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.

THE NORTH AMERICAN COAL CORPORATION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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Additional Captions Listed On Inside Cover

WESTMORELAND MINING HOLDINGS LLC, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

STATE OF NORTH DAKOTA, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

QUESTIONS PRESENTED

1. Whether the Clean Air Act, 42 U.S.C. 7401 *et seq.*, unambiguously excludes generation shifting from the measures that the Environmental Protection Agency (EPA) may consider in determining the "best system of emission reduction," 42 U.S.C. 7411(a)(1), for purposes of regulating carbon dioxide (CO_2) emissions from existing power plants.

2. Whether EPA's regulation of hazardous air pollutants from coal-fired power plants under 42 U.S.C. 7412 bars regulation of CO_2 from those same sources under 42 U.S.C. 7411(d).

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OPINION BELOW

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

JURISDICTION

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

STATEMENT

1. The Clean Air Act, 42 U.S.C. 7401 *et seq.*, "establishes a series of regulatory programs to control air pollution from stationary sources," such as factories and power plants. *Michigan* v. *EPA*, 576 U.S. 743, 747 (2015). One of those programs is set forth in 42 U.S.C. 7411.

a. As a preliminary step to regulation, Section 7411 directs the Administrator of the Environmental Protection Agency (EPA) to list "categories of stationary sources" that, "in his judgment," "cause[], or contribute[] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. 7411(b)(1)(A). Once the Administrator lists a particular category of stationary sources, Section 7411(b) requires EPA to "establish[] Federal standards of performance for new sources within such category." 42 U.S.C. 7411(b)(1)(B). A "new source" is "any stationary source, the construction or modification of which is commenced after the publication of regulations (or, if earlier, proposed regulations) prescribing" an applicable

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[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari in No. 20-1530.

"standard of performance" under Section 7411. 42 U.S.C. 7411(a)(2). The statute defines a "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.

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

Once EPA has established standards of performance for new sources within a particular category, Section 7411(d) requires regulation of certain air pollutants emitted by "existing" sources within the same category. 42 U.S.C. 7411(d)(1). Under Section 7411(d), "[t]he Administrator shall prescribe regulations which shall establish a procedure * * * under which each State shall submit to the Administrator a plan" that "establishes standards of performance" for those existing sources and "provides for the implementation and enforcement of such standards of performance." *Ibid.* Thus, EPA generally does not directly regulate existing sources under Section 7411(d). Rather, the applicable standards of performance are generally established through plans submitted by States.

As in the case of new sources, however, those standards of performance must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction which * * * the Administrator determines has been adequately demonstrated." 42 U.S.C. 7411(a)(1). In making that determination, the Administrator (1) identifies the "system[s]

of emission reduction" that are "adequately demonstrated" for existing sources within the pertinent category; (2) identifies the "best" of those systems, based on relevant criteria that include "the cost of achieving [emission] reduction"; and (3) derives from that system an "achievable" "degree of emission limitation" for those existing sources. *Ibid.*

To identify the best system of emission reduction, and the degree of emission limitation that the agency views as achievable through use of that system, EPA promulgates a set of regulations known as "emission guidelines." See 40 C.F.R. Pt. 60, Subpt. Ba. The emission guidelines also establish procedures through which EPA receives and approves individualized state plans, which specify the standards of performance applicable to particular sources within a State. See 42 U.S.C. 7411(d)(1) (providing that EPA's regulations "shall establish a procedure similar to that provided by section 7410 of [Title 42]" and "shall permit the State in applying a standard of performance to any particular source" under such a plan "to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies"). If a State elects not to submit a plan to EPA, or submits a plan that EPA does not find "satisfactory," EPA must promulgate a federal plan that directly limits emissions from the State's existing sources. 42 U.S.C. 7411(d)(2)(A).

b. "Congress designed the existing source provision in Section 7411(d) to ensure that there were 'no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.'" Pet. App. 124a (quoting S. Rep. No. 1196, 91st Cong., 2d Sess. 20 (1970)). Only certain air-pollutant emissions from existing sources are subject to regulation

under Section 7411(d). Until 1990, Section 7411(d)(1)(A) authorized regulation of only those air pollutants "for which air quality criteria have not been issued or which [are] not included on a list published under section 7408(a) or 7412(b)(1)(A) of [Title 42]." 42 U.S.C. 7411(d)(1)(A)(i) (1988). Section 7411(d)(1)(A) thus cross-referenced two other Clean Air Act programs—the National Ambient Air Quality Standards (NAAQS) program, 42 U.S.C. 7408-7410; and the National Emissions Standards for Hazardous Air Pollutants program, 42 U.S.C. 7412—that address air pollution from stationary sources. "Section 7411(d), in its gap-filling capacity, covers all dangerous pollutants except those already regulated by NAAQS or the Hazardous Air Pollutants provision." Pet. App. 124a.

Under the NAAQS program, 42 U.S.C. 7408-7410, EPA issues "air quality criteria" and national ambient air quality standards for certain air pollutants whose "presence * * * in the ambient air results from numerous or diverse mobile or stationary sources." 42 U.S.C. 7408(a); see 42 U.S.C. 7409(a). To date, EPA has issued air quality criteria "for six pollutants: sulfur dioxide, particulate matter, nitrogen dioxide, carbon monoxide, ozone, and lead." *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 308 (2014); see 40 C.F.R. Pt. 50. Those six pollutants are included on a list published under Section 7408(a). See 42 U.S.C. 7408(a)(1).

Under the Hazardous Air Pollutants program, EPA establishes emission standards for stationary sources of "hazardous air pollutants." 42 U.S.C. 7412(d). As enacted in 1970, Section 7412(b)(1)(A) left it to the Administrator to determine which hazardous air pollutants to regulate and directed the Administrator to publish a list of those hazardous air pollutants. 42 U.S.C. 7412(b)(1)(A)

(1988). In the ensuing decades, however, Congress became "impatien[t] with the EPA's progress in regulating." 80 Fed. Reg. 64,662, 64,766 n.502 (Oct. 23, 2015). In the Clean Air Act Amendments of 1990 (1990 Amendments), Pub. L. No. 101-549, Tit. III, § 301, 104 Stat. 2531, Congress overhauled Section 7412 "to accelerate the EPA's regulation of hazardous air pollutants." 80 Fed. Reg. at 64,711. To that end, Congress replaced Section 7412(b) with a "lengthy list" of hazardous air pollutants that EPA was required to regulate, while authorizing EPA to add to that list. *Ibid.*; see 42 U.S.C. 7412(b)(1)-(2).

