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

IN THE

Supreme Court of the United States

State of WEST VIRGINIA, et al.,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

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.

State of NORTH DAKOTA,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

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

BRIEF FOR STATES AND MUNICIPALITIES IN OPPOSITION

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QUESTIONS PRESENTED

Section 111 of the Clean Air Act (42 U.S.C. § 7411) provides that the Environmental Protection Agency (EPA) shall select the "best system of emission reduction" that has been "adequately demonstrated" for categories of stationary sources such as power plants, after taking into account several enumerated criteria. With respect to existing sources, EPA issues guidelines reflecting "the degree of emission limitation achievable through the application of the best system of emission reduction," and the States use EPA's guidelines to develop state plans. The questions presented are:

1. Whether a now-defunct EPA rulemaking erred in concluding that, in determining the "best system of emission reduction," the agency is forbidden from considering any measures besides those that the agency judged could apply "at and to" an individual source—including measures that have been widely adopted and proven to significantly reduce emissions?

2. Whether EPA is prohibited from regulating emissions of dangerous pollutants from power plants under Section 111(d) if it already regulates other pollutants from those sources under Section 112 (42 U.S.C. § 7412), the Act's hazardous air pollutant program?

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INTRODUCTION

Four related petitions seek this Court's review of a decision invalidating the Affordable Clean Energy (ACE) Rule, a regulation that the Environmental Protection Agency (EPA) has abandoned and that imposes no obligations on any State or other entity. Petitioners nonetheless ask this Court to grant their petitions based on their speculation about what EPA might include in a future rulemaking. This Court should reject petitioners' demands for an advisory opinion and deny the petitions.

EPA issued the ACE Rule as an exercise of its authority to regulate carbon dioxide (CO_2) emissions from existing power plants under Section 111(d) of the Clean Air Act. In the ACE Rule, EPA interpreted Section 111 to prohibit the agency from considering emission reduction measures other than those that can be installed at each individual source and implemented without regard to other sources. That led EPA to reject measures that are widely adopted in the power industry and that have proven effective at reducing CO_2 emissions from power plants. The U.S. Court of Appeals for the District of Columbia Circuit rejected EPA's view that Section 111 compels that specific limitation on the agency's decision-making process and thus vacated and remanded the rule. The court of appeals also rejected an argument made by certain coal companies that EPA was precluded from regulating CO_2 emissions from existing power plants under Section 111(d) because it also regulates their emissions of hazardous air pollutants under Section 112.

EPA has announced that it is undertaking a new rulemaking to regulate CO_2 emissions from existing power plants, which will supersede the abandoned rule.

But the agency has not yet proposed, let alone decided, what measures it may adopt in this future rulemaking. In the meantime, neither the ACE Rule nor a prior EPA regulation, the Clean Power Plan, imposes any obligations regarding CO_2 emissions from existing power plants on States or other regulated entities.

Certiorari is not warranted under these circumstances. Petitioners' arguments improperly rely on speculation about what EPA might do in a future regulation. But this Court does not offer preemptive advice on ongoing agency rulemaking. Such premature review would be particularly inappropriate here, when this Court has already recognized that Congress delegated to EPA in the first instance the complex and fact-driven responsibility to regulate power-plant CO_2 emissions. *See American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 428 (2011) ("*AEP*"). To the extent that petitioners believe themselves to be aggrieved when EPA completes its new rulemaking, they may challenge the new rule on applicable grounds at that time.

Certiorari is unwarranted for the additional reason that the decision below is correct. With respect to EPA's selection of the best system of emission reduction under Section 111, the narrow and discrete question addressed by the court of appeals was whether the statute compelled EPA's restrictive view of the emission-reducing measures that it could consider. The court correctly observed that EPA's asserted at-the-source limitation is not mentioned in the text of Section 111—in sharp contrast to other limitations that Congress expressly identified—and that the structure and history of Section 111 also did not compel EPA's interpretation. The court of appeals also rightly rejected petitioner Westmoreland Mining Holdings' argument that EPA lacks authority to regulate existing power plants under

Section 111(d) at all because power plants are already regulated as to entirely different pollutants under Section 112; that argument is flatly inconsistent with Section 111(d)'s enacted text and its well-established role of assuring that the Clean Air Act authorizes appropriate regulation of all dangerous pollutants, with no gaps in coverage. This Court should accordingly deny the petitions.

STATEMENT

1. Section 111 of the Act directs EPA to set standards of performance for categories of *new* stationary sources that cause or significantly contribute to air pollution that endangers public health or welfare. 42 U.S.C. § 7411(b)(1). 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 which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

Id. § 7411(a)(1).

For *existing* sources in the categories for which EPA has issued new-source standards, Section 111(d) uses a cooperative-federalism approach to address emissions of dangerous pollutants. EPA first selects "the best system of emission reduction" that has been "adequately demonstrated" for such sources, and issues

emission guidelines that reflect the degree of emission reduction achievable based on application of the best system. *See id.* § 7411(a)(1), (d)(1). "[I]n compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction." *AEP*, 564 U.S. at 424.

