No. 20-1530 (Consolidated Case
Nos. 20-1531, 20-1780, 20-1778)

In The
Supreme Court of the United States

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

MERITS BRIEF OF PETITIONER THE STATE OF NORTH DAKOTA, NO. 20-1780

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QUESTION PRESENTED

Section 111(d) of the Clean Air Act ("CAA"), 42 U.S. Code § 7411(d), governs air emissions from stationary sources of air pollutants. Section 111(d) explicitly requires the U.S. Environmental Protection Agency ("EPA") to develop guidelines for the States to create their own Section 111(d) plans to establish "standards of performance" for controlling air emissions from any individual "existing source." Section 111(d)(1) further provides that EPA guidelines "shall permit" States, in developing their plans, to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."

The question presented is: Can EPA promulgate regulations for existing stationary sources that require States to apply binding nationwide "performance standards" at a generation-sector-wide level, instead of at the individual source level, and can those regulations deprive States of all implementation and decision-making power in creating their Section 111(d) plans?

PARTIES TO THE PROCEEDING

Petitioner is the State of North Dakota (Petitioned in Case No. 20-1780). North Dakota was a respondent-intervenor below.

Other Petitioners in this consolidated case are: the States of West Virginia, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming; and Mississippi Governor Tate Reeves (Petitioned in Case No. 20-1530, and were respondent-intervenors below); the North American Coal Corporation (Petitioned in Case No. 20-1531, and was a petitioner in Case No. 19-1179 below prior to consolidation in Case No. 19-1140); and Westmoreland Mining Holdings LLC (Petitioned in Case No. 20-1778, and was a petitioner in Case No. 19-1176 below prior to consolidation in Case No. 19-1140).

Respondent in 20-1530, 20-1531, 20-1778, 20-1780 who was a petitioner-intervenor below and filed a brief in opposition to certiorari is the State of Nevada.

Respondents in 20-1530, 20-1531, 20-1778, 20-1780 who were respondents below are the United States Environmental Protection Agency and Michael Regan, in his official capacity as Administrator of the United States Environmental Protection Agency (substituted for the previous administrator under Supreme Court Rule 35.3).

PARTIES TO THE PROCEEDING—Continued

Respondents who were petitioners below and did not file any brief at the certiorari stage are, by court of appeals case number, as follows:

In Case No. 19-1175: Robinson Enterprises, Inc., Nuckles Oil Co., Inc., DBA Merit Oil Co., Construction Industry Air Quality Coalition, Liberty Packing Co. LLC, Dalton Trucking, Inc., Norman R. "Skip" Brown, Joanne Brown, The Competitive Enterprise Institute, and the Texas Public Policy Foundation.

In Case No. 19-1185: Biogenic CO2 Coalition.

Respondents who were respondent-intervenors below and did not file any brief at the certiorari stage are Indiana Michigan Power Co., Kentucky Power Co., Public Service Co. of Oklahoma, Southwestern Electric Power Co., AEP Generating Co., AEP Generation Resources, Inc., Wheeling Power Co., Chamber of Commerce of the United States of America, Indiana Energy Association and Indiana Utility Group, International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO, Murray Energy Corp., National Rural Electric Cooperative Association, Nevada Gold Mines, Newmont Nevada Energy Investment, and PowerSouth Energy Cooperative.

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OPINION BELOW & JURISDICTION

The United States Court of Appeals for the D.C. Circuit entered judgment on January 19, 2021 (JA.53-255), which is reported at *American Lung Ass'n v. EPA*, 985 F.3d 914 (D.C. Cir. 2021). North Dakota's Petition for Certiorari was timely filed on June 18, 2021, and was granted on October 29, 2021. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 111 of the Clean Air Act ("CAA"), 42 U.S.C. § 7411 provides in pertinent part:

> (a)
>
> > (1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.
>
> . . . (d) Standards of performance for existing sources; remaining useful life of source
>
> > (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which

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

Section 302 of the CAA, 42 U.S.C. § 7602 also provides in pertinent part:

(k)

> The terms "emission limitation" and "emission standard" mean a requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants

> on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter.

The full relevant provisions of the Clean Air Act are set forth at No. 20-1780, Pet.App.216-231.

INTRODUCTION

The D.C. Circuit's decision below that is on review by the Court is that EPA did not act lawfully in repealing the regulations entitled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Clean Power Plan" or "CPP"), JA.867-1669, and promulgating the *Repeal of the Clean Power Plan; Emissions 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) (the "CPP Repeal/ACE Rule" or "ACE Rule"), JA.1729-2030.

The dispute over the CPP and the CPP Repeal/ACE Rule goes to the proper and relative roles and authorities of the Federal government (through EPA) and the States in regulating the emissions of carbon dioxide ("CO_2") from existing fossil-fueled energy generating units ("EGUs," or more colloquially, power plants).

North Dakota believes that EPA struck the correct and Congressionally-mandated balance between State and Federal authority in the CPP Repeal/ACE Rule and that the D.C. Circuit incorrectly vacated that Rule.

EPA repealed the CPP and promulgated the ACE Rule because EPA concluded that the CPP exceeded EPA's statutory authority under the CAA. EPA found that the best system of emission reductions ("BSER") codified in the CPP, which established national fixed hard emissions limits applied on a sector-wide basis (e.g. pounds of carbon dioxide per megawatt-hour or CO2 lb/MWhr) and mandated that States must achieve them, was in direct conflict with Section 111(d) of the CAA, which provides that the States (not EPA) "have the authority and responsibility to establish and apply standards of performance for their existing sources, taking into consideration source-specific factors where appropriate." CPP Repeal/ACE Rule, JA.1732. Because the sector- and nationwide-hard emission limitations of the CPP usurped the States' statutorily mandated role under Section 111(d)(1), EPA's repeal of the CPP was compelled. In the same rulemaking and based on the same reasoning, EPA replaced the CPP with the ACE Rule, setting national BSER guidelines (not mandatory hard standards) and returning to the States' their primacy in setting standard of performance for existing sources.

The D.C. Circuit held that EPA got it wrong with the CPP Repeal/ACE Rule, opining that Section 111(d) of the CAA does not "constrain [EPA] to identifying a [BSER] consisting only of controls 'that can be applied

at and to a stationary source'," and therefore EPA "based its decision" to repeal the CPP and promulgate the ACE Rule "on an erroneous view of the law." JA.104. The D.C. Circuit went on to conclude that because EPA's interpretation of its authority was not "the only permissible interpretation of the scope of the EPA's authority," the D.C. Circuit held that the CPP Repeal/ACE Rule "must be declared invalid, even though the agency might be able to adopt the regulation in the exercise of its discretion, if it was not based on the agency's own judgment but rather on the unjustified assumption that it was Congress' judgment that such a regulation is desirable or required." *Id.* at 214 (quoting *Prill v. NLRB*, 755 F.2d 941, 948 (D.C. Cir. 1985) and *FCC v. RCA Commc'ns*, 346 U.S. 86, 96 (1953) (internal quotation omitted).

However, it is the D.C. Circuit which misinterpreted Section 111(d) by finding that EPA, not the States, could set binding hard nationwide performance standards (i.e., emission limitations) and was not required to promulgate BSER guidelines that could be applied by the States when setting performance standards (i.e., achievable emission limitations), including taking into account source-specific factors. The D.C. Circuit ignored the plain text of Section 111(d)(1) by effectively dismantling the States' role in establishing performance standards for existing sources through State plans created under Section 111(d)(1).

The D.C. Circuit's decision undermines the cooperative federalism framework carefully crafted by Congress to reach a workable balance between federal and

State authority. Described as an "experiment in federalism," *Michigan v. EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (quotation omitted), the CAA assigns to the States the primary role in air pollution prevention and control. One of the States' principal authorities and responsibilities under the Act is to implement and enforce standards of performance for *existing* sources of air pollution under Section 111(d), using the States' expertise in applying source-specific considerations and factors to establish achievable emission limitations controlling air emissions from those sources.