That revision required Congress to update Section 7411(d)(1)(A)'s cross-reference to "a list published under section * * * 7412(b)(1)(A)," which no longer existed. 42 U.S.C. 7411(d)(1)(A) (1988). The 1990 Amendments, however, contained two different provisions amending that cross-reference as part of Congress's broader revision of the Clean Air Act. Section 108 of the 1990 Amendments—entitled "Miscellaneous Guidance," 1990 Amendments, Tit. I, § 108, 104 Stat. 2465 (capitalization altered; emphasis omitted)—replaced the words "or [74]12(b)(1)(A)" in Section 7411(d) with the phrase "or emitted from a source category which is regulated under section [74]12." § 108(g), 104 Stat. 2467. That provision originated in a House Bill and is known as the "House amendment." 80 Fed. Reg. at 64,711. Section 302 of the 1990 Amendments—entitled "Conforming Amendments," 1990 Amendments, Tit. III, § 302, 104 Stat. 2574 (capitalization altered; emphasis omitted)—replaced the reference to Section "[74]12(b)(1)(A)" in Section 7411(d) with a reference to Section "[74]12(b)." § 302(a), 104 Stat. 2574. That provision originated in a

Senate Bill and is known as the "Senate amendment." 80 Fed. Reg. at 64,711.

In preparing a revised edition of the United States Code, the Office of the Law Revision Counsel of the United States House of Representatives, which is responsible for keeping the Code current, see 2 U.S.C. 285 *et seq.*, updated Section 7411(d)'s cross-reference in the manner set forth by the House amendment. See 42 U.S.C. 7411 note (Amend. 1990, Subsec. (d)(1)(A)(i)). The Law Revision Counsel declined to incorporate the Senate amendment, stating that it "could not be executed" in light of the revision made by the House amendment. *Ibid.* As it now appears in the United States Code, Section 7411(d) provides:

> The Administrator shall 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 (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of [Title 42] or emitted from a source category which is regulated under section 7412 of [Title 42] 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.

42 U.S.C. 7411(d)(1). Congress has not enacted the Law Revision Counsel's version of Section 7411(d) into positive law.

2. In the 1970s, pursuant to Section 7411, EPA placed power plants on the list of categories of stationary sources that cause, or contribute significantly to, air pollution. 80 Fed. Reg. 64,510, 64,527 (Oct. 23, 2015).

Specifically, EPA listed fossil-fuel-fired steam plants in 1971, see 36 Fed. Reg. 5931 (Mar. 31, 1971), and stationary combustion turbines in 1977, see 42 Fed. Reg. 53,657 (Oct. 3, 1977).

In 2015, EPA published two rules—the New Source Rule and the Clean Power Plan—that addressed emissions of carbon dioxide (CO_2) from power plants. Pursuant to Section 7411(b), the New Source Rule established CO_2 standards for new power plants. 80 Fed. Reg. at 64,510. In prescribing those standards, EPA noted this Court's holding in *Massachusetts* v. *EPA*, 549 U.S. 497, 528-532 (2007), that greenhouse gases are encompassed by the Clean Air Act's general definition of "air pollutant," 42 U.S.C. 7602(g), and the Court's further holding in *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410, 424-425 (2011), that greenhouse-gas emissions are subject to regulation under Section 7411. 80 Fed. Reg. at 64,527. EPA also noted its prior finding that "[greenhouse-gas] air pollution may reasonably be anticipated to endanger public health or welfare." *Id.* at 64,530. And EPA emphasized that power plants are "by far the largest emitters" of greenhouse gases among stationary sources in the United States. *Id.* at 64,522. By promulgating the New Source Rule to govern CO_2 emissions from *new* power plants, EPA also satisfied one of the legal prerequisites to Section 7411(d) regulation of CO_2 emissions from *existing* power plants—*i.e.*, the requirement that the existing source be one "to which a standard of performance under this section would apply if such existing source were a new source." 42 U.S.C. 7411(d)(1)(A)(ii).

The Clean Power Plan established Section 7411(d) emission guidelines for States to follow in developing plans to limit CO_2 emissions from existing power plants.

80 Fed. Reg. at 64,662. In establishing those guidelines, EPA first identified the "best system of emission reduction" that has been "adequately demonstrated" for existing plants. 42 U.S.C. 7411(a)(1); see 80 Fed. Reg. at 64,707. EPA found that the "best system of emission reduction" would incorporate three types of measures: (1) improving heat rate (*i.e.*, the amount of fuel that must be burned to generate a unit of electricity) at coal-fired steam plants; (2) substituting increased generation from lower-emitting natural-gas combined-cycle plants for generation from higher-emitting steam plants (which are primarily coal-fired); and (3) substituting increased generation from new zero-emitting renewable energy sources for generation from fossil-fuel-fired plants (which are primarily coal- or natural-gas-fired). 80 Fed. Reg. at 64,667. The latter two measures are known as "generation shifting" because they involve shifting electricity generation from higher-emitting sources to lower-emitting ones. *Id.* at 64,728.

EPA then determined the "degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. 7411(a)(1). It quantified that determination in the form of emission performance rates (pounds of CO_2 per megawatt-hour) for fossil-fuel-fired steam plants and stationary combustion turbines. 80 Fed. Reg. at 64,812. And it explained that, to comply with its guidelines, a State would "have to ensure, through its plan, that the emission standards it establishes for its sources individually, in the aggregate, or in combination with other measures undertaken by the [S]tate, represent the equivalent of" those performance rates. *Id.* at 64,667. EPA emphasized, however, that its guidelines did not mandate any particular approach to compliance, *id.* at 64,667-64,668, and that

States could adopt emissions-trading programs as compliance measures, see, *e.g.*, *id.* at 64,709, 64,727.

Numerous States and private parties petitioned for court of appeals review of the Clean Power Plan and sought a stay of the rule pending review. Pet. App. 36a. After the court of appeals denied a stay, this Court granted one. *West Virginia* v. *EPA*, 136 S. Ct. 1000 (2016) (No. 15A773). The en banc court of appeals heard oral argument, but the litigation in that court subsequently "was held in abeyance and ultimately dismissed as the EPA reassessed its position." Pet. App. 36a.