2. In 2009, EPA found that greenhouse gases—including CO_2—endanger public health and welfare by causing heat waves, smog, droughts, intensification of storms, disease, and rising sea levels. Endangerment and Cause or Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496, 66,497, 66,524-25, 66,532-33 (Dec. 15, 2009). In 2011, this Court held that EPA is the "primary regulator of greenhouse gas emissions," and confirmed that Section 111(d) is a source of EPA authority to regulate such emissions from existing power plants. *AEP*, 564 U.S. at 428. "The critical point is that Congress delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants." *Id.* at 426.

In 2015, EPA issued regulations to limit CO_2 pollution from new fossil-fueled power plants under Section 111(b), Standards of Performance for Greenhouse Gas Emissions from New, Modified, and Reconstructed Stationary Sources, 80 Fed. Reg. 64,510 (Oct. 23, 2015), and from existing power plants under Section 111(d) (the Clean Power Plan), Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015). In considering the best system of emission reduction in the Clean Power Plan, EPA found that, as a matter of practice in the power industry, "[g]eneration from one generating unit can be and routinely is substituted for generation from another generating unit" to satisfy electricity demand while meeting the

power grid's many "technical, environmental, and other constraints and managing its costs." *Id.* at 64,725. This well-established practice—sometimes referred to as "generation shifting"—is the result of the interconnected nature of the electric grid, under which "any electricity that enters the grid immediately becomes a part of a vast pool of energy that is constantly moving." *New York v. FERC*, 535 U.S. 1, 7 (2002).

In the Clean Power Plan, EPA noted that power companies themselves rely on generation shifting for both environmental and economic reasons. 80 Fed. Reg. at 64,725, 64,803-06. Past industry practice indicated that, even if EPA were to identify a best system of emission reduction using bolt-on, at-the-source controls, affected plants would still choose to meet their emission limits by shifting generation to lower- or zero-emission generation because doing so would be cheaper than installing bolt-on technology. *Id.* at 64,784. Based on those practices, EPA determined that, with respect to CO_2 emissions from power plants, the best system would consist of three "building blocks": (1) improving heat rate (efficiency) at coal-fired plants; (2) substituting electricity generation from gas-fired plants for generation from coal-fired plants; and (3) substituting generation from zero-emitting sources for generation from coal-fired and gas-fired plants. *Id.* at 64,666-67.

The Clean Power Plan never took effect. A group of States and industry groups challenged the Clean Power Plan, *see West Virginia v. EPA*, D.C. Cir. No. 15-1363, and in February 2016, this Court stayed the Plan, U.S. Sup. Ct. No. 15A773. After the 2017 change in presidential administrations, the D.C. Circuit placed the case into abeyance, and eventually dismissed the case in 2019 when EPA replaced the Clean Power Plan with the ACE Rule.

When it issued the final ACE Rule, EPA found that—notwithstanding the stay of the Clean Power Plan and lack of any nationally applicable CO_2 rule for power plants—industry and market trends across the United States would cause the power-plant sector to meet the emission-reduction goals the Clean Power Plan had set for 2030 a decade earlier. EPA, Office of Air Quality Planning & Standards, Health & Envtl. Impact Div., *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* 2-12 (June 2019).

4. In July 2019, EPA finalized the ACE Rule, which consisted of two distinct actions relevant here. Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019). First, EPA repealed the Clean Power Plan based on a new interpretation of Section 111 as unambiguously limiting the agency to selecting a best system that relies solely on emission controls "applied to and at the level of the individual source." *Id.* at 32,529. EPA concluded that this interpretation precluded the agency from relying on the electric grid's uniquely interconnected structure and the actions States and power companies have already been taking to prioritize cleaner generation over dirtier generation. EPA conceded that such an approach "might be a workable policy for achieving sector-wide carbon-intensity reduction goals," but insisted that "what is not legal cannot be workable," and that the Act left EPA "no interpretive room" to adopt such an approach. *Id.* at 32,532.

Second, EPA replaced the Clean Power Plan's emission guidelines with new guidelines that relied solely on minor efficiency improvements to individual coal-fired plants, and that rejected several other

comparatively more effective at-the-source measures, including any controls for natural gas- or oil-fired plants. *Id.* at 32,534. EPA projected that the ACE Rule's approach would result in less than one percent reduction in CO_2 emissions from the power sector in 2030. *See Regulatory Impact Analysis, supra*, at ES-6. Moreover, the ACE Rule would have prohibited States and sources from using measures such as emissions trading or averaging even for purposes of complying with the ACE Rule's targets. 84 Fed. Reg. at 32,555-56.

5. A group of States, municipalities, organizations, and power companies challenged both aspects of EPA's rulemaking. The D.C. Circuit granted the petitions for review, vacated the ACE rule, and remanded to EPA for further proceedings. (*See* Pet. App. 163a).