To that end, Section 111(d) directs EPA's Administrator to "prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant . . . and (B) provides for the implementation and enforcement of such standards of performance." 42 U.S.C. § 7411(d)(1). This text reflects the Federal-State balance of the cooperative federalism framework created by Congress: EPA is to establish national guidelines (i.e., BSER) for the States to follow in creating their Section 111(d) plans, but it is the States, through the State plans, that establish the specific standards of performance (i.e., achievable emission limitations) for the existing sources in their States. The final layer of cooperative federalism is that the State plans that establish standards of performance must be reviewed and approved by EPA. In addition, Congress specifically directed EPA to "permit the State" in creating its Section 111(d) plan to "apply[ ] a

standard of performance to any particular source" and "to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." *Id.*

The primary "regulatory authority" and decisionmaker in setting standards of performance for specific individual existing sources under Section 111(d) is therefore the States. That means that Congress granted States the authority (and responsibility) to establish "emission limitations achievable" through the application of EPA's BSER guidelines, with "emission limitation" defined as:

> [A] requirement established by the State or the Administrator which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter

42 U.S.C. § 7602(k). Congress also granted States considerable discretion in exercising this authority, including requiring that States "take into consideration" source specific factors such as, *inter alia*, "the remaining useful life of the source" when creating their Section 111(d) plans. 42 U.S.C. §7411(d)(1). Section 111(d) did not grant EPA the authority to establish emission limitations such as binding and fixed nationwide standards of performance and force the States to achieve these emission limitations through the State

plans, reducing the States to mere extensions of Federal authority.

The CPP established fixed emission limitations (and thus standards of performance) measured by pounds of carbon dioxide per megawatt-hour, or CO2 lb/MWhr for (1) certain EGU *subcategories as a whole* (e.g. all fossil fuel-fired EGUs) that were intentionally not achievable for certain types of EGUs within those categories (such as coal-fired EGUs) to meet under any realistic operating scenario; or (2) "rate-based CO2 goals that are the weighted aggregate of the emission performance rates for the state's EGUs" *as a whole*, which relied on the same hard CO2 lb/MWhr emission limitations and thus could still not be met by certain types of EGUs (such as coal-fired EGUs). JA.300. In establishing emission limitations and standards of performance, the CPP displaced and eliminated the States' statutorily-mandated primary role under Section 111(d) for creating Section 111(d) plans that set standards of performance for existing sources while applying source-specific considerations. The CPP did not create "procedures" or provide BSER "guidelines" for the States to use to establish achievable emissions limitations. Instead, under the guise (and title) of promulgating BSER "guidelines," the CPP established binding national emission limitations, from which EPA calculated binding emission limitations for each State that were standards of performance. This infringed on and severely diminished the State's primary authority to establish achievable emission limitations (i.e., standards of performance for existing sources),

reducing the States' role to establishing controls to achieve the binding standards of performance and emission limitations imposed by EPA.

EPA's hard emission limitations effectively required the States to shut down existing sources that could not achieve those mandates, or subsidize investment in alternate energy sources that EPA preferred in order to offset emissions that exceeded EPA's hard emission limitations—a regulatory scheme known as "generation shifting." *See* CPP, JA.768 (claiming that utilities with coal-fired EGUs could reduce their emissions by buying electricity from EPA-preferred generators "through contractual arrangements, investment, or purchase," thus shifting generation elsewhere). The CPP obligated the States to achieve the federally-mandated emission limitations by any means possible, even if that required States to shut down power plants in their own States and purchase power from other States. The CPP thus turned Section 111(d) upside down, with EPA establishing binding emission limitations and standards of performance, the States reduced to becoming EPA's implementation foot soldiers.

This Court stayed implementation of the CPP before it could even take effect. *See* Application by the State of North Dakota for Immediate Stay of Final Agency Action Pending Appellate Review, *State of North Dakota v. EPA*, No. 15A793 (Jan. 29, 2016), Pet.App.203; Order in Pending Case, *West Virginia, et al. v. EPA*, Nos. 15A773, 15A776, 15A778, 15A787, 15A793 (Feb. 9, 2016).

EPA then correctly concluded that the CPP exceeded EPA's statutory authority, repealed the CPP, and promulgated the ACE Rule which returned to the States their rights and authorities provided for under the CAA. The EPA explained that it was statutorily compelled to repeal the CPP because "the plain meaning" of Section 7411(d) "unambiguously" limits the BSER to only those measures "that can be put into operation at a building, structure, facility, or installation," and does not allow the EPA to "select as the BSER a system that is premised on application to the source category as a whole or to entities entirely outside the regulated source category." ACE Rule, JA.1746. EPA also concluded that the CPP usurped the States' primary role in regulating existing sources under Section 111(d).

EPA replaced the CPP with the ACE Rule, which, consistent with the text of Section 111(d), provided the States with procedures and guidance (i.e., the BSER) that the States must follow when the States, not EPA, establish achievable emissions limitations (i.e., standards of performance) for existing sources in their States, taking source-specific factors into account.

The D.C. Circuit vacated the ACE Rule and the rule's repeal of the CPP, holding that the EPA erred in concluding that it did not have the authority to reach past the States and directly promulgate hard emission limitations applicable to existing sources. The D.C. Circuit relied largely on the reasoning underlying the CPP, which had been stayed by this Court.

The D.C. Circuit's decision to vacate the CPP Repeal/ACE Rule resurrects the jurisdictional overreach of EPA in the CPP that was stayed by this Court, and usurps the States' statutory authority under Section 111(d) of the CAA to establish and implement standards of performance for existing sources while taking into account source specific factors that the Congress entrusted the States to evaluate.

North Dakota respectfully requests that this Court confirm the delicate balance of cooperative federalism established by Congress in Section 111 of the Clean Air Act that gives the States the primary role establishing standards of performance for existing sources of air emissions, vacate the D.C. Circuit's opinion below, and reinstate the ACE Rule. Thus the ACE Rule, published at 84 Fed. Reg. 32,520 and codified at 40 CFR Part 60, is before the Court.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background

The CAA establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). In this "experiment in cooperative federalism" (*Michigan v. EPA*, 268 F.3d at 1083), the CAA establishes that improvement of the nation's air quality will be pursued "through state and federal regulation," where controlling the sources of air pollution is the primary responsibility of the States (*BCCA*

Appeal Group v. EPA, 355 F.3d 817, 821-22 (5th Cir. 2003); *see also* 42 U.S.C. § 7401(a)(3) ("air pollution prevention . . . and air pollution control at its source *is the primary responsibility of States and local governments*") (emphasis added); and 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . .")).

Section 111(a)(1) of the CAA, 42 U.S.C. § 7411, defines "standards of performance" for new and existing stationary sources and the BSER that EPA sets to allow States to promulgate standards of performance.

Section 111(d) implements the CAA's cooperative federalism approach as to existing sources by requiring EPA to "establish a procedure" for States to submit Section 111(d) plans that "establish[ ] standards of performance for [certain] existing source for any air pollutant[s]." 42 U.S.C. § 7411(d)(1).

Under Section 111(d), EPA may not set emission reduction requirements for States or existing sources. EPA instead is only authorized to "establish a procedure" for States to submit plans containing State performance standards applying EPA's BSER guidelines. 42 U.S.C. § 7411(d)(1). EPA then reviews State plans to determine if the States' performance standards are "satisfactory" based on the BSER guidelines (not mandates) established by EPA. *Id.* at (d)(2)(A). The primacy of State authority in setting standards of performance for existing sources under Section 111(d) stands in sharp contrast to the primary authority granted to

EPA to set such standards for new sources under Section 111(b).

A "standard of performance," is "a standard for emissions of air pollutants which reflects the degree of emission limitation *achievable*" by applying the "best system of emission reduction . . . taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements [EPA] determines has been *adequately demonstrated*." *Id.* at (a)(1) (emphasis added). The BSER set by EPA is not an "emission limitation," which is a "requirement established by the State or the [EPA] which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis, including any requirement relating to the operation or maintenance of a source to assure continuous emission reduction, and any design, equipment, work practice or operational standard promulgated under this chapter." 42 U.S.C. § 7602(k). As set forth in Section 111(a), the standard of performance is established by applying EPA's BSER to create an "emission limitation" that is "achievable," so the BSER is by definition not an "emission limitation." 42 U.S.C. § 7411(a)(1).

While EPA creates the BSER, the achievable emission limitation may be established by either the State or EPA, depending on the direction of Congress in Section 111. Under Section 111(b), the standards of performance for new sources are established by EPA. By contrast, Section 111(d)(1) gives States the primary authority to establish the standards of performance (and emission limitation) for existing sources.

Section 111(d)(1) requires EPA to "establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to [EPA] a plan which (A) establishes standards of performance for any existing source for any air pollutant. . . ." 42 U.S.C. § 7411(d)(1). Further, the "[r]egulations of the Administrator under this paragraph shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." *Id*. Thus, for existing sources, States have the primary authority to establish the standards of performance (i.e., the achievable emissions limitations, applying EPA's BSER guidelines), subject to EPA review and approval. Further, Congress specifically requires that States be able to consider source-specific factors when establishing those achievable emission limitations (i.e., standards of performance).