3. In 2019, EPA finalized two rulemakings that are relevant here. 84 Fed. Reg. 32,520 (July 8, 2019). First, EPA repealed the Clean Power Plan. *Ibid.* EPA explained that it had reevaluated its interpretation of Section 7411, *id.* at 32,522, and had concluded that the Clean Power Plan "significantly exceeded the Agency's authority," *id.* at 32,523. In particular, EPA expressed the view that Section 7411 "unambiguously" prohibits the agency from including generation-shifting measures in its determination of the best system of emission reduction, *id.* at 32,524, because Section 7411's "text and reasonable inferences from it" make "clear" that a "system" of emission reduction consists only of "measures that can be applied to and at the level of the individual source," *id.* at 32,529. EPA thus felt "obliged to repeal the [Clean Power Plan] to avoid acting unlawfully." *Id.* at 32,532. EPA noted, however, that "[m]arket-based forces ha[d] already led to significant generation shifting in the power sector," *ibid.*, and that there was "likely to be no difference between a world where the [Clean Power Plan] is implemented and one where it is not," *id.* at 32,561.

Second, EPA promulgated the Affordable Clean Energy (ACE) Rule, a new set of emission guidelines that the agency viewed as "consistent with the legal interpretation adopted in the repeal of the" Clean Power Plan. 84 Fed. Reg. at 32,532. The ACE Rule established emission guidelines only for existing coal-fired plants; EPA explained that it lacked "adequate information" to issue guidelines for other types of existing plants. *Id.* at 32,533. In light of EPA's Clean Power Plan repeal, which was premised on the agency's rejection of generation shifting as a permissible component of a "system of emission reduction," the ACE Rule found that the best system of emission reduction consisted of only the first of the three measures that the Clean Power Plan had identified: heat-rate improvements. *Id.* at 32,535. The ACE Rule then provided a list of technologies that could achieve such improvements, *id.* at 32,536, and "identified the degree of emission limitation achievable * * * by providing ranges of expected reductions associated with each of the technologies," *id.* at 32,537. The ACE Rule observed that States have "discretion in setting standards of performance" for particular sources and that those "sources have flexibility in how they comply with those standards." *Id.* at 32,555. The ACE Rule required, however, that any compliance measure must itself qualify as a "system of emission reduction" and thus "be capable of being applied to and at the source." *Ibid.* The ACE Rule excluded "averaging and trading and bio-mass cofiring" as possible compliance measures, on the view that such measures do not so qualify. *Ibid.*

4. Numerous States and private parties petitioned for court of appeals review of the Clean Power Plan repeal and the ACE Rule. See Pet. App. 43a-44a. The North American Coal Corp. (petitioner in this Court in

No. 20-1531) and Westmoreland Mining Holdings LLC (petitioner in this Court in No. 20-1778) challenged the ACE Rule, arguing that EPA cannot regulate CO_2 emissions from coal-fired power plants under Section 7411(d) because the agency is already regulating emissions of mercury and other hazardous air pollutants from those plants under Section 7412. See *id.* at 44a; 19-1179 C.A. Doc. 1838666, at 20-35 (Apr. 17, 2020). Numerous States (petitioners in this Court in Nos. 20-1530 and 20-1780) intervened in support of the Clean Power Plan repeal and the ACE Rule. See 19-1140 C.A. Doc. 1856393, at 4-35 (Aug. 13, 2020); 19-1140 C.A. Doc. 1856359, at 11-47 (Aug. 13, 2020).

a. The court of appeals vacated both the Clean Power Plan repeal and the ACE Rule and remanded to the agency for further proceedings. Pet. App. 1a-163a.

The court of appeals observed 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." Pet. App. 51a. The court concluded, however, that "traditional tools of statutory interpretation reveal nothing in the text, structure, history, or purpose of Section 7411 that compels the reading the EPA adopted in" repealing the Clean Power Plan and adopting the ACE Rule. *Id.* at 79a. The court likewise concluded that neither the "major questions" doctrine, *id.* at 83a; see *id.* at 83a-103a, nor the federalism canon (the interpretive rule that Congress must speak clearly in order to effect a significant alteration of the balance between federal and state powers), see *id.* at 103a-109a, supports that reading. The court therefore held that Section 7411 "does not unambiguously bar

a system of emission reduction that includes generation shifting." *Id.* at 66a. Having held that EPA had "erred in concluding Section 7411 unambiguously requires that the best system of emission reduction be source specific," the court also "reject[ed] the ACE Rule's exclusion from Section 7411(d) of compliance measures it characterizes as non-source-specific." *Id.* at 80a.

The court of appeals concluded that, because EPA had 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," both the Clean Power Plan repeal and the ACE Rule should be vacated. Pet. App. 162a. The court emphasized, however, that it had "not [been] called upon to decide whether the [source-specific] approach of the ACE Rule is a permissible reading of the statute as a matter of agency discretion." *Id.* at 50a-51a. The court therefore "remanded to the EPA so that the Agency may 'consider the question afresh in light of the ambiguity'" that the court had perceived in the statute. *Id.* at 162a (citations omitted).

The court of appeals also upheld EPA's authority under Section 7411(d) to issue emission guidelines addressing CO_2 emissions from existing power plants. Pet. App. 124a-146a. The court acknowledged that "those same power plants' mercury emissions are regulated under Section 7412's Hazardous Air Pollutants provision." *Id.* at 124a. The court held, however, that EPA's regulation of those hazardous-pollutant emissions from power plants did not preclude the agency from regulating CO_2 emissions from the same sources under Section 7411(d). See *id.* at 124a-146a.