Regarding EPA's repeal of the Clean Power Plan, the court of appeals found that EPA had improperly relied "on the erroneous legal premise that the statutory text expressly foreclosed consideration of measures other than those that apply at and to the individual source." (Pet. App. 162a). The court held that Section 111(a)—the provision that empowers EPA to set the best system—contains other express limitations on EPA's authority, such as the requirement that EPA "study all 'adequately demonstrated' means of emission reduction" (Pet. App. 56a), but that those "limitations simply do not include the source-specific caveat" that EPA sought to impose. (Pet. App. 54a).

The court rejected EPA's attempt to limit Section 111(a) by inferring that an "indirect object" must be found for that provision's use of the word "application," and then finding that indirect object in a different subsection, Section 111(d)(1). (Pet. App. 58a-63a.) The

court further held that, even accepting that unnecessary approach, EPA's interpretation was erroneous because it inexplicably substituted the prepositions "at" and "to" where the statutory text actually reads "*for* any existing source." (Pet. App. 63a-65a.) "The word Congress actually used—'for' the source—lacks the site-specific connotation" of the prepositions "at" and "to." (Pet. App. 64a.)

In addition to finding no textual support for EPA's statutory interpretation, the court of appeals found that the history, structure, and purpose of Section 111 refuted that interpretation. "Over the last half century, no prior Administrator" had taken the position that Section 111 forecloses "all but at-the-source means of emission control." (Pet. App. 73a.) For example, during the George W. Bush Administration, EPA had adopted a cap-and-trade program under Section 111(d) to reduce mercury emissions from power plants. (Pet. App. 74a.)

The court of appeals also held that, because *AEP* had already recognized that EPA could rely on Section 111 to regulate CO_2 emissions from power plants, this case did not implicate the major-questions doctrine, which tests whether Congress has plausibly given an agency authority to regulate a particular problem. (Pet. App. 83a, 85a.) Moreover, the court found that, far from being transformative, the Clean Power Plan had instead been based on "generation-shifting measures that are already widely in use by States and power plants." (Pet. App. 93a.)

Finally, the court of appeals rejected an argument, raised by certain coal companies, that EPA lacks authority to regulate CO_2 emissions from existing power plants under Section 111(d) because it regulates emissions of entirely different, hazardous pollutants

from the same power plants under Section 112. (Pet. App. 109a-146a.)

In February 2021, the court of appeals granted EPA's motion to withhold issuance of the mandate with respect to the vacatur of the repeal of the Clean Power Plan because the agency intends to reconsider afresh its approach to CO_2 emissions from existing power plants. (*See* Order, D.C. Cir. doc. 1886386.) Under the court of appeals' order, the mandate will not issue "until the EPA responds to the court's remand in a new rulemaking action." (*Id.)* In a status update filed in May 2021, EPA informed the court of appeals that the agency is engaged in "administrative proceedings to respond to the Court's remand in a new rulemaking action." (Status Report (May 24, 2021), D.C. Cir. doc. 1899829.)

REASONS TO DENY THE PETITIONS

I. Certiorari Is Unwarranted Because EPA Is Reconsidering Its Approach to Regulating CO_2 Emissions from Power Plants and Petitioners Face No Present Obligations.

A. EPA's Ongoing Rulemaking Process Makes This Case an Exceptionally Poor Vehicle for Reviewing the Questions Presented.

After the court of appeals' decision and the change in presidential administrations, EPA made clear that it is beginning afresh in its approach to regulating CO_2 emissions from power plants. Moreover, as EPA informed States in February 2021, neither the ACE Rule nor the Clean Power Plan is in effect, and States and power plants face no immediate regulatory burden on CO_2 emissions from existing plants. Joseph

Goffman, EPA Acting Asst. Adm'r, Memorandum, *Status of Affordable Clean Energy Rule and Clean Power Plan* (Feb. 12, 2021) (D.C. Cir. doc. 1885168, Ex. A.) Certiorari is not warranted when the rule under review imposes no obligations and will inevitably be superseded, and when judicial review will be fully available for any party that believes it is aggrieved by EPA's future rule.

Petitioners nonetheless urge this Court to grant certiorari "simply to get an answer" from this Court on the questions presented. (W. Va. Pet. 21.) But petitioners are transparently concerned not with the ACE Rule or any present regulatory obligations, but instead with "the agency's next rule" (W. Va. Pet. 16) or the (nonexistent) "Clean Power Plan 2.0" (N. Am. Coal Corp. (NACC) Pet. 14). Indeed, the petitions are rife with speculation about "EPA's steps on remand and every regulation under the statute to follow" (W. Va. Pet. 3), including the unfounded claim that EPA might adopt policies going beyond any prior Section 111(d) rule, such as "a carbon tax on emissions from any building" or a mandate that "residential housing be shunted toward solar power" (NACC Pet. 14).

Petitioners' speculation about the approaches EPA might adopt in a future rule governing CO_2 emissions from existing power plants—including whether and to what degree such a rule will incorporate the "building blocks" previously adopted by the Clean Power Plan—do not create a live dispute for this Court to resolve. Petitioners' demand that this Court issue a legal ruling that would preemptively handcuff speculative exercises of agency authority improperly seeks an advisory opinion of the type that this Court has steadfastly refused to issue. *See Carney v. Adams*, 141 S. Ct. 493, 498 (2020); *see also TransUnion LLC v. Ramirez*, 141

S. Ct. 2190, 2203 (2021) ("Federal courts do not possess a roving commission to publicly opine on every legal question. Federal courts do not exercise general legal oversight of the Legislative and Executive Branches, or of private entities.").