Under Section 111(d)(1), EPA does not have the authority to establish binding emission limitations for existing sources that States are then required to implement through local controls. EPA instead is only authorized to "establish a procedure" (42 U.S.C. § 7411(d)(1)) for States to follow when they create their plans containing performance standards established by States applying EPA's BSER. EPA's BSER are guidelines, not binding emission limitations on the States or existing sources, because Section 111(d) is explicit that it is the States, not EPA, that establish the

binding standards of performance for existing sources. This is reflected in the titles of both the CPP and the CPP Repeal/ACE Rule, which are both captioned as "emission guidelines." EPA then reviews State plans to determine if the standards of performance set by the States are "satisfactory." 42 U.S.C. § 7411(d)(2)(A).

These express statutory limitations on EPA's authority are reinforced by Section 111(d)(2), which establishes when EPA may step into the shoes of a State who failed to submit a satisfactory plan for regulating emissions from existing sources. If a State fails to submit an adequate plan, EPA, in creating an adequate replacement "plan prescribed under" Section 111(d), "shall take into consideration, among other factors, remaining useful lives of the sources in the category of sources." 42 U.S.C. § 7411(d)(2). Thus, EPA may only establish standards of performance (i.e., emission limitations) for existing sources for a State that fails to do so. Even then, standards of performance set by EPA "shall" consider source-specific factors. *Id.*

B. The Clean Power Plan

The CPP was promulgated on October 23, 2015, in which the EPA determined that the BSER would be comprised of three "building blocks" which included: (1) Improving heat rate at affected coal-fired steam EGUs; (2) Substituting increased generation from lower-emitting existing natural gas combined cycle units for generation from higher-emitting affected steam generation units; and (3) substituting increased

generation from new zero-emitting renewable energy generating capacity for generation from affected fossil fuel-fired generating units. CPP, JA.299.

The second and third "building blocks" are commonly referred to as "generation shifting" mandates because they impose emission reductions that are intentionally not achievable by the applicable source category and require emission reductions to occur shifting power generation from the source category that cannot meet the standard that has been imposed on that category (i.e., "generation shifting from coal-fired steam EGUs to existing" gas EGUs) to lower-emission sources of energy. *Id.* at JA.582.

To effectuate its "generating shifting" mandate, EPA set binding "CO2 emission performance rates for two subcategories of affected EGUs—fossil fuel-fired electric utility steam generating units and stationary combustion turbines." *Id.* at JA.300. For fossil fuel-fired-steam generating units (i.e., coal-fired, gas-fired, and petroleum-fired EGUs), a hard emission performance rate of 1,305 lb CO2/MWh was set, and for stationary combustion turbines, a hard emission performance rate of 771 lb CO2/MWh. *Id.* These hard emission limitations were not achievable for portions of the fossil fuel-fired EGU subcategory, including virtually all coal-fired steam generating units (including those in North Dakota).

These state-wide hard emission performance standards were not a "best system of emission reduction" that reflected any "degree of emission limitation

achievable" by specific sources. 42 U.S.C. § 7411(a)(1). Rather, they were "emission limitations" as defined in 42 U.S.C. § 7602(k), and thus "standards of performance." Despite the CPP's title describing the rule as establishing "guidelines," the CPP was anything but: it established "limits [on] the quantity, rate, or concentration of emissions of air pollutants on a continuous basis," and thus was an "emission limitation" that the States and existing sources were obligated to achieve. 42 U.S.C. § 7602(k). Thus in the CPP, it was EPA, not the States, that established the basic standard of performance for existing sources.

EPA claimed it was affording States flexibility in choosing "additional alternatives in meeting their obligations" to meet these hard performance rates by "promulgating each state's goal expressed as a CO2 mass goal." CPP, JA.300-301. In describing the BSER as having established State "obligations," EPA admitted that the BSER in the CPP was not a "guideline" and that it was EPA, not the States, "establishing" the standards of performance for existing sources. In this "alternative" EPA went even further, imposing binding standard of performance "goals" on the States themselves, claiming an authority nowhere found in Section 111(d). Section 111(d)(1) says nothing about EPA imposing emission reduction obligations on States. Further, any notion of "flexibility" with regard to implementing emission limitations or standards of performance imposed by EPA is irrelevant. Section 111(d)(1) does not give EPA the authority to establish nationwide or statewide emission limitation mandates

or standards of performance on existing sources. Any purported flexibility afforded to the States by EPA on how EPA's unlawfully established standards of performance and emission limitations might be achieved does not cure the underlying unlawful action.

EPA stated that using mass goals "paves the way for states to implement mass-based trading," admitting that both the hard emission standards and the mass-based State "goals" could not be achieved by individual existing sources. CPP, JA.301. Not only did EPA displace the States' authority to establish standards of performance and emissions limitations in the first instance, the standards and limitations imposed by EPA were intentionally not achievable by whole categories of sources to which the CPP applied. The regional mass-based trading and mandated generation-shifting "alternatives" were admissions that the CPP's requirements were not even achievable at the individual State level. Thus, EPA's claimed flexibility in the CPP was anything but that, as it mandated emission standards that existing EGUs could not achieve that forced a generation shifting approach that had to be applied at a sector-wide level in each State (e.g., shutting down coal-fired power plants regardless of their remaining useful life), based on EPA imposing a mass emissions standard on the States. Further, in conceding that mass-based trading is an "implementation" option, EPA admitted that it had appropriated the States' authority to establish standards of performance and the only thing left for the States to do was achieve the standards set by EPA.

A few examples from North Dakota illustrate how the CPP transformed Section 111(d)(1) into a set of national mandates on the States that effectively gutted the States' authority to "establish" standards of performance. North Dakota, using the EPA's the Integrated Planning Model ("IPM"), calculated that the CPP would have required North Dakota to reduce its carbon dioxide (CO2) emission rate by 44.9%, Pet.App.246. The national emission rates mandated by EPA would have required the closure of the 427 MW Coyote Station, two miles south of Beulah, North Dakota, Unit 1 and Unit 2 at the R.M. Heskett Station near Mandan, North Dakota, the 250 MW Milton R. Young Station Unit 1, four miles southeast of Center, North Dakota, and the 558 MW Coal Creek Station Unit 1, located between Underwood and Washburn, North Dakota. *Id.* at 249-252. All of these facilities would have to have been shut down by 2018, with no consideration of their remaining useful lives or other source-specific factors, as required by Section 111(d)(1). Thus, in the CPP, it was EPA that imposed fixed national standards of performance and emission limitations on States and existing sources, rather than creating BSER "guidelines" that would be applied by the States to establish achievable emission limitations for existing sources in their States.

The CPP was challenged in the U.S. Court of Appeals for the District of Columbia Circuit, by the State of North Dakota and 158 other petitioners, including more than half of the States. *State of West Virginia, et al. v. EPA*, No. 15-1363 (and consolidated cases) (D.C.

Cir., Oct. 23, 2015). A stay was sought with the D.C. Circuit, which the Circuit denied. *Id.*, Doc. No. 1594951.

Subsequently, five separate applications were filed with this Court seeking to stay the CPP, including an application from the State of North Dakota. *See* Application by the State of North Dakota for Immediate Stay of Final Agency Action Pending Appellate Review, Pet.App.232-267. On February 9, 2016, the full Court granted the five stay applications without qualification, halting the implementation or enforcement of the CPP pending disposition of the D.C. Circuit petitions. Order in Pending Case, *West Virginia, et al. v. EPA*, Nos. 15A773, 15A776, 15A778, 15A787, 15A793 (Feb. 9, 2016). This purportedly marked the first time this Court had stayed a federal regulation before initial review by a federal appeals court. *See* https://www.americanbar.org/groups/litigation/committees/environmental-energy/practice/2016/021716-energy-supreme-court-stays-epas-clean-power-plan/

C. The Affordable Clean Energy Rule

After this Court stayed implementation of the CPP, EPA repealed the CPP, conceded that the CPP exceeded EPA's statutory authority, and promulgated the CPP Repeal/ACE Rule on July 8, 2019. ACE Rule, JA.1725 ("the Agency has determined that the CPP exceeded the EPA's statutory authority under the [CAA]"). Upon promulgation of the CPP Repeal/ACE

Rule the petitions challenging the CPP Rule in the D.C. Circuit were dismissed. *See* JA.86.

In promulgating the CPP Repeal/ACE Rule, EPA corrected the jurisdictional overreach of the CPP by establishing a BSER that acts as guidelines, not binding national or statewide emission limitations, that the States apply to establish achievable standards of performance and emission limitations for existing sources. Further, the BSER guidelines were based on what had been adequately demonstrated for the relevant emission source categories, recognizing that it was the States, not EPA, that determine what emission limitations were achievable for existing sources. The CPP Repeal/ACE Rule correctly rejected the notion that EPA has the authority to establish standards of performance and emission limitations for existing sources and returned it to the States as explicitly set forth in Section 111(d)(1).