The court of appeals explained that the Senate amendment to Section 7411(d)(1)(A) excludes from Section

7411(d)'s coverage only "hazardous *pollutants* already regulated under Section 7412." Pet. App. 127a. The court held that the House amendment is best construed to produce the same result. The court observed that the exclusionary language of Section 7411(d)(1)(A)(i) "refer[s] directly to specific air pollutants listed for regulation under other statutory provisions, and so [] prevent[s] duplicate regulation of the same harmful emissions." *Id.* at 130a. The court further explained that "Section 7412's regulatory scheme operates not broadly on the source category, but only on its emissions of the specified air pollutants" that are listed as hazardous under that provision. *Id.* at 132a. The court concluded that reading Section 7411(d) to authorize regulation of CO_2 emissions from existing power plants "fits with Section 7411(d)'s gap-filling purpose, which is to capture those dangerous air pollutants not covered by NAAQS or the Hazardous Air Pollutants program." *Id.* at 133a. The court of appeals therefore held that "Section 7411(d) allows the EPA to regulate carbon dioxide emissions from power plants, even though mercury emitted from those same power plants is regulated as a hazardous air pollutant under Section 7412." *Id.* at 146a.

b. Judge Walker concurred in part, concurred in the judgment in part, and dissented in part. Pet. App. 164a-203a. In his view, EPA is precluded from regulating coal-fired power plants under Section 7411(d) "because coal-fired power plants are already regulated under § [74]12, and § [74]11 excludes from its scope any power plants regulated under § [74]12." *Id.* at 165a. Judge Walker therefore would have upheld the Clean Power Plan repeal but would have vacated the ACE Rule. See *id.* at 202a.

5. After the court of appeals issued its decision, EPA moved for a stay of the court's mandate with respect to vacatur of the Clean Power Plan repeal until the agency promulgates a new Section 7411(d) rule on remand. 19-1140 C.A. Doc. 1885168, at 4 (Feb. 12, 2021) (EPA Partial Stay Mot.). In that motion, EPA made clear that it did not wish for the Clean Power Plan to be reinstated. *Ibid.* The agency noted that the deadline for States to submit their plans under the Clean Power Plan had "long since passed," EPA Partial Stay Mot., Goffman Decl. ¶ 13, and that because of "ongoing changes in electricity generation," "the emissions reductions that the [Clean Power Plan] was projected to achieve have already been achieved by the power sector," *id.* ¶ 14. EPA explained that, while the Clean Power Plan "was projected to reduce CO_2 emissions from the electric power sector by 2030 to a level approximately 32 percent below the level in 2005," "[p]reliminary data indicates that CO_2 emissions from the electric power sector in 2019 were 34 percent below the level in 2005." *Ibid.* Thus, to "promote regulatory certainty and to avoid the possibility of administrative disruption," EPA argued that "no Section 7411(d) rule should go into effect until [the agency's new rulemaking] is completed." EPA Partial Stay Mot. 4.

No party opposed EPA's motion, and the court of appeals granted it, "withhold[ing] issuance of the mandate with respect to the vacatur of the Clean Power Plan Repeal Rule until the EPA responds to the court's remand in a new rulemaking action." 19-1140 C.A. Doc. 1886386, at 1 (Feb. 22, 2021). The court then issued its mandate with respect to vacatur of the ACE Rule. 19-1140 C.A. Doc. 1888579 (Mar. 5, 2021). For that reason, no Section

7411(d) rule governing CO_2 emissions from existing power plants is currently in effect.

ARGUMENT

Petitioners challenge the Clean Power Plan's approach to regulating CO_2 emissions from existing power plants. They argue that Section 7411 unambiguously forecloses EPA from relying on generation shifting as a component of the "best system of emission reduction." But the question whether the Clean Power Plan was lawful has no continuing practical significance, since that Plan is no longer in effect and EPA does not intend to resurrect it.

EPA instead intends to issue a new Section 7411(d) rule after taking into account all relevant considerations, including changes to the electricity sector that have occurred during the last several years. Petitioners urge this Court to grant review now to help guide the upcoming rulemaking, but that is little more than a request for an impermissible advisory opinion. Any further judicial clarification of the scope of EPA's authority under Section 7411(d) would more appropriately occur at the conclusion of the upcoming rulemaking, when the courts can review a concrete and considered EPA rule, rather than speculate as to the regulatory approaches the agency *might* take. In the meantime, the court of appeals' stay of its vacatur of the Clean Power Plan repeal ensures that petitioners will face no burdens from any Section 7411(d) regulation unless and until EPA promulgates a new rule.

Petitioner Westmoreland also contends that EPA cannot regulate CO_2 emissions from existing coal-fired power plants under Section 7411(d) because EPA already regulates emissions of certain hazardous air pollutants from such plants under Section 7412. The court

of appeals correctly rejected that contention. And in any event, this Court's consideration of that issue would be premature, given pending challenges to EPA's regulation of hazardous-air-pollutant emissions from power plants under Section 7412. Further review is not warranted.

1. Petitioners contend that Section 7411 unambiguously forecloses the approach to regulating CO_2 emissions from existing power plants that EPA adopted two Administrations ago in the Clean Power Plan. See 20-1530 Pet. 25-34; 20-1531 Pet. 23-33; 20-1778 Pet. 32-38; 20-1780 Pet. 19-32. In particular, petitioners contend that Section 7411 unambiguously excludes generation shifting from the measures that EPA may consider in determining the "best system of emission reduction." See, *e.g.*, 20-1530 Pet. 23-33. That contention does not warrant this Court's review.

a. Whether the Clean Power Plan was lawful is no longer an issue of ongoing practical importance. EPA repealed the Clean Power Plan two years ago. 84 Fed. Reg. at 32,520. Although the court of appeals vacated that repeal, see Pet. App. 163a, EPA promptly moved to stay that vacatur, and the court granted EPA's motion. See p. 15, *supra*. That stay ensured that the Clean Power Plan would not spring back into existence simply by virtue of the court's vacatur decision, and EPA does not intend to resurrect the Clean Power Plan of its own accord.

When the court of appeals' stay order is taken into account, it is clear that the decision below does not subject petitioners to any present or imminent concrete harm. To the contrary, in addition to vacating EPA's repeal of the Clean Power Plan, the court of appeals vacated the ACE Rule, and that aspect of the court's decision has not been stayed. See p. 15, *supra*. The present

effect of the decision below thus is to leave CO_2 emissions from existing power plants unregulated under Section 7411(d).

Petitioners find the decision below objectionable not because of any present or imminent legal effect of the court of appeals' *mandate*, but because of the potential effect of the court's legal analysis on future EPA deliberations. Any such effect, however, is neither imminent nor certain. EPA is now in the process of initiating a notice-and-comment rulemaking to promulgate new CO_2 emission guidelines for existing power plants under Section 7411(d). See 19-1140 C.A. Doc. 1899829, at 3 (May 24, 2021) (reporting that "administrative proceedings to respond to the Court's remand in a new rulemaking action are ongoing"). As part of that upcoming rulemaking, EPA will take a fresh look at the scope of its authority under Section 7411(d). See Pet. App. 162a (remanding for the agency to "consider the question afresh") (quoting *Negusie* v. *Holder*, 555 U.S. 511, 523 (2009)).