The rule against issuing such advisory opinions has special force in this context, where Congress has tasked EPA with the responsibility to consider regulations in the first instance, and where the nature and focus of any legal challenge will depend on the details of the regulatory scheme that EPA actually adopts. As this Court has previously recognized, the Clean Air Act has a "prescribed order of decisionmaking—the first decider under the Act is the expert administrative agency, the second, federal judges." *AEP*, 564 U.S. at 427. That "prescribed order" reflects the fact that "[t]he appropriate amount of regulation in any particular greenhouse gas-producing sector cannot be prescribed in a vacuum," *id.*, and instead requires the marshaling of "scientific, economic, and technological resources [that] an agency can utilize" but that courts lack, *id.* at 428. The administrative process also gives affected entities like petitioners a full and fair opportunity to raise not only their legal concerns but also their policy and practical concerns with any EPA proposal; EPA then has the concomitant opportunity to resolve those concerns in a way that might obviate subsequent litigation. Review based on defunct rules would be especially inappropriate now given the rapid changes that have occurred in both technology and consumers' demand for low-emission power over just the last few years. (*See* Br. in Opp'n for Power Co. Resps. 2-3, 6-8.)

This Court's review, if necessary at all, would be best reserved until after EPA has completed its new rulemaking and has provided both reasoning and a full

administrative record upon which judicial review can be based. *See Camp v. Pitts*, 411 U.S. 138, 142 (1973). The completion of that process may very well resolve, and at the very least will clarify, the otherwise speculative concerns that petitioners raise now. And the traditional approach of resolving legal questions only after concrete agency action preserves judicial efficiency by allowing parties to raise at the same time all of their objections to the particular rule in question. By contrast, granting certiorari now would force this Court to opine on matters that may prove irrelevant. This Court should decline review.

B. None of Petitioners' Arguments Justify Immediate Review.

1. Petitioners assert that this Court should grant certiorari to limit the "ripple effects" of the decision below, particularly in its interpretation of EPA's authority under Section 111. (W. Va. Pet. 15.) But petitioners repeatedly mischaracterize the breadth of the court of appeals' reasoning and overstate the impact that the decision below will have on any ongoing rulemaking.

The court of appeals correctly understood the Section 111 dispute at issue here to be "a relatively discrete one." (Pet. App. 50a-51a.) The parties generally did not dispute that Section 111(d) authorizes EPA to impose "limits on emissions of carbon dioxide from domestic powerplants." *AEP*, 564 U.S. at 425. Instead, the primary question regarding Section 111 at issue in this proceeding was the validity of EPA's conclusion that "the only permissible interpretation" of Section 111, 84 Fed. Reg. at 32,534, restricted EPA to determining the best system of emission reduction using "measure[s] that can be applied 'at and to' any one individual source." (Pet. App. 49a.) And the court of

appeals vacated the ACE Rule based on its conclusion that Section 111 did not *compel* that interpretation, without addressing whether the ACE Rule's approach might be "a *permissible* reading of the statute as a matter of agency discretion." (Pet. App. 51a (emphasis added).)

Petitioners are mistaken in claiming that the court of appeals recognized "no limits" on EPA's authority to regulate greenhouse gas emissions from existing power plants. (W. Va. Pet. 1.) The quoted language from the decision, which petitioners repeatedly take out of context, said that "Congress imposed no limits on the *types of measures* that EPA may consider," but specifically recognized several other restrictions that are expressly enumerated in the text of Section 111(a). (Pet. App. 56a (emphasis added).) For example: EPA must "study all 'adequately demonstrated' means of emission reduction"; EPA must "determine the 'best' system to reduce emissions"; and EPA must consider "three additional criteria: cost, any nonair quality health and environmental impacts, and energy requirements." (Pet. App. 56a.) Indeed, it was Congress's express articulation of these specific limits on EPA's authority that led the court of appeals to reject EPA's addition of the atextual limitation to measures imposed "at and to the source." (Pet. App. at 54a.)

These limitations and the court of appeals' careful resolution of the discrete question before it also rebut petitioners' unsupported claims about the implications of the decision below for EPA's regulatory authority. Contrary to petitioners' claims, nothing in the decision below or in the statutes interpreted by the court of appeals "effectively mandates" a new CO_2 rule that "reenact[s] generation-shifting equivalent to or even

more aggressive than the [Clean Power Plan]." (Westmoreland Pet. 4.) The decision below recognized that EPA may consider emission-reduction measures that take into account the nature of the power grid (Pet. App. 101a); it did not thereby authorize EPA to impose any "system it deems 'best,'" such as ordering power plants "to subsidize carbon offsets" by "planting trees." (W. Va. Pet. 17). Similarly, given that both the ACE Rule and the Clean Power Plan were limited to power plants, there is no basis whatsoever for petitioners' speculation that the court of appeals' decision authorizes EPA to use Section 111 to regulate "nearly every industry" (NACC Pet. 14) or to "unilaterally decarboniz[e] virtually any sector of the economy" (W. Va. Pet. i). Petitioners' speculation about the consequences of the decision below fails to recognize the limitations contained in Section 111 and identified by the decision.