The CPP Repeal/ACE Rule restored the Federal-State relationship required by the CAA, with EPA setting guidelines in BSER tied to specific categories of sources of emissions, which the States apply to establish emission limitations by setting "rate-based standards of performance . . . generally . . . in the form of the mass of carbon dioxide emitted per unit of energy (for example pounds of CO2 per megawatt-hour or lb/MWh)." JA.1888. Consistent with the text of Section 111(d)(1), States, not EPA, set the rate-based emission limitations for existing sources.

D. Procedural History

The CPP Repeal/ACE Rule was met with multiple challenges that were consolidated in the D.C. Circuit. North Dakota intervened in the D.C. Circuit litigation below as a respondent-intervenor in support of the ACE Rule.

In the opinion below, a divided three judge panel of the D.C. Circuit vacated the CPP Repeal/ACE Rule, with the *per curiam* majority holding that EPA erred in concluding that it did not have the authority to promulgate the nationwide generation sector mandates under the CPP. The *per curiam* opinion concluded that EPA's reading of 111(d) as requiring at-the-source controls was not "the only permissible interpretation of the scope of EPA's authority" under Section 111(d), holding that EPA's repeal of the CPP could not be upheld as "Section 7411 does not, as the EPA claims, constrain the Agency to identifying a best system of emission reduction consisting only of controls 'that can be applied at and to a stationary source.' " JA.103-104.

Further, despite admitting that "the statutory role of the best system of emission reduction under Section [111(d)] textually preserves and enforces the States' independent role in choosing from among the broadest range of options to set standards of performance appropriate to sources within their jurisdiction," the D.C. Circuit concluded that the national and state-wide mandatory hard CO2 lb/MWhr emission limitations of the CPP that imposed plant shut downs and generation shifting on the States somehow fit within Section

111(d)'s regulatory structure giving State's the primary role in setting standards of performance for existing source. JA.149-150.

The D.C. Circuit opinion dismissed cooperative federalism concerns, asserting that the CPP "in fact, afforded States considerable flexibility in choosing how to calculate and meet their emissions targets." JA.144. The D.C. Circuit did not identify the statutory basis giving EPA the authority for setting emission targets for States ("their emission targets"). Further, the D.C. Circuit did not explain how "affording" the States "considerable flexibility" to achieve emission targets set by EPA squared with Section 111(d)(1), which explicitly provides that it is the States, not EPA, that set the standards of performance for existing sources. The decision emphasized that "Congress imposed no limits" on EPA in Section 111(d) other than directives to consider costs, nonair health and environmental impacts, and energy requirements, conflating the BSER with "emission limitations" and effectively gutting the text of Section 111(d)(1) directing that States "establish" the standards of performance and emission limitations for existing sources. JA.108.

Judge Walker dissented on the grounds that Section 111(d) did not authorize what EPA had attempted in the CPP. Judge Walker would have held that EPA "was required to repeal [the CPP]" under Section 111(d). JA.217 (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part).

Addressing the plain text of Section 111(d), Judge Walker wrote that "[h]ardly any party in this case makes a serious and sustained argument that § 111[d] includes a clear statement unambiguously authorizing the EPA to consider offsite solutions like generation shifting." JA.217. Judge Walker stated that the CPP was a "groundbreaking" rule for attempting to reshape the power sector, noting the CPP aimed to reduce carbon emissions "equal to the annual emissions from more than 166 million cars," and it would have exacted "almost unfathomable costs" to do so. JA.225-226 (citation omitted). Thus, "because the [CPP] implicates 'decisions of vast economic and political significance,' Congress's failure to clearly authorize the [CPP] means the EPA lacked the authority to promulgate it." JA.217.

Finally, Judge Walker explained that even if Section 111(d) fairly showed that Congress "*allowed* generation shifting" (which he concluded it did not), that would result in an unconstitutional delegation because Congress did not "clearly *require* it." JA.230. Congress must decide "what major rules make good sense," and cannot shirk that duty by passing off critical questions to "the impenetrable halls of an administrative agency." JA.232.

After the decision, the EPA sought and secured a stay of the mandate. Order, *American Lung Ass'n v. EPA*, No. 19-1140 (Feb. 22, 2021).

SUMMARY OF THE ARGUMENT

The relief North Dakota seeks in this case is (1) the reversal of the Court of Appeals' decision below vacating the ACE Rule, (2) the reinstatement of the ACE Rule improvidently vacated by the decision below, and (3) the affirmation of EPA's repeal of the CPP.

The CAA is based on a "division of responsibilities" between the States and the federal government. *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. 60, 79 (1975). Under this scheme of "cooperative federalism," there are different roles for the EPA and the States in the regulation of existing sources of air emission. EPA is primarily responsible for setting federal guidelines for reducing air emissions from existing sources, termed a best system of emission reduction, or BSER, which takes into account statutory factors such as the cost of achieving emission reductions, nonair quality health, environmental impacts, and energy requirements.

The States are then charged with the primary authority and responsibility for establishing standards of performance for reducing emissions of air pollutants from existing sources within their borders. States do this by establishing "emission limitations" that are achievable, applying the BSER guidelines created by EPA. In addition to applying EPA's BSER guidelines when setting achievable emission limitations, States take into account source specific factors, including the remaining life of individual sources. Thus the States

have the authority and responsibility to weigh and apply State and source-specific factors within the bounds of the BSER guidelines set by EPA.

Section 111 clearly defines the constraints and limitations of both EPA's and the States' authority under this cooperative federalism framework for regulating existing sources. Section 111(a)(1) defines the term "standard of performance," and sets forth how the EPA shall determine its BSER guidelines which then inform the States' promulgation of standards of performance. Section 111(a)(1) also distinguishes between emission limitations and the BSER that is applied in establishing those limitations. Section 111(d)(1) then clarifies that it is the States, not EPA, that shall establish the standards of performance for existing sources by setting achievable emission limitations for existing sources in their States, using the BSER guidelines. States also have the authority take source-specific factors into account when setting standards of performance.

For the EPA, the BSER must be "adequately demonstrated" and take "into account the cost of achieving [emission reductions through the application of that system] and any nonair quality health and environmental impact and energy requirements." 42 U.S.C. § 7411(a)(1). BSER cannot infringe on the State's authority under Section 111(d)(1) to take into account source-specific factors. Further, BSER guidelines should not be confused with binding emission

limitations, which are for the States, not EPA, to establish for existing sources.

In a complementary fashion, the States must apply the BSER guidelines to set achievable "emission limitations" for existing sources. *Id.* at (a)(1). In other words, the BSER must provide an adequately demonstrated and justified framework for the States to apply to set binding emission limitations that can be achieved by existing sources. In applying the BSER to set emission limitations, the States apply EPA's BSER to set emission limitations for "any particular source," and to "take into consideration" source-specific factors such as "the remaining useful life of the existing source to which such standard applies." *Id.* at (d)(1). Inherent in the authority and discretion granted to the States under Section 111(d)(1) to make source-specific determinations in establishing standards of performance is that the EPA's BSER guidelines must be capable of being applied so that State-established emission limitations are achievable by existing sources and can be applied in a source-specific manner.

The cooperative federalism structure of Sections 111(a)(1) and 111(d)(1) gives EPA the primary responsibility of setting BSER guidelines, and it is the States who have the primary responsibility for establishing binding emission limitations that are achievable by existing sources within those States when applying those BSER guidelines, taking into account source-specific factors.

Despite the clear complimentary statutory roles established in Section 111, the D.C. Circuit held that EPA has essentially unlimited authority in setting the BSER guidelines, including transforming BSER "guidelines" into binding hard CO2 lb/MWhr emission limitations, transferring to EPA the authority to establish standards of performance, thus diminishing the States' primacy in setting standards of performance. Further, the D.C. Circuit held that not only did EPA have the authority to establish binding emission limitations under Section 111(d)(1), but those emission limitations did not have to be achievable for categories of existing sources (e.g. coal-fired power plants) in furtherance of EPA's generation-shifting mandate. The D.C. Circuit held that these extreme measures were allowable, because the discretion afforded to States under Section 111(d)(1) in setting standards of performance need not be read "upstream" into Section 111(a)(1) defining standards of performance and the BSER. However, the D.C. Circuit's interpretation of Section 111 cannot withstand a clear reading of the text.