In determining anew the "best system of emission reduction," 42 U.S.C. 7411(a)(1), the agency will take into account this Court's decision to stay the Clean Power Plan, see *West Virginia* v. *EPA*, 136 S. Ct. 1000 (2016) (No. 15A773); the court of appeals' decision below; "changed facts and circumstances in the electricity sector that have occurred over the last several years," EPA Partial Stay Mot. 4-5; and public comments from interested parties, including petitioners here, during the new rulemaking, see 42 U.S.C. 7607(d)(5). The new rule that EPA promulgates will then be subject to judicial review. See 42 U.S.C. 7607(b). There is consequently no sound reason for this Court to grant review now to resolve the legality of a *prior* agency regulation that has

no present operative effect and that EPA does not intend to revive.

b. Petitioners do not dispute that "the Clean Power Plan itself is now a relic." 20-1531 Pet. 18. Petitioners nevertheless contend that this Court should grant review "to clarify EPA's legal framework from the outset" of the agency's new rulemaking. 20-1530 Pet. 21; see 20-1531 Pet. 14 (urging the Court to "clarify the bounds of [EPA's] power now").

Any such "clarif[ication]" (20-1530 Pet. 21) to guide the upcoming rulemaking, however, would amount to little more than an "advisory opinion[]" on an "abstract proposition[] of law." *Hall* v. *Beals*, 396 U.S. 45, 48 (1969) (per curiam); see *TransUnion LLC* v. *Ramirez*, 141 S. Ct. 2190, 2203 (2021) (reaffirming that "federal courts do not issue advisory opinions"). EPA's new rule has yet to be proposed, much less promulgated. Petitioners therefore can only speculate as to what the new rule might contain.

It is entirely speculative, for example, to suggest that EPA will again include generation shifting as an element of the best system of emission reduction. See, *e.g.*, 20-1531 Pet. 18 (speculating that EPA "will[] issue similarly broad regulations again"); 20-1780 Pet. 33 (speculating that EPA "will seize upon the broad and expansive license given to it by the D.C. Circuit's opinion"). In determining what "system of emission reduction" is "best," EPA will be required to consider not only the likely efficacy of various measures in reducing CO_2 emissions from existing power plants, but also additional factors such as "cost" and "energy requirements." 42 U.S.C. 7411(a)(1). The core holding of the court below—*i.e.*, that the Clean Air Act's text does not unambiguously preclude the use of generation shifting

as a component of such a system—therefore cannot reasonably be construed as *requiring* EPA to include generation shifting as part of its new regulatory approach. In taking a fresh look at the issue, EPA may adopt an approach, similar to the ACE Rule and Section 7411(d) guidelines that the agency has promulgated for greenhouse-gas emissions from other sources, that considers only measures that can be applied at and to the level of the individual source. See Pet. App. 50a-51a (leaving it open on remand for EPA "to decide [that] the approach of the ACE Rule is a permissible reading of the statute as a matter of agency discretion"); 81 Fed. Reg. 35,824, 35,826-35,827 (June 3, 2016) (identifying only at-and-to-the-source measures for oil and natural-gas sources); 61 Fed. Reg. 9905, 9907 (Mar. 12, 1996) (identifying only at-and-to-the-source measures for municipal solid-waste landfills). If EPA adopts such an approach, petitioners' concerns will be moot, and no court will need to determine the legality of an alternative regulatory regime that incorporated generation shifting.

This Court's review therefore should await the completion of EPA's new rulemaking, when any challenge to the new rule "will take a more concrete shape." *Trump* v. *New York*, 141 S. Ct. 530, 535 (2020) (per curiam). That is when judicial review of an agency rule typically occurs, see, *e.g.*, 42 U.S.C. 7607(b), and petitioners identify no sound basis for departing from that usual practice here. The upcoming rulemaking may well obviate their concerns that EPA will "craft systems of emission reduction 'without regard for the thresholds prescribed by Congress.'" 20-1530 Pet. 20 (citation omitted). And if petitioners are ultimately aggrieved by the outcome of that rulemaking, they may seek judicial review at that time. The Court's immediate review therefore is

not necessary to ensure that EPA's new rule is consistent with Section 7411.

The Court's immediate review likewise is unnecessary to ensure that EPA refrains from issuing the equivalent of a Clean Power Plan for "every building that emits [greenhouse] gases, including residential homes and every commercial facility." 20-1531 Pet. 19; see 20-1530 Pet. 15 (similar). EPA cannot regulate a category of sources under Section 7411(d) unless it first "list[s]" them as a category that "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare," 42 U.S.C. 7411(b)(1)(A), and then establishes "Federal standards of performance for new sources within [that] category," 42 U.S.C. 7411(b)(1)(B). EPA has never taken those steps with respect to "residential homes" or "commercial facilit[ies]" generally (20-1531 Pet. 19), even though it has listed and regulated numerous categories of large industrial or other high-intensity facilities under Section 7411. See 40 C.F.R. Pt. 60. And given that EPA does not intend to resurrect the Clean Power Plan itself, the suggestion that EPA would adopt that approach on an even broader scale is groundless.

The usual practice of allowing an agency to interpret and apply a statute in the first instance, before judicial review occurs, ensures that "the agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides." *Negusie*, 555 U.S. at 524 (brackets and citations omitted). And where (as here) the relevant agency process involves notice-and-comment rulemaking, it is important that the agency be able to

evaluate the competing submissions of interested persons before committing itself to particular legal or factual conclusions. Granting review at this juncture would subvert that administrative process by pressuring EPA to commit (in its briefs and argument in this Court) to a view of the statute before its rulemaking is complete.