2. Petitioners urge that certiorari is warranted now because of certain burdens they suggest they will face as a result of the decision below, but they are mistaken. There is no dispute that the States and power industry face no present regulatory burden from any power-plant CO_2 rule under Section 111(d) because EPA has made clear that neither the ACE Rule nor the Clean Power Plan are in effect. And petitioners' complaint that they may have to invest resources in any future notice-and-comment process (W. Va. Pet. 21) does not identify any cognizable injury at all; it is simply part of their statutory right under the Clean Air Act to have any rulemaking consider their concerns—a right that has been repeatedly invoked by parties on all sides of this dispute. Petitioners' complaints about regulatory uncertainty (W. Va. Pet. 21; Westmoreland Pet. 1; NACC Pet. 3) do not create a case or controversy: the possibility that an agency may adopt a new regulatory

approach always exists, and has never been understood to justify premature review.

Petitioners' predictions about the harms of any future rule (W. Va. Pet. 28; N. Dak. Pet. 15, 28-29; Westmoreland Pet. 4; NACC Pet. 16-17) are also highly questionable given the inaccuracy of their past predictions. For example, petitioners previously told this Court that the Clean Power Plan's emission requirements would radically transform the power plant industry (*see* Application for Stay by W. Va. et al. in No. 15A773, at 3, 5); but in fact, even without the Clean Power Plan, the industry surpassed the emission reduction goals of that Plan years earlier than projected. See *supra* at 6. The speculative nature of petitioners' predictions of harm underscores the importance of awaiting a concrete dispute before considering granting certiorari.

II. Certiorari Is Unwarranted Because the Decision Below Was Correct.

A. The Court of Appeals Correctly Rejected the ACE Rule's Reading of an Atextual Restriction into Section 111.

1. The petitions for certiorari should be denied for the additional reason that the court of appeals did not err.

In the ACE Rule, EPA concluded that "the only permissible interpretation of the scope of the EPA's authority," 84 Fed. Reg. at 32,534, is that systems of emission reduction under Section 111 must be those that rely on "add-ons or retrofits confined to the level of the individual fossil-fuel-fired power plant" (Pet. App. 52a). In analyzing the statutory text, the court of

appeals correctly identified several points that independently demonstrated that EPA's at-the-source restriction is not present.

First, the court explained that the "plain language" of Section 111(a)(1), "the root of the EPA's authority to determine the best system, announces its own limitations," and "[t]hose limitations simply do not include the source-specific caveat that the [ACE Rule] now interposes." (Pet. App. 54a.) Rather, under Section 111(a)(1), EPA is restricted to choosing among "already-demonstrated methods" of emissions reduction to identify the "best system" for each "particular source category and pollutant." Furthermore, the agency must take into consideration "three additional criteria: cost, any nonair quality health and environmental impacts, and energy requirements." (Pet. App. 56a.) These express limitations do not include any restriction "on the types of measures the EPA may consider," but rather cabins EPA's discretion in identifying the best system from *among* candidate systems. (Pet. App 56a.)

Second, the court of appeals explained that nothing in Section 111(d)(1)—which governs a State's development of plans for individual sources—purported to alter the interpretation of Section 111(a)(1). As the court explained, "the two subsections address distinct steps in the regulatory process, one focused on the EPA's role and the other focused on the States'." (Pet. App. 56a.) The court rightly rejected EPA's ungrammatical view that the word "application" in Section 111(a)(1) is intelligible only if matched to an "indirect object," and that this indirect object must be found in a different subsection, Section 111(d)(1). (Pet. App. 59a.) The court correctly explained that Section 111(a)(1) is "grammatically complete" as written, and that in any event "[g]rammar assigns direct or indirect objects only

to verbs—not nouns." (Pet. App. 61a). Even if an indirect object were required, the court noted, "[e]qually logical indirect objects include, for example, the entire category of stationary sources, or the air pollutant to be limited." (Pet. App. 62a).

Third, the court of appeals recognized that even if Section 111(d)(1) had some effect on the plain meaning of Section 111(a)(1), it would not have the effect claimed by EPA, because EPA's "entire theory hinges on [EPA's] unexplained replacement of the preposition 'for' in 'standards of performance for any existing source' with the prepositions 'at' and 'to.'" (Pet. App. 55a.) "[N]owhere in the ACE Rule does the EPA explain this swap of one preposition for two meaningfully more restrictive ones." (Pet. App. 65a.) The ACE Rule added words to the statute that Congress never enacted.