The D.C. Circuit invalidated the ACE Rule and granted EPA expansive authority not found in Section 111 by refusing to read Section 111 as a whole. Yet, the Court's precedent has long established that "[s]tatutes must 'be read as a whole.'" *U.S. v. Atlantic Research Corp.*, 551 U.S. 128, 135 (2007) (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). "Standards of performance" are "emission limitations" set to be achievable by applying the BSER guidelines

established by EPA. 42 U.S.C. § 7411(a)(1). "Emission limitations," which are not BSER, are separately defined to include "limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis." 42 U.S.C. § 7602(k). Finally, Section 111(d)(1) gives the States the authority to "establish" the standards of performance for existing sources. 42 U.S.C. § 7411(d)(1). Thus, it is the States, not EPA, that establish the "emission limitations that are achievable through the application" of the BSER. *Id.* at (a)(1). By holding that EPA has largely limitless authority to establish and impose binding national CO2 emission limitations and thus standards of performance on existing sources, the D.C. Circuit has upended the cooperative federalism framework of Section 111(d), infringing on and severely diminishing the States' authority under Section 111(d) to regulate CO2 emissions from existing sources in the States, including eviscerating their authority to tailor such regulations to specific conditions in their States. This result cannot be squared with the text of the Clean Air Act and, accordingly, the D.C. Circuit's decision should be reversed, and the ACE Rule should be reinstated.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION IMPROPERLY INTERPRETED THE PLAIN TEXT OF SECTION 111 OF THE CLEAN AIR ACT

The EPA, like all federal administrative agencies, is "a creature of statute" and cannot take regulatory

actions counter to "the expressed will of Congress." *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 614-615 (1983) (O'Connor, J., concurring). It follows that EPA "literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Public Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986). Therefore, "[i]f EPA lacks authority [to take particular action] under the Clean Air Act, then its action is plainly contrary to law and cannot stand." *Michigan v. EPA*, 268 F.3d at 1081; *see also* 5 U.S.C. § 706(2)(C).

Ignoring the plain text of Section 111(d)(1) providing that States, not EPA, shall establish performance standards for existing sources, the D.C. Circuit held that "Congress imposed no limits" on EPA in Section 111(d) other than directives to consider costs, nonair health and environmental impacts, and energy requirements, transforming EPA's responsibility to establish BSER guidelines into the authority to set binding emission limitations. JA.108. In so doing, the D.C. Circuit turned Section 111(d)(1) on its head, with EPA now having almost limitless power to regulate existing sources, with the States reduced to searching for whatever crumbs of "flexibility" that EPA deigns to offer. The D.C. Circuit's view that EPA has limitless power under Section 111(d)(1) also renders meaningless Section 111(d)(2), which gives EPA the authority to establish standards of performance only where States fail to satisfactorily do so, because under the

D.C. Circuit's interpretation, EPA already effectively has this authority under Section 111(d)(1).[1]

Having gutted Section 111(d)(1) by concluding that "Congress imposed no limits" (JA.108) on EPA's authority to regulate existing sources, the D.C. Circuit went after the last remaining vestige of State authority by asserting that the statute "does not . . . constrain [EPA] to identifying a [BSER] consisting only of controls 'that can be applied at and to a stationary source'" (JA.104). This completes the removal of all State authority from Section 111(d)(1), because in addition to eliminating the State's primacy in setting performance standards for existing sources, States are also deprived of their right under Section 111(d)(1) to apply State-established performance standards on a source-specific basis, taking State and local conditions and factors into account.

In order to give the cooperative federalism codified in Section 111(d)(1) effect, EPA must establish BSER guidelines that (1) are not binding, national, statewide, or sector-wide "emission limitations" that deprive States of their primacy in setting performance standards for existing sources, and (2) allow the States, in setting their emission limitations for existing sources at the category and individual levels that are

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[1] The D.C. Circuit's decision also largely removes any distinction between new and existing sources. Under Section 111(b), EPA has the primary authority to establish standards of performance for new sources. Under the D.C. Circuit's decision, EPA now has the authority to establish standards of performance and emission limitations for existing sources as well.

achievable, to use their expertise to consider source-specific factors. EPA has no authority to mandate hard emissions limitations, applied at sector- and nation-wide-levels, which deprive the States of their authority to set standards of performance that take into account source-specific factors.

Similarly, the D.C. Circuit was wrong to conclude that "the sole ground on which the EPA defends its abandonment of the Clean Power Plan in favor of the ACE Rule is that the text of Section 7411 is clear and unambiguous in constraining the EPA to use only improvements at and to existing sources in its best system of emission reduction." JA.103. The EPA's repeal of the CPP and its decision to replace it with the ACE Rule was based on a much broader conclusion that the BSER in the CPP which "set standards that could only be achieved by a shift in the energy generation mix at the grid level, requiring a shift from one type of fossil fuel-fired generation to another, and from fossil fuel-fired generation as a whole towards renewable sources of energy" was inconsistent with the mandate of Section 111(d)(1) that the States had the authority and right to make source-specific determinations in setting standards of performance. ACE Rule, JA.1741. Thus, EPA's repeal of the CPP and promulgation of the ACE Rule was based on the broader determination that the CPP read the term BSER "so broadly as to encompass measures the EPA had never before envisioned in promulgating performance standards under CAA section 111," including fully excising the States' role in establishing achievable emission limitations and

making source-specific determinations under Section 111(d)(1).[2] *Id.*

Therefore, the D.C. Circuit's erroneous interpretation of Section 111 authorized EPA to establish binding emission limitations, including limitations that are not achievable by categories of existing sources. Further, the D.C. Circuit's interpretation of Section 111 does not require EPA to promulgate BSER guidelines that preserve the States' primacy in establishing standards of performance and that leave source-specific determinations in setting standards of performance to the States. For these reasons, the D.C. Circuit's decision is "plainly contrary to law" and "cannot stand," and the ACE Rule must be reinstated. *Michigan v. EPA*, 268 F.3d at 1081.

A. The Plain Text of the Clean Air Act Mandates that the States have the Primary Role in Setting Standards of Performance Under the Cooperative Federalism Codified in Section 111(d)(1).

The Court's precedents make clear "that the starting point for [its] analysis is the statutory text." *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003) (citing to

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[2] Thus, it is worth noting the status of the CPP. The CPP was stayed by this Court, never went into effect, and was repealed before any final decision was reached regarding its validity. The CPP was essentially a legal nullity, with no legal status or effect. Thus the reasoning underlying the CPP, which was an unprecedented and massive departure from the cooperative federalism framework created by Congress and long recognized by this Court, should not be afforded any weight.

Connecticut Nat. Bank v. Germain, 503 U.S. 249, 253-254 (1992)). Similarly, it is well established that "when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms." *Hartford Underwriters Ins. Co. v. Union Planters Bank, N. A.*, 530 U. S. 1, 6 (2000). And, where "Congress has directly spoken to the precise question at issue," and "the intent of Congress is clear, that is the end of the matter; for the court." *Chevron, U.S.A., Inc. v. N.R.D.C., Inc.*, 467 U.S. 837, 842 (1984).

The statutory text of Sections 111(a) and 111(d), when read together, set forth a four-step process by which EPA establishes a BSER guideline: States create plans establishing standards of performance for existing sources based on the States' application of the guidelines in the BSER, which plans are then submitted to EPA for review and approval.

First, in accordance with the definition of "standard of performance" under Section 111(a)(1), EPA determines the BSER that is "adequately demonstrated," taking into consideration certain enumerated statutory criteria: cost, any nonair quality health and environmental impacts, and energy requirements. 42 U.S.C. § 7411(a)(1). The BSER established by EPA is not a "standard of performance." A standard of performance is a "standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application" of BSER. *Id.* EPA's BSER is not itself the emissions standard or emission limitation, but rather is a guideline to be "applied" by the States in the process of setting "emission limitations" that are "achievable." *Id.* While the definition of

"standard of performance" provides that EPA creates the BSER guidelines, it is silent on who establishes the standard of performance and emission limitations. Which takes one to the second step.

Second, for existing sources, EPA "shall prescribe regulations" under which States shall establish "standards of performance for any existing source for any air pollutant." *Id*. at (d)(1). Since the States "establish" the standards of performance, that means it is the States that determine, for existing sources, what "emissions limitations" are "achievable," applying EPA's BSER guidelines. In promulgating its Section 111(d) procedures, EPA "shall permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." *Id*. This language in Section 111(d)(1) explicitly lays out the cooperative federalism framework of the CAA for the regulation of existing sources, mandating that the States have the primary role in setting standards of performance and emission limitations, and mandating that States have the authority to make source-specific determinations in setting those standards of performance "for any existing source." *Id.*

Third, under subsection (d)(1), States create a plan establishing "standards of performance" for existing sources and "provide[] for the implementation and enforcement of such standards of performance" (i.e., of the standards established by the State). *Id.* It is at this stage that States establish standards of

performance for existing sources, applying EPA's BSER to determine what emission limitations are achievable by those existing sources. In so doing, States take into consideration source-specific factors (including but not limited to the remaining useful life of the existing source) in setting standards of performance that are "achievable" (*Id.* at (a)(1)) for "any existing source" (*Id.* at (d)(1)).

