 (2011). A real controversy over an actual, operative EPA regulation is a necessary prerequisite to reasoned judicial consideration of the scope of Section 7411. If any of the legal issues Petitioners seek to raise are actually presented in a future final rule, then they, along with any other ostensibly aggrieved parties, will be able to pursue judicial review of that final agency action. *See id.* at 426; 42 U.S.C. § 7607(b). Reviewing courts would then be able to judge EPA's regulation in the light of its actual provisions and a real-world administrative record, not litigants' mere speculations. That some Petitioners portray their claims as having "constitutional[]" dimensions, *e.g.*, W. Va. Pet. i, is all the more reason why the Court should wait to see if resolving those questions proves necessary, and, if so, to do so in the context of a live controversy over a regulation that the administering agency actually intends to implement. *Cf. Ashwander v. TVA,* 297 U.S. 288, 345-48 (1936) (Brandeis, J., concurring).

None of the Petitioners nor their supporters contend that either the 2015 or 2019 rule will ever be implemented. Instead, the petitions brim with confident prognostications about what EPA "will" do in its *new* rulemaking. *E.g.*, W. Va. Pet. 3, 15, 22; North Am. Coal Pet. 14, 18, 20; N. Dak. Pet. 33. Petitioners suggest that the yet-to-be-proposed new rule will (or even *must*, under the D.C. Circuit's decision, *see* Westmoreland Pet. 19) replicate the

Clean Power Plan, including, for example, provisions for fossil-fuel burning generators to buy emission reduction credits created by solar or wind generators, which Petitioners characterize as "forcing" those generators to "subsidize" competitors. North Am. Coal Pet. 1. *See also, e.g.*, *id*. at 14 (asserting that EPA will adopt a "Clean Power Plan 2.0"). In the absence of even a proposed rule (let alone a final one), such forecasts are nothing but speculation. Petitioners admit that the Clean Power Plan is not before the Court, and they offer no sound basis to assume that it will provide the template for whatever regulation emerges from EPA's new rulemaking, or indeed to make any particular assumptions about what a new power plant rule will look like.

The D.C. Circuit's decision does not compel EPA to adopt any particular regulatory approach, let alone mandate the Clean Power Plan's. And far from holding that EPA has "no limits" when it regulates under Section 7411(d), Westmoreland Pet. i, the panel emphasized "[t]he numerous substantial and explicit constraints on EPA's selection of a best system of emission reduction," Pet. App. 94a, *see also* Pet. App. 90a, 93a, 95a (describing the congressional "reins" and "rope" "cabin[ing]" EPA discretion). The panel held that "EPA lacks authority to 'order the wholesale restructuring' of anything." Pet. App. 100a. The decision below merely rejected the claim, based on words that do not appear in Section 7411, that EPA is statutorily restricted to considering only emission controls that can be applied "to" or "at" an individual

source. *See*, *e.g.*, Pet. App. 64a-65a. The panel did not require EPA, on remand, to adopt a rule resembling the Clean Power Plan.

3. Some petitioners also urge that certiorari is warranted to clarify the proper application of the "major questions" doctrine. W. Va. Pet. 18-19; Westmoreland Pet. 22–23. It is not.

No party below asserted that the major questions doctrine denies EPA *authority* to regulate power plants' carbon dioxide emissions in the first place; to the contrary, the State Petitioners here intervened below to *support* the 2019 ACE rule, which exercised that authority. In a decision Petitioners fail even to cite, this Court has affirmed that Section 7411(d) "'speaks directly'" to carbon dioxide emissions from power plants, *Am. Elec. Power*, 564 U.S. at 424, and that "Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants," *id.* at 426. The Court further explained that, under the statute, regulation of greenhouse gas emissions from existing coal-fired power plants requires careful consideration of "environmental benefit," "our Nation's energy needs," and "the possibility of economic disruption," and that "Congress entrust[ed] such complex balancing to EPA in the first instance, in combination with state regulators." *Id.* at 427.

Furthermore, any "major questions" arguments related to the particular *manner* in which EPA exercises its Section 7411(d) statutory authority must

await the result of EPA's new rulemaking. A case involving an agency's repeal of a regulatory "relic" that will never be implemented is an unsuitable vehicle for elaborating upon general administrative law doctrines that turn upon regulations' real-world consequences.