As the court of appeals further reasoned, Section 111's structure and history also contradicted the ACE Rule's reading of the statute. The court noted that although some other sections of the Act expressly refer to technological or retrofit controls—42 U.S.C. §§ 7651f(b)(2); 7491(b)(2)(A), (g)(2)—there is no such restriction in Section 111(a) or (d). (Pet. App. 68a.) And the court of appeals recognized that EPA has "previously embraced beyond-the-source measures of emission reduction" under presidential administrations of both parties. (Pet. App. 75a; *see id.* 73a-75a.) For example, during the George W. Bush administration, EPA adopted a mercury cap-and-trade program for coal-fired power plants under Section 111(d) and approved state implementation plans that relied entirely on trading without on-site controls. *See New Jersey v. EPA,* 517 F.3d 574, 577-78 (D.C. Cir. 2008) (summarizing mercury rule); *see also id.* at 583-84 (vacating

mercury rule for failure to follow required procedures under Section 112 of the Act).

2. Petitioners' contrary arguments are unavailing. As a threshold matter, petitioners misstate the actual question considered by the court of appeals in reframing the legal dispute here as whether Congress clearly authorized EPA to exercise "expansive powers" (W. Va. Pet. 25-29) or "[a]llow[ed] EPA to set its own scope of authority" (Westmoreland Pet. 37). Instead, as explained above (at 7), the court held only that EPA was wrong in concluding that the statute *compelled* the conclusion that Section 111 authorizes only at-the-source level measures. (Pet. App. 54a.)

With respect to the question actually decided below, no petitioner defends the ACE Rule's textual analysis, which had attempted to link the noun "application" in Section 111(a) to an "indirect object" in a different subsection, Section 111(d). See *supra* at 6, 16-17. Instead, petitioners offer a variety of other reasons to defend the ACE Rule's conclusion. Those reasons are meritless.

First, petitioners err by arguing that, because States set standards of performance "for any existing source" under Section 111(d), EPA's authority to select the "best system of emission reduction" under Section 111(a) must be limited to those same source-specific measures (W. Va. Pet. 30.; *see also* NACC Pet. 24, N. Dak. Pet. 20.) This argument ignores the separate roles set forth for EPA and the States in the plain text of Section 111(a) and (d). As the ACE Rule itself recognized, Section 111 gives EPA and the States "distinct roles, responsibilities, and flexibilities." 84 Fed. Reg. at 32,521. It is EPA's initial responsibility under Section

111(a)(1) to identify "the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated," and to establish emission guidelines reflecting the degree of emission limitation achievable by application of the best system. 42 U.S.C. § 7411(a)(1). Then, under Section 111(d), a State develops a plan that "establishes standards of performance for any existing source." *Id.* § 7411(d)(1). A source must meet the emissions targets set by its State, but in doing so the source is not restricted to using the controls initially identified by EPA. *Id.* § 7411(e).

The fact that a State sets a standard of performance for each individual source at the end of this process under Section 111(d) simply does not preclude EPA, at the earlier stage of determining the best system under Section 111(a), from taking into account the interaction of sources in the interconnected power grid or the practical experiences of sources. To the contrary, Section 111(a) directs EPA to study "adequately demonstrated" measures of emission reduction—including those measures already in use in the regulated field—and to select the "best" system for the pollutant and source category at issue. EPA is not barred from considering emission reduction measures already being deployed, including those involving multiple sources, to formulate guidelines for States to then determine source-specific standards that meet federal and state emissions targets. As the court of appeals explained, "the two subsections address distinct steps in the regulatory process," and EPA was wrong to conclude the statute compels the conclusion that Section 111(d)'s "limitations pertain to each regulatory actor." (Pet. App.54a.)

Second, NACC cites Section 111(d)'s use of the singular "any existing source" (NACC Pet. 24) to support

its view that the best system must be limited to at-the-source measures, but that usage applies only to the States' establishment of source-specific standards of performance. By contrast, Section 111(a)(1), which requires EPA to determine the best system, does not contain any similar usage of the singular form, and thus does not suggest that EPA's antecedent determination of the best system is limited to measures that can be applied at individual sources. Petitioners' argument, like the defunct ACE Rule, "depends critically on words that are not there" and "collapses two separate functions and provisions of the Act." (Pet. App. 66a.)

Third, petitioners' insistence that a system of emission reduction cannot exist on an "industry-wide" level (W. Va. Pet. 30) is belied by the fact that, as the court of appeals found (Pet. App. 93a), existing electricity generators have in practice chosen to rely on the electric grid's unique generation-shifting capability in place of bolt-on, at-the-source systems to cost-effectively achieve pollution reduction. 80 Fed. Reg. at 64,769. State regulators, too, have increasingly relied on power plants' ability to prioritize production from less-polluting sources to achieve meaningful CO_2 reductions. *Id.* at 64,803, 64,806.