Lastly, these State plans are submitted to EPA for its review and approval. *Id.* at (d)(1)-(2).

These provisions, read in concert, clearly mandate that the States are the ones to set the standards of performance and emission limitations, and further mandates that the States have the authority to make source specific determinations in setting those standards of performance "for any existing source." *Id.* at (d)(1). It therefore follows that any BSER guideline created by EPA must not infringe on the States' authority to establish emission limitations and determine what emission limitations are "achievable" by existing sources, including the States' authority to take source-specific factors into account in establishing the standards of performance. Otherwise the primary role designated to the States under Section 111(d)(1) is rendered superfluous if EPA has already assumed primacy in Section 111(d)(1). Therefore, under the plain language of Section 111(d), EPA exceeds its authority if it promulgates BSER guidelines which instead create mandatory emission limitations that tie the States' hands in establishing Section 111(d) plans by infringing on the States' authority to (1) "establish[] standards of performance for any existing source" and (2)

"take into consideration" source specific factors in applying the standards of performance "to any particular source." *Id.*

Five decades ago, this Court recognized the CAA's "division of responsibilities" between the States and the federal government in *Train v. Natural Resources Defense Council, Inc.*, 421 U.S. at 79. There, the Court looked at Section 110 of the CAA and acknowledged that EPA has the "responsibility for setting the national ambient air standards." But "[j]ust as plainly," the Court emphasized, the EPA "is relegated by the [CAA] to a *secondary role* in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id.* (emphasis added). As the Court explained, "[t]he Act gives the [EPA] *no authorit*y to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [CAA's] standards." *Id.* (emphasis added). "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id.*; *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.").

Just as EPA is limited in enforcing the NAAQS under Section 110 of the CAA, EPA is limited to

regulating existing sources under Section 111(d) by "establish[ing] a procedure *similar to that provided by* [Section 110] of this title under which each State shall submit to the Administrator a plan" for establishing standards of performance for existing sources. 42 U.S.C. § 7411(d)(1) (emphasis added). Congress, by this reference, intended that the States' authority for regulating existing sources under Section 111(d) would mirror State authority under Section 110. And, as the Court has recognized, "States have 'wide discretion' in formulating their plans." *Alaska Dept. of Environmental Conservation v. EPA*, 540 U.S. 461, 470 (2004) ("*Alaska v. EPA*") (quoting *Union Elec. Co. v. EPA*, 427 U.S. 246, 250 (1976)).

The Court previously confirmed Section 111(d)'s cooperative federalism structure in *American Electric Power Co. v. Connecticut* ("*AEP*"), where the Court stated that "for existing sources, EPA issues emissions guidelines," and "in compliance with those guidelines and subject to federal oversight, the States then issue performance standards *for stationary sources within their jurisdiction*." 564 U.S. 410, 424 (2011) (emphasis added). The D.C. Circuit's decision failed to recognize and adhere to this Court's direction in *AEP* that Section 111(d) restricts EPA to creating *guidelines* that apply to generation sources "within the same category," which States then use to "issue performance standards" that can be applied to individual "stationary sources" within the States' jurisdiction. *Id.* Instead the CAA "envisions extensive cooperation between federal and state authorities, generally

permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain[.]" *Id.* at 428 (internal citation omitted). The D.C. Circuit reached the opposite conclusion, holding that EPA had essentially limitless authority over existing sources under Section 111(d) such that EPA could impose fixed national and state-wide emission limitations on existing sources.

Further, the D.C. Circuit's holding mischaracterized what EPA did. EPA justified repealing the CPP and promulgating the ACE Rule on much broader grounds than those focused on by the D.C. Circuit, including recognizing that "the CPP read the statutory term [BSER] so broadly as to encompass measures the EPA had never before envisioned in promulgating performance standards under CAA section 111" and thus read the cooperative federalism mandate out of Section 111(d)(1) and could not stand. ACE Rule, JA.1741. Thus, EPA's determination that the CPP must be repealed, and its reasons for promulgating the ACE Rule, were not limited only to its determination that at the source controls were mandated, but also on the much broader premise that using the guise of BSER "guidelines" to establish and impose hard CO2 lb/MWhr "emissions limitations" that were known to be unachievable by entire source sub-categories (such as coal-fired EGUs) in order to force plant shut-downs and generation shifting was incompatible with the cooperative federalism structure mandated by Section 111.

This Court previously weighed in on "the division of responsibilities" set out in the CAA, held EPA to the limits of its congressionally-delegated authority, and protected the authority reserved to the States. In *Alaska v. EPA*, the Court examined whether EPA had the authority to block a permitting decision that was clearly left to the State of Alaska's discretion under the cooperative federalism of the CAA. 540 U.S. 461. At issue was the prevention of significant deterioration ("PSD") program, which sets up a regulatory system by which States permit new air pollutant emitting facilities prior to construction by requiring in the permit that each individual facility is equipped with best available control technology ("BACT"). *Id.* at 468. BACT is defined in CAA § 7479(3) as "an emission limitation based on the maximum degree of [pollutant] reduction . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [the] facility. . . .". *Id.*

In analyzing the cooperative federalism required by the CAA, this Court concluded that § 7479(3) "entrusted state permitting authorities with initial responsibility to make BACT determinations 'case-by-case.'" *Id.* at 488 (citing to 42 U.S.C. § 7497(3)). "A state agency," this Court stated, "is best positioned to adjust for local differences in raw materials or plant configurations, differences that might make a technology 'unavailable' in a particular area." *Id.* It is only once a State has made its BACT determination that EPA can participate by reviewing the reasonableness of that

determination. *Id.* at 489 ("EPA claims no prerogative to designate the correct BACT; the Agency asserts only the authority to guard against unreasonable designations."). Ultimately, the Court concluded that "EPA has supervisory authority over the reasonableness of state permitting authorities' BACT determinations," but that authority could only be used *after* the State had made its initial BACT determination, and could not be used to designate the correct BACT determination from the outset. *Id.* at 502.

Much like the BACT determination at issue in *Alaska v. EPA*, the "plan" that each "State shall submit to the" EPA under Section 111(d) requires that the States, not EPA, shall in the first instance establish the standards of performance and determine what are achievable emission limitations for existing sources in their States in light of EPA's BSER guidelines. The States have the authority, "in applying a standard of performance to any particular source" to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d)(1). The plain language of Section 111(d) gives States the authority to use their expertise, just like in BACT determinations, to apply source specific factors in a case-by-case manner to set achievable standards of performance for individual source categories. Just as in *Alaska v. EPA*, EPA retains a secondary oversight over State's 111(d) plans, including situations where EPA can "prescribe a plan for a State in cases where the State fails to submit a satisfactory plan." *Id.* at (d)(2).

EPA's limited oversight authority is just that: it cannot be read to effectively eliminate the State's primacy in establishing standards of performance for existing sources. The D.C. Circuit's opinion reads the authority granted to the States under Section 111(d)(1) out of the CAA.

Unlike in *Alaska v. EPA*, where EPA openly acknowledged it did not have the authority to mandate any particular BACT outcome at the initial decision stage that was reserved to States, under the CPP, EPA *mandated* a hard CO2 lb/MWhr standard of performance across the entire generation sector. These mandatory fixed numeric standards were indisputably "emission limitations" (i.e., a "requirement established by . . . [EPA] . . . which limits the quantity, rate, or concentration of emissions of air pollutants on a continuous basis" (42 U.S.C. § 7602(k))), not BSER "guidelines" to be applied by the States to establish emission limitations. EPA's decision to transform BSER guidelines into mandatory "emission limitations" entirely displaced the States from their primary role in setting standards of performance and foreclosed the States from making their own determinations as to what was achievable by existing sources or applying their own expertise to their Section 111(d) plans. The CPP further violated Section 111(a) in that those unlawfully set standards were intentionally set at a level that certain entire categories of power plants could not achieve them. The D.C. Circuit's decision upholding this jurisdictional overreach thus grants EPA the authority, through its "guidelines," to mandate exactly what a

State's 111(d) standards of performance will be before the State plan is written—a result that is in conflict with the Court's decision in *Alaska v. EPA*.