Even if it were appropriate for the Court "to clarify EPA's legal framework" in order to guide the agency's new rulemaking, 20-1530 Pet. 21, this case would be an unsuitable vehicle for providing that clarification. The agency action that the court of appeals reviewed here was not the Clean Power Plan itself, but the agency's repeal of that Plan. The court's task thus was the "relatively discrete one" of reviewing "the sole ground on which the EPA defend[ed] its abandonment of the Clean Power Plan in favor of the ACE Rule"—namely, the agency's determination "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." Pet. App. 50a-51a. If this Court grants certiorari, its review likewise will be limited to that "relatively discrete" issue. *Id.* at 50a. The Court will not have before it—as it may if it awaits the completion of EPA's new rulemaking—the broader question "whether the approach of the ACE Rule is a permissible reading of the statute as a matter of agency discretion." *Id.* at 50a-51a.

c. Petitioners contend that any "delay" in this Court's review "would carry serious and far-reaching costs." 20-1530 Pet. 13. But petitioners face no burdens from any Section 7411(d) rule on CO_2 emissions while EPA's new rulemaking is ongoing. The court of appeals stayed its vacatur of the repeal of the Clean Power Plan, and it vacated the ACE Rule, which EPA had promulgated to

replace the Clean Power Plan. See pp. 15-16, *supra*. For that reason, no Section 7411(d) CO_2 rule is currently in effect.

Petitioners suggest that the costs of delay include the resources that will be devoted to EPA's upcoming rulemaking. See 20-1530 Pet. 20. But that new rulemaking, with its attendant costs, will proceed whether or not this Court grants review. And because any new rule that EPA adopts will inevitably be challenged in court, it would be more cost-effective to consolidate all issues for review at the conclusion of the process, rather than to conduct review at both ends. See *FTC* v. *Standard Oil Co. of Cal.*, 449 U.S. 232, 242 (1980) (explaining that judicial intervention before agency action is final "leads to piecemeal review which at the least is inefficient and upon completion of the agency process might prove to have been unnecessary").

Petitioners further argue that any delay in this Court's review would "leav[e] the industry in regulatory limbo." 20-1531 Pet. 22; see 20-1778 Pet. 23-24 (similar). But until EPA finalizes its new rule, regulatory uncertainty is unavoidable. Indeed, even if this Court granted review and held 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," Pet. App. 51a, significant uncertainty would remain. It would still be uncertain, for example, what measures are properly viewed as applying "at and to" particular sources. *Ibid.*; see, *e.g.*, 84 Fed. Reg. at 32,558 (concluding that biomass co-firing (*i.e.*, using trees and crops as fuel) is not a measure that "can be applied to the source itself," even though "the firing of biomass occurs at a designated facility"). And there would still be uncertainty about which of the various

measures that can be applied "at and to" the source constitute the "best" system of emission reduction. Pet. App. 51a; see, *e.g.*, 84 Fed. Reg. at 32,543 (considering, but ultimately rejecting, natural-gas co-firing and carbon capture and storage as potential elements of the best system of emission reduction). The Court's review therefore would not provide any "final resolution" (20-1780 Pet. 34) of a plant's obligations under Section 7411(d).

d. Petitioners observe that this Court granted a stay of the Clean Power Plan five years ago. *West Virginia*, 136 S. Ct. at 1000; see, *e.g.*, 20-1531 Pet. 2, 14. The Court's decision to take that step provides no sound reason to grant certiorari now.

The issue before the Court five years ago was whether parties should be required to comply with the Clean Power Plan while the Plan itself was under judicial review. Numerous States asserted that, if the Court did not grant a stay, they would suffer substantial irreparable harms "as a direct result of the Plan." States Stay Appl. at 38, *West Virginia*, *supra* (No. 15A773). Those alleged practical burdens were relevant not only to the irreparable-harm prong of the stay analysis, but also to the likelihood that the Court would grant certiorari if the D.C. Circuit found the Plan to be lawful. See *id.* at 14 (arguing that, given "the wide-ranging impact of the Power Plan," there was a reasonable probability that this Court would grant certiorari if the court of appeals upheld the Plan).

The present case comes to the Court in a substantially different posture. The Clean Power Plan has been repealed and will not be reinstated, and petitioners do not claim that they will suffer any harms as a direct result of either the Plan itself or the vacatur of the Plan's

repeal. The basis for this Court's intervention five years ago therefore does not exist today.

2. Section 7411(d)(1)(A)(i) authorizes EPA to prescribe regulations with respect to any air pollutant "for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of [Title 42] *or emitted from a source category which is regulated under section 7412 of* [*Title 42*]." 42 U.S.C. 7411(d)(1)(A)(i) (emphasis added). In *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011) (*AEP*), this Court relied specifically on Section 7411(d) in concluding that the Clean Air Act "'speaks directly' to emissions of carbon dioxide from [existing power] plants." *Id.* at 424. Section 7411(d) was integral to the Court's holding that "the Clean Air Act and the EPA actions it authorizes displace any federal common-law right to seek abatement of carbon-dioxide emissions from fossil-fuel fired powerplants." *Ibid.*; see Pet. App. 144a-145a.

Relying on the italicized portion of Section 7411(d)(1)(A)(i) quoted above, petitioner Westmoreland nevertheless contends that, because EPA regulates emissions of hazardous air pollutants from coal-fired power plants under Section 7412, the agency cannot regulate CO_2 emissions from those same sources under Section 7411(d). 20-1778 Pet. 27-32. That contention does not warrant this Court's review.

a. Westmoreland's argument lacks merit.

i. Section 7411(d)(1) establishes a framework under which each State "establishes standards of performance for any existing source for any air pollutant" that satisfies specified criteria. 42 U.S.C. 7411(d)(1)(A). Each of the "standards of performance" to which Section 7411(d)(1) refers governs emissions of a specific pollutant from a

specific source category. The Clean Power Plan, for example, did not address CO_2 emissions generally, or power-plant emissions generally, but CO_2 emissions from power plants.[2] Section 7412 likewise regulates emissions of specific pollutants from specific source categories. See 42 U.S.C. 7412(c)(1) (directing EPA to publish "a list of all categories and subcategories of major sources and area sources * * * *of the air pollutants listed pursuant to subsection (b)*") (emphasis added); Pet. App. 132a ("Section 7412's regulatory scheme operates not broadly on the source category, but only on its emissions of the specified air pollutants.").