Fourth, North Dakota attempts to locate an at-the-source requirement in Section 111(d)'s cooperative federalism structure. (N. Dak. Pet. 19-27.) North Dakota suggests that the Clean Power Plan would have left sources with no meaningful choice but to engage in generation-shifting to meet targets, and thus prevented States from considering site-specific factors. (N. Dak. Pet. 26.) But the court of appeals neither authorized nor compelled the use of generation-shifting; it merely held that EPA is not categorically excluded from considering such practices as one component of the best

system of emissions reduction. Moreover, the decision below advances rather than undermines federalism by rejecting the ACE Rule's artificial, atextual constraint on the compliance measures that both States and sources may rely upon to obtain emission reductions. Indeed, it was the ACE Rule that undermined the Clean Air Act's cooperative-federalism framework by relying on EPA's erroneous interpretation of Section 111 to bar States from using well-established measures such as emissions trading and averaging to comply with federal emission reduction requirements. *See* 84 Fed. Reg. at 32,555-56. By contrast, the court of appeals' reasoning respects the States' flexibility to adopt measures that are already widely in use and that have been demonstrated to be effective at reducing greenhouse-gas emissions.

North Dakota's further contention that the decision below would allow EPA to usurp the States' role under the Clean Air Act by "mandat[ing] a hard . . . standard of performance across the entire generation sector" (N. Dak. Pet. 26) simply misunderstands the court's reasoning. Contrary to North Dakota's contention (N. Dak. Pet. 20), the court of appeals' decision does not "prohibit States from taking into consideration source-specific factors in their Section 111(d) plans," including by considering a source's "remaining useful life." Under the Act, a State may propose a variance *after* EPA has set general emissions guidelines. 42 U.S.C. § 7411(d)(1). For example, a State may demonstrate to EPA that a source's remaining useful life, or "[o]ther factors specific to the facility," such as feasibility or cost, justifies "application of a less stringent standard or final compliance time." 40 C.F.R. § 60.24a(e)(3). Nothing in the court of appeals' decision would prevent a State—in implementing a future Section 111(d) rule—from

continuing to propose such variances in their state plans based on site-specific factors.

Finally, North Dakota's reliance (Pet. 24) on *Alaska Department of Environmental Conservation v. EPA*, 540 U.S. 461 (2004), is misplaced, because that case involved the Clean Air Act's Prevention of Significant Deterioration (PSD) program, which establishes very different roles for EPA and the States than does Section 111. Under the PSD program, a State, "on a case-by-case basis," issues a preconstruction permit for "any major emitting facility" that requires the facility to apply the best available control technology to limit its emissions. 42 U.S.C. § 7479(3). Thus, unlike Section 111, the PSD program does not require EPA to set nationwide guidelines in advance, but empowers the agency to, for example, issue a stop-construction order if a State issues an unreasonable permit. *Id.* §§ 7413(a)(5), 7477. Far from supporting North Dakota's claim of a conflict of authority, *Alaska* and the PSD provisions illustrate that the Clean Air Act contains multiple approaches to cooperative federalism: some in which EPA is the lead agency, and others in which state authorities act in the first instance.

B. The Statutory Dispute Here Does Not Implicate the Major-Questions Doctrine.

Contrary to petitioners' arguments, the specific statutory dispute here does not trigger the major-questions doctrine. As a threshold matter, the court of appeals' vacatur of the ACE Rule will not result in "'an enormous and transformative expansion'" of the agency's authority (NACC Br. at 30 (quoting *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*")) because, as EPA has made clear, neither the ACE Rule nor the Clean Power Plan will go into effect.

Petitioners also overstate the holding of the court of appeals in suggesting that the decision below will necessarily lead EPA to exercise impermissibly expansive powers in a future rulemaking. This Court has already determined that the Clean Air Act authorizes EPA to regulate greenhouse-gas emissions, *Massachusetts v. EPA*, 549 U.S. 497, 528-29 (2007), and that EPA may regulate such emissions from existing power plants under Section 111(d), *AEP*, 564 U.S. at 424. The court of appeals here did not extend EPA's authority beyond the scope already recognized by this Court's prior decisions. Instead, as discussed, the court merely rejected a particular restriction on regulatory authority that EPA had erroneously found was compelled by the statute. This case thus bears no resemblance to the precedents cited by petitioners, in which the rule under review sought to extend an agency's reach to a type of activity the agency had never before regulated, *cf. FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000), or to previously unregulated sectors, *cf. UARG*, 573 U.S. at 324.

Petitioners largely ignore *AEP*'s on-point holding that in the Clean Air Act Congress "delegated to EPA the decision whether and how to regulate carbon-dioxide emissions from powerplants," *AEP*, 564 U.S. at 426, and that Section 111(d) is the "most relevant" provision, *id.* at 424. Alone among petitioners, Westmoreland acknowledges *AEP*'s holding that Section 111 "'speaks directly to emissions of carbon dioxide' from fossil-fuel-fired plants." (Westmoreland Pet. 37.) Because this Court has already recognized that Congress authorized EPA to determine how to regulate power-plant CO_2 emissions, EPA will not inevitably exceed its delegated powers in promulgating such regulations, and any theoretical issue of whether

a particular agency approach raises a major question must be reviewed, if at all, after promulgation of an actual rule.