This is not to say that States have unfettered authority or discretion. States must apply EPA's guidelines (i.e., the BSER) in establishing standards of performance in their Section 111(d) plans, and EPA retains the authority to review the States' plans. *Cf. Alaska*, 540 U.S. at 482. However, the BSER which the States apply must be one that EPA is statutorily authorized to promulgate under Section 111(d) (i.e., guidelines for control measures that States can apply to determine what emission limitations are achievable by existing sources in the State). EPA cannot transform BSER guidelines into binding emission limitations that extinguish the States' authority to establish performance standards through their Section 111(d) plans, leaving States only limited "flexibility" to achieve standards of performance unlawfully set by EPA.

The D.C. Circuit's decision below also conflicts with earlier decisions of that court as well. For example, in *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), EPA had promulgated a rule requiring the States to consider best available retrofit technology ("BART") factors on a group, rather than on an individual source-by-source, basis. *See* 291 F.3d at 6. The D.C. Circuit invalidated the rule, holding that it was "inconsistent with the CAA's provisions giving the states broad authority over BART determinations." *Id.* at 8. By dictating that the States make BART

determinations in a particular manner, the EPA had impermissibly "constrain[ed] authority Congress conferred on the states." *Id*. at 9.

The same is true here. The cooperative federalism framework codified in Section 111 gives the States the first crack at establishing standards of performance and creating their Section 111(d) plans for existing sources, and mandates that States be able to consider source-specific factors in setting standards of performance. The D.C. Circuit's opinion ignores this clear directive in Section 111(d)(1), and instead concludes that EPA has authority to set the standards of performance itself, *mandating* hard CO2 lb/MWhr emission limitations (masquerading as BSER) across the entire generation sector and require States to achieve these hard, qualitative emission limitations though their Section 111(d) plans. The D.C. Circuit's interpretation of Section 111 effectively removes from the States their authority to establish standards of performance (i.e., the determination of what emission limitations are achievable based on the application of BSER) and prevents States from taking into consideration source-specific factors in their Section 111(d) plans.

Section 111(d) only allows EPA to step into the States' role and "prescribe a plan" establishing standards of performance for existing sources if a State "fails to submit a satisfactory plan." 42 U.S.C. § 7411(d)(2)(A)-(B). If EPA does step in to "promulgat[e] a standard of performance" for a State that failed to submit a satisfactory plan, EPA continues to be required to "take into consideration, among other

factors, remaining useful lives of the sources *in the category of sources* to which such standard applies." *Id.* at (d)(2)(B). The D.C. Circuit's decision below also reads this cooperative federalism balance out of Section 111, because if EPA can mandate standards of performance and national emission limitations binding on all States in the guise of BSER "guidelines," including standards that are unachievable for entire categories of sources such as coal-fired EGUs under 111(d)(1), that leaves little for EPA to do under 111(d)(2) for States that do not submit satisfactory plans under Section 111(d)(1). There is also now little to differentiate between the regulation of new sources under Section 111(b), for which EPA has primary authority, and the D.C. Circuit's conclusion that EPA can likewise set binding national emission limitations for existing sources.

By mandating an outcome (i.e., setting nationwide standards of performance and emission limitations) in the CPP that infringed on and deprived the States of their full authority to develop standards of performance in their Section 111(d) plans, EPA plainly "infringe[d] on [the State's] authority under the [CAA]." *American Corn Growers Ass'n*, 291 F.3d at 9. Thus, EPA was right to conclude in the CPP Repeal/ACE Rule that it had overstepped the bounds of its authority under Section 111 when it set hard, inflexible emission limitation mandates in the CPP, and it was correct to replace the CPP with the ACE Rule, that returned that authority to the States.

The D.C. Circuit's justification that "the States have flexibility in determining the specifics of the

standards they issue so long as they accomplish the 'degree of emission limitation' the EPA calculated based on its 'best system'" falls short. EPA does not have the authority to establish "the degree of emission limitation" for existing sources. 42 U.S.C. § 7411(a)(1). Section 111(d)(1) explicitly gives the States the authority to establish standards of performance: i.e., determine what the degree of emission limitations existing sources can achieve based on the application of BSER guidelines (not mandates) set by EPA. Section 111(d)(1) does not state that EPA has the authority to set binding national emission limitations, including limitations that are intentionally set at unachievable levels for entire categories of EGUs, so long as EPA affords States a modicum of "flexibility" in how those national emission limitations will be achieved at the State level.

The debate over whether the States have been "afforded flexibility" to implement or achieve EPA's national emission limitations mandates obscures the real issue: EPA does not have the authority to *establish* fixed national emission limitations mandates under Section 111(d)(1) (or under Section 111(a)(1)) in the first instance, rendering *implementation* discussion irrelevant. Whether EPA may have thrown some crumbs the States' way by "affording" them some "flexibility" in how they might *implement* EPA's unlawfully mandated standards of performance does not cure the fundamental defect in the CPP or the D.C. Circuit's

flawed reasoning.[3] EPA was correct in repealing the CPP and promulgating the ACE Rule that returned to the States their statutory authority to establish standards of performance (i.e., determine, for the existing sources in their States, what emission limitations are achievable in light of EPA's BSER guidelines and source-specific factors such as the remaining life of power plants).

B. The Plain Text of the Clean Air Act Mandates that the BSER Set by EPA for Existing Sources be Adequately Demonstrated and Achievable for Application "At" and "To" Existing Sources.

The cooperative federalism codified in Section 111(d)(1) squarely places the authority for determining "standards of performance" for existing sources with the States. It is the States, not EPA, that have the authority to establish the emission limitations that are achievable by existing sources. Thus, any BSER guidelines set by EPA under Section 111(a)(1) which

[3] In any event, that vaunted flexibility was a mirage. Once EPA established and imposed the hard national emission limitations under the guise of BSER "guidelines," North Dakota's flexibility to implement EPA's standards was limited to shutting down many of its coal-fired power plants (and thus eliminating North Dakota's right to consider the remaining life of power plants under Section 111(d)(1)(B)) and negotiating with sources in other States to purchase electricity from EPA's preferred sources. But these very limited alternatives to *implement* EPA's dictat could hardly be characterized as North Dakota having primacy in *establishing* standards of performance for existing sources in North Dakota.

infringe on the States' authority to establish standards of performance are contrary to the clear text of the CAA.

Section 111(a)(1) makes clear that the "standard of performance" the States develop must "reflect the degree of emission limitation *achievable* through the application of the" BSER that EPA has determined is "adequately demonstrated." 42 U.S.C. § 7411(a)(1) (emphasis added). Thus, any BSER that is not "adequately demonstrated" to be applicable to individual existing sources, nor "achievable" by those individual existing sources is unlawful because it infringes on the States' authority to determine what emission limitations are achievable. Yet, that is precisely what the D.C. Circuit affirmed: EPA's imposition in the CPP of mandatory hard CO2 lb/MWhr emission standards, essentially establishing the "standards of performance" and thus depriving the States of their authority to make that determination, was an allowable interpretation of Section 111.

i. The BSER Set by EPA Must be "Adequately Demonstrated" for Individual Existing Sources.

The D.C. Circuit held that there was no basis to read Section 111(d) "upstream into subsection (a)(1) to equate the EPA's 'application of the best system' with the controls States eventually will apply 'at and to' an individual source." JA.106. This interpretation misreads both Section 111(a) and 111(d).

The definition of "standards of performance" has three basic components, only one of which is reserved to EPA for purposes of existing sources. Standards of performance for existing sources are (1) emission limitations (set by the States) that are (2) achievable (determined by the States) based on the application of (3) BSER (developed by EPA) that has been "adequately demonstrated." 42 U.S.C. § 7411(a)(1). The separately defined "emission limitations" (*see* 42 U.S.C. § 7602(k)) and BSER are not the same thing, and the EPA's authority to develop BSER must not be confused with the States' authority to "apply" the BSER to establish standards of performance.

While Section 111(a)(1) provides that EPA creates BSER, it does not address who establishes the emission limitations themselves, the real core of the standard of performance (i.e., who applies EPA's BSER). The D.C. Circuit was incorrect when it assumed that Section 111(a)(1) gives EPA the authority to set emission limitations for existing sources.

The definition of "emission limitation" provides that either States or EPA can establish emission limitations. Section 111 addresses the relative responsibilities of EPA and the States by assigning the authority for establishing standards of performance, hence the "degree of emission limitations," based on the nature of the source being regulated. Under Section 111(b), EPA establishes the standards of performance (and thus emission limitations) for existing sources.