It would be particularly inappropriate to use Petitioners' backward-looking critiques of the Clean Power Plan as an occasion to explore the major questions doctrine. According to Petitioners, that doctrine applies to regulations that carry a certain "'economic and political' heft." W. Va. Pet. 26. But while some Petitioners reproduce forecasts from 2015 about the Clean Power Plan's ostensibly sweeping effect, they fail to acknowledge the dramatic changes that have already occurred in the sector or even to mention the last administration's 2019 finding that, because of those changes, the 2015 rule would achieve no emission reductions relative to business-as-usual trends while imposing no costs on operators. *Supra*, pp. 3-5 & nn. 3, 4. Indeed, today it is readily apparent that the now six-year-old projections of both EPA and challengers regarding the costs and impacts of the 2015 Clean Power Plan were grossly overstated. A never-implemented regulation that would have imposed *no* costs and reduced *no* emissions is not a proper vehicle for this Court to expound upon a doctrine that, according to Petitioners, is reserved for regulations that impose *extraordinary* costs and have *transformational* impacts on society.

4. Westmoreland Mining (Pet. 26-32) asks the Court to take up its claim—raised by no other petitioner—that once EPA regulates emissions of "hazardous air pollutants" from power plants under Section 7412 of the Clean Air Act, the agency is precluded from regulating power plants' emissions of any other dangerous air pollutants, such as carbon dioxide, under Section 7411(d). The argument rests on a fanciful reading of a 1990 amendment originating in the House of Representatives that merely sought to update a cross-reference to Section 7412, thereby retaining a statutory proviso that EPA cannot regulate emissions of an air pollutant under Section 7411(d) when the relevant sources' emissions of *that pollutant* are regulated under Section 7412. The 1990 Clean Air Act Amendments also included a Senate-originating provision updating the same cross-reference, which likewise prevents duplicate regulation of pollutants; both amendments were signed into law.[7]

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[7] As amended by the House-originating language, Pub. L. No. 101-549, § 108(g), 104 Stat. 2399, 2467 (1990), and reflected in the U.S. Code, Section 7411(d)(1) provides that each State shall:

> establish[] 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 [the NAAQS program] or emitted from a source category which is regulated under section 7412 of this title [the Hazardous Air Pollutant program] but (ii) to which a

Every presidential administration since the 1990 Clean Air Act Amendments has rejected the proposition advanced in Westmoreland's petition. Contrary to Westmoreland's claim, Pet. 27, each administration has understood that what the statute prohibits is regulating a source's emissions of *any given pollutant* under both Sections 7411 and 7412.[8] For decades, EPA has in fact regulated dangerous pollutants from sources under Section 7411(d) and the more narrowly defined "hazardous" pollutants from the same sources under Section 7412.[9]

> standard of performance under this section would apply if such existing source were a new source[.]

As amended via the Senate-originating language, Pub. L. No. 101-549, § 302(a), 104 Stat. 2399, 2574 (1990), Section 7411(d) provides that each State shall:

> establish[] 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 [the NAAQS program] or section [74]12(b)(1)(A) but (ii) to which a standard of performance under this section would apply if such existing source were a new source[.]

[8] *See, e.g.*, 56 Fed. Reg. 24,468, 24,469 (May 30, 1991); 65 Fed. Reg. 66,672, 66,674-75 (Nov. 7, 2000); 70 Fed. Reg. 15,994, 16,031-32 (Mar. 29, 2005); 73 Fed. Reg. 44,354, 44,417-18 (July 30, 2008); 80 Fed. Reg. 64,662, 64,710 (Oct. 23, 2015); 84 Fed. Reg. 32,520, 32,533 (July 8, 2019).