Petitioners' arguments also ignore the many constraints on Section 111 rulemaking that Congress expressly included in the statute (see *supra* at 13), as well as the Clean Air Act's requirement that EPA engage in reasoned rulemaking. West Virginia is simply wrong when it says that the court of appeals "found nothing in the statute" to restrict EPA's authority. (W. Va. Pet. 16-17). To the contrary, the court of appeals rightly recognized that, among other requirements, EPA's determination of the best system of emission reduction must draw from "adequately demonstrated" measures, which here would include "methods of operation already adopted by and familiar to the power sector." (Pet. App. 33a-34a (citing 80 Fed. Reg. at 64,725, 64,727-28).) The court thus correctly concluded that the "numerous substantial and explicit constraints on EPA's selection of a best system" preclude reliance on the major-questions doctrine "to write additional, extratextual, and inflexibly categorical limitations" that Congress did not include. (Pet. App. 94a.)

Finally, as a practical matter, the specific measures that petitioners seek to challenge in this Court as novel are well-established, widely adopted, and proven methods of emission reduction. Petitioners repeatedly object to the now-defunct Clean Power Plan's reliance on "generation shifting" as a component of the plan. (W. Va. Pet. 16, 33; N. Dak. Pet. 31-32, 35; NACC Pet. 23, 27; Westmoreland Pet. 20.) Yet, EPA found in the ACE Rule that "there is likely to be no difference between a world where the Clean Power Plan is implemented and one where it is not." *Regulatory Impact Analysis*, *supra*, at 2-1; *see also id.* at 2-5 ("[T]he cost

and benefit impacts of the CPP repeal are de minimis."). Furthermore, no petitioner disputes the court of appeals' finding that the prioritization of generation from some sources over others on the electric grid is a method that has been widely adopted in the power sector for both economic and environmental reasons. (Pet. App. 33a-34a, 52a-53a, 93a.) Indeed, shifting generation to sources that emit less CO_2 is often *less* burdensome to power-plant operators than requiring individual sources to install bolt-on, at-the-source controls; for this reason, many power companies supported EPA's consideration of generation-shifting as providing them more cost-effective and flexible methods of achieving emission limitations. *See* 80 Fed. Reg. at 64,727-29.

Moreover, invoking the major-questions doctrine now, in the absence of a concrete rule and before EPA can seek public and industry comment, would improperly position this Court to function as the agency in the first instance, rather than as a court of review. *See AEP*, 564 U.S. at 428 (Clean Air Act requires that EPA, not federal judges, "determine, in the first instance," what measures are reasonable).

C. Westmoreland's Argument Based on Section 112 Does Not Merit This Court's Review.

Westmoreland alone asks this Court to review whether Section 111(d) allows EPA to regulate CO_2 emissions from power plants if EPA already regulates emissions of *any* hazardous air pollutant from power plants under Section 112, 42 U.S.C. § 7412. (Westmoreland Pet. 26-28.) There is no reason for this Court to review this argument, which is contrary to the Act's

comprehensive application to all source emissions that affect public health.

The United States' brief in opposition fully explains why the court of appeals was correct to hold that Westmoreland's argument conflicts with the text and structure of Sections 111 and 112. Westmoreland's argument would arguably force EPA to choose between either regulating hazardous air pollutants under Section 112, or regulating other pollutants emitted by the same sources under Section 111(d). Such a choice would allow one or the other set of these dangerous pollutants to be emitted without restriction, undermining the purposes of these mutually supporting regulatory regimes. For this reason, this interpretation has been rejected by EPA under every presidential administration since the language in question was adopted. (*See* Pet. App. 111a-113a, 143a-147a.)

Nothing in the broader statutory scheme suggests that Congress wanted to put EPA to such a choice. To the contrary, Congress created Section 111 to ensure that there are "no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare." S. Rep. No. 91-1196, at 20 (1970). When Congress added a statutory list of hazardous pollutants to Section 112 via the 1990 amendments, it preserved Section 111 as a gap-filling provision, providing that it applies to all pollutants not regulated under Section 112. *See* Clean Air Act Amendments of 1990, Pub. L. No. 101-549, sec. 301, § 112(b), 104 Stat. 2399, 2535-2537; *id.*, sec. 302(a), § 111(d)(1), 104 Stat. at 2574.

Westmoreland's contention—that Congress intentionally created a regulatory gap via the 1990 amendments to Section 112 (Westmoreland Pet. 31)—is

implausible. Nothing in Congress's *addition* of regulatory protections against newly defined hazardous air pollutants in 1990 indicated any intent to alter the preexisting regulation of *non*-hazardous pollutants, whether under Section 111 or any other Clean Air Act provision. Pub. L. No. 101-549, § 301, 104 Stat. at 2531. The 1990 amendments also did not change the fact that EPA's authority under Section 112 is pollutant-specific, and that the corresponding amendments to Section 111(d) were technical, merely aligning that section to refer to the reorganized Section 112. It is not credible that Congress dissolved the Act's longstanding comprehensive coverage of all pollutants through a technical rephrasing of a cross-reference. *See Whitman v. American Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (Congress does not "hide elephants in mouseholes."). Such a self-defeating policy would harm the public interest and undermine the goals of the Clean Air Act.

CONCLUSION

The petitions for writs of certiorari should be denied.

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