However, under Section 111(d)(1), Congress provided that the States, not EPA, have the authority to establish standards of performance, hence the "degree of emission limitations" (applying, of course, EPA's BSER). It reads from this statutory structure that the BSER set by EPA must be capable of "application" to the existing sources for which the States are setting standards of performance. 42 U.S.C. § 7411(a)(1). And, since the BSER set by EPA must be "adequately demonstrated," it further follows that EPA must have demonstrated that the BSER is able to be applied to the same individual existing sources for which the States are then tasked with setting standards of performance. *Id.*

The D.C. Circuit's interpretation would effectively negate this distinction, because EPA would be the primary authority for setting the emission limitations for both new and existing sources, with the States' authority for existing sources reduced to simply achieving the performance standard set by EPA. The States would be left with creating "implementation plans" for an EPA mandated emission standard, not "standards of performance."

Thus, EPA was correct in the CPP Repeal/ACE Rule to return to statutory framework for regulating existing sources, wherein EPA establishes BSER guidelines (not emission limitations) that are "adequately demonstrated" as applicable to individual existing sources, and the States apply those guidelines to set the "degrees of emission limitation" that are achievable for those existing sources. 42 U.S.C. § 7411(a)(1).

To do otherwise would render the language of Section 111(d)(1) superfluous, and as the Court has long established "[s]tatutes must 'be read as a whole.'" *U.S. v. Atlantic Research Corp.*, 551 U.S. at 135 (quoting *King v. St. Vincent's Hospital*, 502 at 221).

ii. The BSER Set by EPA for Existing Sources Must be "Adequately Demonstrated" and Allow States to Establish Emission Limitations that are "Achievable" by Existing Sources.

Section 111(a)(1) mandates, the "standard of performance" that is set by the States must be based on the "degree of emission limitation *achievable* through the application of the" BSER. 42 U.S.C. § 7411(a)(1) (emphasis added). Thus, EPA does not have authority to promulgate elements of a BSER "guideline" that have not been "adequately demonstrated" for existing sources, and that will not allow States to exercise their statutory authority to establish emission limitations that are "achievable" by those existing sources.

Yet, by EPA's own admission in the CPP, the hard CO2 lb/MWhr emission limitations promulgated in the CPP under the guise of BSER "guidelines," were neither "adequately demonstrated" nor "achievable" for an entire category of existing EGUs that generate approximately 20% of the nation's electricity: coal-fired power plants. In analyzing whether all EGUs could meet the BSER in the CPP (itself an admission that it was unlawfully exercising its authority, since BSER is supposed to be, and is announced as, a "guideline" not a

mandatory emission limitation), EPA stated that "an owner of a small generation portfolio consisting of a single coal-fired steam EGU may need to rely more on cross-investment approaches, possibly including the purchase of emission credits or allowances, because of a lack of sufficient scale to diversify its own portfolio to include NGCC capacity and RE generating capacity in addition to coal-fired capacity" because that individual coal-fired EGU could not meet the CO2 lb/MWhr requirements. *See* CPP, JA.614.

EPA dismissed both the "adequately demonstrated" and "achievability" requirements in Section 111(a) for its selected emission limitations by claiming that "it is not necessary that each affected EGU be able to implement the BSER," because "all affected EGUs can do so" if they are willing to engage in generation shifting by investing "in building block measures that are physically implemented at other locations." CPP, JA.614-615.

The anodyne phrase "generation shifting" conceals the practical effect of the CPP: transforming BSER "guidelines" into binding national emission limitations that could not be achieved by the entire coal-fired power sector in order to force utilities to generate or obtain power from other categories of sources. Under the CPP, utilities could only achieve EPA's BSER (which unlawfully included binding nationwide emission limitations) if they shut down coal-fired power plants and purchased power from or invested in EGUs

using different sources of energy.[4] Setting aside the fundamental point that neither Section 111(a)(1) nor Section 111(d)(1) give EPA the authority to establish binding emission limitations for existing sources, EPA's justification in the CPP was wholly inconsistent with the mandate that the BSER be "adequately demonstrated" and capable of being applied to existing sources to determine what "degree of emission limitation" is actually "achievable." U.S.C. § 7411(a)(1).

Thus, the D.C. Circuit's conclusion that Section 111 allows EPA's BSER "guidelines" to include binding emission limitations that are admittedly neither "adequately demonstrated" nor "achievable" by an entire category and sector of EGUs cannot be squared with the clear language of Section 111.

iii. The States' Authority to Establish Standards of Performance "At" and "To" Individual Existing Sources Cannot Be Infringed Upon.

The D.C. Circuit's conclusion that "[e]mission-reduction measures 'for' sources may readily be understood to go beyond those that apply physically 'at' and 'to' the individual source" falls short. JA.107. That reading would render superfluous the requirement in Section 111(d)(1) that it is the States who establish the

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[4] For example, the hard CO2lb/MWh emission limitations established by EPA under the guise of the BSER "guidelines" in the CPP would have forced North Dakota to close six coal-fired EGUs in the state. *See* Statement of the Case, at B (citing to Pet.App.249-252).

standard of performance "for *any* existing source," using EPA's guidelines which "shall permit the State in applying a standard of performance to *any particular source* under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life *of the existing source to which such standard applies*." 42 U.S.C. § 7411(d)(1) (emphasis added).

Even if EPA could set binding emission limitations under 111(d) (which it cannot), any such limitations cannot deprive States of their authority under Section 111(d)(1) to establish standards of performance and achievable emission limitations that take source-specific factors into account.

At the outset, the D.C. Circuit's discussion of this issue is based on its incorrect conclusion that Section 111(d)(1) gives EPA the authority to impose binding emission limitations on existing sources under the guise of BSER "guidelines" in the first instance. Then, with much grammatical maneuvering through a discussion of the preposition "for," the D.C. Circuit held that a BSER "for" a source "might entail a broader array of controls that concern but are not immediately physically proximate to the source—such as, for instance, generation shifting." JA.117. This reading of Section 111(d)(1) would obviate the provision that States have the authority and discretion to make source-specific determinations when the States set standards of performance.

The generation shifting requirement (mandated via the binding emission limitations concealed as BSER) does not apply at the source-specific level. As EPA admitted in the CPP, the BSER in the CPP was focused on the "shifting of emissions from higher-emitting to lower-emitting sources," which necessarily required "appropriate incentives for affected entities to achieve the emission reductions encompassed in the BSER, including through state plans that provide crediting for lower-emitting generation." CPP, JA.992. By EPA's own admission, the hard CO2 lb/MWhr emission limitations could not be achieved by higher-emitting source categories such as coal-fired EGUs. There was simply no room under the CPP for States, in "applying a standard of performance to any particular source" to "take into consideration" source-specific factors. 42 U.S.C. § 7411(d)(1).

The D.C. Circuit's tortured grammatical analysis improbably suggests that EPA "erroneously treats a nominalization of a verb as requiring an indirect object, collapses two separate functions and provisions of the Act in order to supply a borrowed indirect object, does so without any evidence that the borrowed indirect object was what Congress necessarily intended, and narrowly focuses the Agency's authority on that indirect object by using a different preposition from the one that actually appears in the borrowed text." JA.118. Nothing in the ACE Rule suggests EPA engaged in or relied on the complex and obscure analysis suggested by the D.C. Circuit, whose interpretation unnecessarily and erroneously complicated a textual and wholistic reading of Section 111(a)(1) and (d)(1).

Instead, EPA cannot promulgate BSER "guidelines" that impose binding national emission limitations that deprives States of their authority under Section 111(d)(1) to apply source-specific considerations in setting standards of performance for any existing source. 42 U.S.C. § 7411(d)(1). Because generation shifting does not allow the States any latitude in determining standards of performance for individual existing sources under Section 111(d)(1), it is beyond EPA's authority under the CAA. A complicated comparison of verbs, indirect objects, functions, and prepositions is not necessary to understand the clear cooperative federalism mandate Congress codified in Section 111(d)(1) that the States be afforded the discretion to make source-specific determinations.

EPA cannot promulgate BSER "guidelines" that impose binding national emission limitations that deprive States of their authority under Section 111(d)(1) to apply source-specific considerations in setting standards of performance for any existing source. 42 U.S.C. § 7411(d)(1). Because generation shifting infringes on the States authority to determine standards of performance for existing sources based on source-specific factors under Section 111(d)(1), it is beyond EPA's authority under the CAA.

CONCLUSION

A State's authority to create its own Section 111(d) plan for regulating emissions from existing sources, including establishing standards of performance and

emission limitations for those existing sources based on State, local and source-specific factors, is key to the cooperative federalism enshrined in the CAA. Congress did not grant EPA the authority, under the guise of BSER "guidelines," to mandate and impose on the States and existing sources binding national emission limitations that infringe on and severely diminish the States' authority under Section 111(d)(1) to regulate emissions from existing sources, taking source-specific factors into account. Accordingly, the D.C. Circuit's decision vacating the CPP Repeal/ACE Rule should be vacated, and the ACE Rule reinstated.

For the foregoing reasons, the judgment below should be reversed.

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