[9] *See* 65 Fed. Reg. 66,672, 66,674-75 (Nov. 7, 2000) (proposing Section 7412 regulation of hazardous pollutants from landfills and explicitly recognizing that Section 7411(d) emission guidelines for non-hazardous pollutants from landfills would

Even if this longstanding and consistent position warranted further examination, this would not be the case to consider it. Westmoreland, the sole petitioner to press this issue, is not a regulated party; it is a fuel supplier. To reach the merits of its issue, the Court would need to determine that Westmoreland has standing to sue. It does not. Westmoreland's "asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992). The causation and redressability requirements for its Article III standing "hinge on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well," making its standing "'substantially more difficult' to establish." *Id.*[10]

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continue to apply); 68 Fed. Reg. 2,227, 2,229 (Jan. 16, 2003) (finalizing the proposed standards while continuing to regulate non-hazardous emissions from landfills under Section 7411(d)); 68 Fed. Reg. 74,868 (Dec. 29, 2003) (approving state implementation plans to regulate landfill gases under Section 7411(d) that apply concurrently with Section 7412 regulations for landfills).

[10] Westmoreland's proffer below only highlights its failure to meet its Article III burden. Decl. of Jeremy Cottrell at ADD-5, No. 19-1140 (D.C. Cir. Aug. 13, 2020), ECF No. 1856447. That 2020 declaration relied on a 2015 report predicting that the Clean Power Plan would decrease coal consumption in Montana, *id.* ¶ 5, but nowhere acknowledged that decreases in coal generation since 2015 occurred for reasons other than the never-implemented Clean Power Plan. The declaration referenced an ACE "illustrative policy scenario" hypothesizing a one-percent

Federal regulation of power plants' air pollution emissions cannot simply be *assumed* to cause harm to fuel suppliers—a fact highlighted by EPA's 2019 finding that, due to the influence of exogenous market trends including lower natural gas prices, the Clean Power Plan would have had *no impact* on the power industry relative to business-as-usual, *supra*, pp. 3–4. Whether Westmoreland will be substantially and directly affected by the actions of regulated parties in response to a new EPA regulation under Section 7411(d) *necessarily* depends upon the requirements of that new rule. At least until a new federal emission guideline is in place, it would be impossible to assess any claimed impacts on coal suppliers such as

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reduction in overall coal use by 2030. *Id.* ¶ 5 (citing 84 Fed. Reg. at 32,562). But even assuming that a hypothetical future one-percent reduction in aggregate national demand could establish a particular supplier's standing today, the "scenario" was only "one possible outcome," 84 Fed. Reg. at 32,561, under a rule that left it to states whether to adopt any emissions control requirements at all, *see* 40 C.F.R. § 60.5740a(a)(1), (2)(i); 84 Fed. Reg. at 32,537–38, 32,550–51. Indeed, EPA acknowledged that ACE could, depending upon states' implementation choices, *increase* coal plants' operations by making them more profitable to operate. Regulatory Impact Analysis for the Proposed Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units (2018), EPA-HQ-OAR-2017-0355-21182 (Aug. 2018), https://www.epa.gov/sites/default/files/2018-08/documents/utilities_ria_proposed_ace_2018-08.pdf. Invocations of "uncertainty" about "customer decisions," Cottrell Decl. ¶ 5, further highlight the speculative inferences involved. And Westmoreland nowhere tried to explain how regulation under Section 7412 rather than Section 7411(d) would redress any harms to coal suppliers.

Westmoreland, including whether any of their claimed harms would be fairly traceable to the regulation (rather than exogenous factors), or whether a judicial decision sustaining Westmoreland's attack on EPA's Section 7411(d) authority would likely redress its asserted injury.

There are reasons to doubt that Westmoreland could satisfy the causation and redressability requirements for Article III standing even if an operative EPA regulation under Section 7411(d) were already in place. Westmoreland contends that the 1990 Amendments "dramatically increas[ed]" EPA's authority under Section 7412 to authorize control of environmentally dangerous pollutants, including carbon dioxide, under that section. Coal Industry Pet'rs Final Opening Br. 21, No. 19-1140 (D.C. Cir. Aug. 13, 2020), ECF No. 1856447. Since 1990, Westmoreland argues, EPA has had a "mandatory obligation to list" carbon dioxide under Section 7412, the hazardous pollutant program. *Id*. at 34.[11] But that would likely have a *greater* impact on power companies' demand for Westmoreland's product, because hazardous pollutant requirements under Section 7412 are in key respects *more* stringent than those under Section 7411(d). Indeed, Westmoreland