The Section 7411(d)(1)(A)(i) language on which Westmoreland relies should be construed so as to harmonize it with the larger statutory scheme, under which the relevant unit of regulation is the emission of a particular pollutant from a particular source category. Under that approach, a particular pollutant is "emitted from a source category which is regulated under section 7412 of [Title 42]," 42 U.S.C. 7411(d)(1)(A)(i), if, but only if, the source category is regulated under Section 7412 with respect to its emissions *of that pollutant*. As noted above, Section 7412 does not authorize EPA to regulate the general operations of power plants, but only to regulate their emissions of the specific hazardous pollutants that are listed pursuant to Section 7412(b). Because

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[2] One of the criteria for regulation of emissions from an existing source under Section 7411(d) is that the specific pollutant involved must be one "to which a standard of performance under this section would apply if such existing source were a new source." 42 U.S.C. 7411(d)(1)(A)(ii). In determining whether that requirement is satisfied, the relevant inquiry is whether a standard of performance applies to emissions of the same pollutant from new sources within the same source category.

CO_2 is not on that list, power plants' emissions of that pollutant are not "regulated under section 7412." *Ibid.* That reading would preclude regulation under Section 7411(d) of the hazardous-pollutant emissions that EPA already regulates under Section 7412. It would ensure, however, that EPA's decision to regulate those emissions does not divest the agency of its pre-existing authority to regulate CO_2 emissions, which are *not* regulated under the Hazardous Air Pollutants program.

ii. That reading of the disputed statutory language best serves the intended purposes both of Section 7411(d) as a whole and of the specific exclusionary language on which Westmoreland relies. Section 7411(d) performs a "gap-filling" role, by "cover[ing] all dangerous pollutants except those already regulated by NAAQS or the Hazardous Air Pollutants provision." Pet. App. 124a. The exclusionary language contained in Section 7411(d)(1)(A)(i) "refer[s] directly to specific air pollutants listed for regulation under other statutory provisions," and thus "prevent[s] duplicate regulation of the same harmful emissions." *Id.* at 130a; see *id.* at 132a-133a.

The court of appeals' reading of Section 7411(d)(1)(A)(i) preserves that balance, ensuring that Section 7411(d) is available when, but only when, a regulatory gap would otherwise exist. Westmoreland's approach, by contrast, would preclude regulation under Section 7411(d) of CO_2 emissions that are *not* regulated under either the NAAQS or Hazardous Air Pollutant program. Cf. Pet. App. 136a (explaining why listing of CO_2 as a hazardous air pollutant would produce disruptive consequences). That would extend the exclusionary language to a circumstance where no threat of duplicative regulation exists, and it

would prevent Section 7411(d) from performing its intended gap-filling role.

iii. The court of appeals' reading of Section 7411(d)(1)(A)(i) also harmonizes the Senate and House amendments (see pp. 6-7, *supra*), both of which were enacted into law as part of the 1990 Amendments to the Clean Air Act. Although those provisions contain different language, "[r]espect for Congress as drafter counsels against too easily finding irreconcilable conflicts in its work." *Epic Sys. Corp.* v. *Lewis*, 138 S. Ct. 1612, 1624 (2018). Thus, if the two provisions can be read to have the same meaning, they should be.[3]

Here, the meaning of the Senate amendment is plain. By cross-referencing the list of pollutants published under Section 7412(b), it excludes from Section 7411(d)'s coverage any hazardous-pollutant emissions that are already regulated under Section 7412. Pet. App. 130a. At the same time, the Senate amendment leaves intact EPA's pre-existing authority under Section 7411(d) to limit emissions of non-hazardous pollutants, which are not subject to regulation under Section 7412, even when EPA has invoked Section 7412 to regulate emissions of

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[3] "If a text contains truly irreconcilable provisions at the same level of generality, and they have been simultaneously adopted, neither provision should be given effect." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 189 (2012) (emphasis omitted). Here, the House and Senate amendments purport to revise the same text in Section 7411(d). If a court adopted Westmoreland's proposed reading of the House amendment, the two amendments would be "truly irreconcilable" and "neither provision should be given effect." *Ibid.* (emphasis omitted). That interpretive approach would leave intact EPA's authority to regulate CO_2 emissions from existing power plants under Section 7411(d), even though hazardous-pollutant emissions from the same sources are regulated under Section 7412.

listed hazardous pollutants from the same sources. The court of appeals correctly recognized that, if the House amendment can reasonably be construed in the same manner—and, as we explain above, it can—the court should adopt that construction rather than reading the House amendment in a way that places the two provisions at loggerheads. See *id.* at 129a-133a.[4]

iv. As noted above, Section 7411(d)(1)(A) empowers EPA to prescribe regulations "for any existing source for any air pollutant [1] for which air quality criteria have not been issued *or* [2] which is not included on a list published under section 7408(a) of [Title 42] or emitted from a source category which is regulated under section 7412 of [Title 42]." 42 U.S.C. 7411(d)(1)(A) (emphasis added). In light of Congress's use of the word "or" to separate clauses [1] and [2], Section 7411(d)(1)(A) could be read literally to identify two independent bases on which EPA may regulate pollutant emissions from existing sources. See, *e.g.*, *Horne* v. *Flores*, 557 U.S. 433, 454 (2009) ("Use of the disjunctive 'or' makes it clear that each of the provision's three grounds for relief is independently sufficient."). Under that approach, the undisputed fact that EPA has not issued air quality criteria for CO_2 emissions under the NAAQS program, see 80 Fed. Reg. at 64,713, would mean that EPA can regulate such emissions from existing power plants.

Despite its literal force, however, that reading is clearly contrary to Section 7411's purpose, and EPA has

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[4] The court of appeals identified one narrow circumstance, where a hazardous pollutant listed under Section 7412(b) is emitted by a source that EPA has not regulated under Section 7412, in which the Senate and House amendments might produce different levels of coverage. See Pet. App. 132a n.19. Because CO_2 is not listed as a hazardous air pollutant, that circumstance is not presented here.

not adopted it. That approach would expand Section 7411(d) well beyond its intended "gap-filling" role, Pet. App. 133a, by allowing Section 7411(d) regulation of emissions that are already regulated under the Hazardous Air Pollutants program, so long as they are not regulated under the NAAQS program as well. That would produce the very sort of "duplicate regulation," *id.* at 130a, that Section 7411(d)(1)(A)(i)'s exclusionary language is intended to prevent. But the conflict between Section 7411(d)'s purpose and Westmoreland's proposed reading is equally stark and fundamental. Westmoreland would preclude EPA from regulating under Section 7411(d) a category of emissions—*i.e.*, emissions of CO_2 and other non-hazardous pollutants from existing power plants—that are *not* regulated under either the NAAQS or the Hazardous Air Pollutants program. That approach "would put the House Amendment in direct conflict with not only the unambiguous language of the Senate Amendment, but also with the Clean Air Act's gap-filling structure and purpose." *Id.* at 135a; see pp. 25-29, *supra*.