[11] Westmoreland suggested that certain *low-emitting* sources could be exempted from regulation under Section 7412, Coal Industry Pet'rs Opening Br. 33-34 n.8. Power plants, however, are the very largest stationary sources of carbon dioxide emissions, and Westmoreland has not suggested that power plants could be exempted on that basis.

itself calls Section 7412 "the Act's most stringent and burdensome regulatory provision." Pet. 7. Any assertion that a favorable decision on its Section 7412/Section 7411(d) argument would redress Westmoreland's claimed injury from decreased coal sales is thus counterintuitive and, at the very least, impermissibly speculative. *See*, *e.g.*, *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 410-14 (2013).

Justiciability problems aside, Westmoreland's statutory argument is meritless. The argument depends upon nullifying the Senate-originating statutory language—approved by both houses and signed into law by the President—which makes clear that what Congress sought to foreclose were efforts by EPA to use Section 7411(d) to regulate sources' emissions of pollutants listed under Section 7412(b). The Senate-originating amendment confirms that Congress's purpose in 1990 was to merely update the Section 7412 cross-reference so as to continue to prevent duplicate regulation of the same pollutants from the same sources, not to introduce dramatic new limitations into the scope of Section 7411. *See* Pet. App. 130a-131a.

Westmoreland's treatment of the House-originating language is likewise wholly unpersuasive. Westmoreland tries to wrench from its complex phrasing an odd prohibition: If EPA has previously regulated hazardous air pollutants from a source category under Section 7412, it may not regulate other dangerous pollutants from that source category under

Section 7411(d).[12] As the panel below explained, Westmoreland's reading is inconsistent with Congress's manifest intent simply to update the above-described statutory cross-reference. Pet. App. 126a, 130a. The most natural reading of the House-originating amendment is that (as prior to 1990) EPA may not regulate "any pollutant" from a given source category under Section 7411(d) if emissions of *that pollutant* from the same category have already been regulated under Section 7412. As the panel concluded, the House text "define[s] which 'air pollutant[s]' cannot be regulated under Section 7411(d) because those same pollutants are already regulated under the [National Ambient Air Quality Standards] or Hazardous Air Pollutants programs," Panel Op. 119. Unlike Westmoreland's interpretation, this reading comports with this Court's observation in *Am. Elec. Power*, 564 U.S. at 424 n.7, that regulation is

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[12] Under Westmoreland's theory, Section 7411(d) regulation would be foreclosed only if EPA regulated a source category's hazardous air pollutants under Section 7412 *before* seeking to regulate its non-hazardous emissions under Section 7411(d); there would be no statutory barrier to Section 7411(d) regulation if the sequence of these regulations were reversed. This "fluke of timing," Pet. App. 135a, is further proof of the theory's lack of coherence. And its severe flaws only go on: If the "literal" meaning of the House text, *see* Westmoreland Pet. 27, were dispositive, then EPA could regulate any pollutant (such as carbon dioxide) "for which air quality criteria have not been issued," regardless of whether the source category or pollutant is regulated under Section 7412, since that text uses the disjunctive "or." *See* 42 U.S.C. § 7411(d)(1)(i) (tenth word).

precluded under Section 7411(d) when the "pollutant in question" has been regulated under Section 7412, and with the central holding of that case: that Section 7411(d) authorizes EPA to regulate carbon dioxide emissions from existing power plants, *id*. at 424-27.

Westmoreland's strained theory conflicts with additional language included in the 1990 Amendments to make abundantly clear that the 1990 Amendments did not diminish EPA's pre-existing Section 7411 authority. *See* 42 U.S.C. § 7412(d)(7) ("No emission standard or other requirement promulgated under this section shall be interpreted, construed or applied to diminish or replace the requirements of a more stringent emission limitation or other applicable requirement established pursuant to section 7411 of this title"); *see also* Pet. App. 133a. Westmoreland's argument is untenable, and no further review on this issue is warranted.

CONCLUSION

The petitions for certiorari should be denied.

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AUGUST 2021