b. Westmoreland does not address clause [1] of the statutory text discussed above. See p. 29, *supra*. Nor does Westmoreland dispute the plain meaning of the Senate amendment to clause [2]. See p. 28, *supra*. Instead, Westmoreland contends that the Senate amendment should be disregarded on the ground that it was "deleted by another provision." 20-1778 Pet. 29. The House amendment, however, did not delete the Senate amendment. Rather, Congress enacted both amendments at the same time. And to the extent that Westmoreland relies (*ibid.*) on the Law Revision Counsel's decision to incorporate the House amendment instead of the Senate amendment into the revised version of

Section 7411(d) that appears in the United States Code, that reliance is misplaced. The Statutes at Large constitute the legal evidence of the laws where, as here, the relevant provisions of the Code have not been enacted into positive law. See 1 U.S.C. 204(a); *United States* v. *Welden*, 377 U.S. 95, 98 n.4 (1964) (noting that "the Code cannot prevail over the Statutes at Large when the two are inconsistent") (citation omitted).

Westmoreland asserts that EPA has "admitted" that the Senate amendment "was a scrivener's error," 20-1778 Pet. 29, and that EPA has "acknowledged," in connection with a 2005 rulemaking, that "a literal reading of" the House amendment supports Westmoreland's more restrictive interpretation of Section 7411(d)(1)(A), *id.* at 27. Neither assertion is correct. In the court of appeals, EPA argued that the Senate amendment was *not* a scrivener's error. See EPA C.A. Br. 183 (noting the argument "that the Senate-drafted amendment is a 'scrivener's error' with no significance," and stating that the argument "fails"). And in the 2005 rulemaking that Westmoreland cites, EPA made clear that Section 7411(d)(1)(A) is most reasonably understood to allow the agency to regulate *non-hazardous* pollutants even when those pollutants are emitted from source categories whose emissions of *hazardous* pollutants are regulated under Section 7412. See, *e.g.*, 70 Fed. Reg. 15,994, 16,031 (Mar. 29, 2005) (concluding that, "[w]here a source category is being regulated under section [74]12, a section [74]11(d) standard of performance cannot be established to address any [hazardous air pollutant] listed under section [74]12(b) that may be emitted from that particular source category").

Westmoreland also relies (20-1778 Pet. 27, 37) on the *AEP* Court's statement that "EPA may not employ

§ 7411(d) if existing stationary sources of the pollutant in question are regulated under the [NAAQS] program, §§ 7408-7410, or the 'hazardous air pollutants' program, § 7412." 564 U.S. at 424 n.7. Westmoreland's reliance on that description of the statutory scheme is misplaced. That description, and in particular its reference to "the pollutant in question," *ibid.*, is consistent with the court of appeals' focus on whether a source's emissions of particular pollutants are regulated under Section 7412. See Pet. App. 145a. That is particularly so given that the *AEP* footnote described in parallel terms regulation under the NAAQS program and regulation under Section 7412. Section 7411(d)(1)(A)(i) cannot plausibly be read to foreclose regulation under Section 7411(d) of all pollutant emissions from a source category that also emits NAAQS criteria pollutants. See *id.* at 145a-146a.

c. In any event, the Court's review of the interplay between Section 7412 and Section 7411(d) would be premature at this time. EPA may regulate hazardous air pollutants from power plants under Section 7412 only if it "finds such regulation is appropriate and necessary." 42 U.S.C. 7412(n)(1)(A). In 2012, EPA determined that it was "appropriate" and "necessary" to regulate power plants under Section 7412, and the agency promulgated standards governing emissions of mercury and other hazardous air pollutants from those sources. 77 Fed. Reg. 9304, 9306, 9363 (Feb. 16, 2012). In *Michigan* v. *EPA*, 576 U.S. 743 (2015), this Court held that EPA had erred in failing to consider cost when making its appropriate-and-necessary finding. *Id.* at 751.

Since then, EPA has promulgated two additional rules—a 2016 rule in which the agency made a supplemental finding that regulation of power plants' hazardous-pollutant emissions remains appropriate and necessary,

even after considering cost, 81 Fed. Reg. 24,420, 24,421 (Apr. 25, 2016); and a 2020 rule in which EPA reversed that supplemental finding but left the 2012 emission standards in place under Section 7412(c)(9), 85 Fed. Reg. 31,286, 31,286, 31,312 (May 22, 2020); see 42 U.S.C. 7412(c)(9) (providing criteria for delisting a source category). Petitions for review challenging those rules are pending in the court of appeals, see, *e.g.*, *Murray Energy Corp.* v. *EPA*, No. 16-1127 (D.C. Cir.) (2016 rule); *American Academy of Pediatrics* v. *Regan*, No. 20-1221 (D.C. Cir.) (2020 rule), including a petition filed by Westmoreland challenging EPA's decision to leave the 2012 emission standards in place, see 20-1160 C.A. Doc. 1857810, at 1 (Aug. 21, 2020). In February 2021, EPA announced that it was reconsidering the 2020 rule, see 20-1221 C.A. Doc. 1885356, at 1-2 (Feb. 16, 2021), and the petitions for review challenging the 2016 and 2020 rules are now being held in abeyance pending further order of the court, see 16-1127 C.A. Doc. 1887125 (Feb. 25, 2021); 20-1221 C.A. Doc. 1885509, at 1 (Feb. 16, 2021); 20-1160 C.A. Doc. 1863712, at 1 (Sept. 28, 2020).

Because EPA's regulation of power plants under Section 7412 is itself the subject of ongoing litigation, review to determine the effect of such regulation on EPA's authority under Section 7411(d) would be premature. If EPA's regulation of power plants under Section 7412 remains in force when the agency promulgates a new Section 7411(d) rule governing CO_2 emissions from existing power plants, Westmoreland can raise the issue then in a petition for review, with the potential for ultimate resolution of the question by this Court.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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