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

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL., PETITIONERS

v.

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

THE NORTH AMERICAN COAL CORPORATION, PETITIONER

V.

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

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

BRIEF IN OPPOSITION FOR POWER COMPANY RESPONDENTS

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August 5, 2021

Additional Captions Listed on Inside Cover

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

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

QUESTION PRESENTED

Whether the court of appeals erred by vacating and remanding an agency rule that repealed and replaced an earlier rule, where the agency's sole basis for the new rule was the erroneous conclusion that 42 U.S.C. § 7411(d) unambiguously required it.

CORPORATE DISCLOSURE STATEMENTS

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

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

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

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

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

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

Power Companies Climate Coalition states that it is an unincorporated association of companies engaged in the generation and distribution of electricity and natural gas. Its members include the Los Angeles Department of Water and Power ("LADWP"), Pacific Gas and Electric Company, Seattle City Light and the other entities providing disclosures in this statement.

LADWP states that it is a vertically integrated publicly-owned electric utility of the City of Los Angeles.

Sacramento Municipal Utility District states that it is has no parent corporation and no publicly held company owns 10 percent or more of its stock.

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INTRODUCTION

Petitioners urge this Court to grant review to address the outer limits of an agency's statutory authority under 42 U.S.C. § 7411 without the benefit of any extant agency action that reflects the agency's current view of its authority. Petitioners posit expansive authority that the agency might wield in forthcoming rulemaking, just to shoot it down. Review to address Petitioners' arguments while the agency reexamines its authority would be advisory and premature. Judicial review should be based on review of agency authority in fact exercised, and in the context of the administrative record supporting that agency action. This case therefore does not present an appropriate vehicle for this Court's review.

Each of the four Petitions attempts to craft a slightly different basis for this Court's review. All of the arguments for review are premised, however, on what the agency *might* do in the future. The four Petitions make claims about both the Affordable Clean Energy ("ACE") Rule, which the decision below vacated,[1] and the Clean Power Plan ("CPP") Rule,[2] which was repealed and replaced by the ACE Rule. But neither the government nor the electricity sector petitioned for *certiorari* to defend the ACE Rule. And

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

[2] Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Dec. 22, 2015).

neither the ACE Rule nor the CPP Rule is in effect at this time.

The Petitions inaccurately suggest that the court of appeals' decision ratifies the view of the agency's authority reflected by the earlier CPP Rule. But the court of appeals made no such pronouncement on the scope of the agency's authority under 42 U.S.C. § 7411(d), nor on the legality of the CPP Rule, and the agency has since announced that it will revisit the scope of its authority on a clean slate.

Petitioners overstate the scope of the court of appeals' decision. The decision is clear that it vacated the ACE Rule's repeal of the CPP Rule because the agency based that repeal on the legally erroneous conclusion that the statute unambiguously commanded it. The court's vacatur and remand accords with longstanding precedent, which holds that when a court determines that an agency mistakenly believed its action was compelled by the statute, the proper remedy is for the court to vacate and remand to the agency for reconsideration.

Some of the Petitions posit a series of hypothetical exercises of agency authority, many exaggerated and without basis in actual policy or practice. None of these reflect a current pronouncement by the agency on the scope of its authority.

As the agency acknowledged when it repealed the CPP Rule and adopted the ACE Rule, changes have occurred within the electricity sector due to a powerful set of forces, independent of federal regulation, that caused the CPP Rule's 2030 nationwide targets to be achieved by the electricity sector more than a decade

in advance, even though the CPP Rule did not go into effect. Those changes, which include reductions in the cost of emission-reduction technologies and increasing consumer preferences for clean power, have only accelerated since adoption of the ACE Rule.

The Court's review at this juncture would risk a ruling untethered to actual circumstances. The dramatic changes occurring within the electricity sector will necessarily be considered by the agency when it reexamines the scope of its authority under Section 7411(d). These changes will presumably factor into the agency's application of the statutory criteria, and that application will provide a concrete context in which the entire array of issues on which the Petitioners seek review may be considered, including the scope of agency authority under Section 7411(d), cooperative federalism, the applicability of the major questions doctrine, or the relationship between Section 7411(d) and other provisions of the statute. This case presents a poor vehicle for review by this Court without extant agency action applying those statutory criteria.

REASONS FOR DENYING THE PETITION

I. THE DECISION BELOW IS NOT AN APPROPRIATE VEHICLE FOR THIS COURT'S REVIEW.

Petitioners ask the Court to decide the outer bounds of an agency's authority in the abstract, based on hypothetical actions they prognosticate the agency *might* take in the future. Petitioner's arguments are unmoored from the practical realities of the electricity

sector and any concrete legal dispute. The Court's intervention at this stage would be advisory and premature.

A. There is no extant agency rule that reflects the agency's view of its statutory authority, thus rendering this case an inappropriate vehicle for review.

It is well-established that this Court "avoid[s] premature adjudication, from entangling [itself] in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Abbott Labs. v. Gardner*, 387 U.S. 136, 148–49 (1967). Indeed, even when final agency action has been taken, the Court will refrain from reviewing an agency rule if "further factual development would significantly advance [the Court's] ability to deal with the legal issues presented." *Nat'l Park Hospitality Ass'n v. Dep't of Interior*, 538 U.S. 803, 812 (2003).

These principles apply with particular force here. Petitioners contend that this Court should grant review to resolve numerous issues related to two agency rules—the Affordable Clean Energy ("ACE") Rule and the Clean Power Plant ("CPP") Rule (*see* notes 1, 2, *supra*), which reflected different interpretations of agency authority under the Clean Air Act, specifically 42 U.S.C. § 7411(d). *See* 20-1530 Pet. 13–15, 25–34 (attacking CPP Rule's interpretation of Clean Air Act and D.C. Circuit's vacatur of ACE Rule); 20-1531 Pet. 13–15, 23–33 (same); 20-1778 Pet. 2–4, 26–38 (same);

20-1780 Pet. 4–6, 19–27 (same). But neither Rule is now in effect nor is expected to take effect in the future. Rather, the decision below remanded the matter to the Environmental Protection Agency ("EPA"), which has indicated that it is revisiting its authority under Section 7411.

The agency did not petition for *certiorari* to defend the ACE Rule that the court of appeals vacated. And the agency obtained a stay of the mandate from the court of appeals with respect to vacatur of the repeal of the CPP Rule because the agency is revisiting its authority under 42 U.S.C. § 7411(d) on a clean slate. *See* Declaration of Joseph Goffman ¶¶ 12–16, *Am. Lung Ass'n v. EPA*, No. 19-1140 (D.C. Cir. Feb. 12, 2021), Doc. No. 1885168. The agency explained that it "strongly believes that no Section 7411(d) rule should go into effect" until the agency "consider[s] the question afresh" and the action is completed. The agency explained that would "promote regulatory certainty" and "avoid the possibility of administrative disruption." *See* Respondent's Motion for Partial Stay of Issuance of the Mandate at 3–4, *Am. Lung Ass'n v. EPA*, No. 19-1140 (D.C. Cir. Feb. 12, 2021), Doc. No. 1885168.

The Petitions and supporting briefs contend that a "definitive answer from this Court is needed to ensure the EPA's next rule is legally correct." *See* Br. of Resp't Nat'l Mining Ass'n at 10; *accord id.* at 1–2. But, of course, this Court does not grant *certiorari* to issue advisory opinions to guide agencies before the agency exercises its authority.

How the agency applies the criteria supplied by 42 U.S.C. § 7411 is especially critical here in light of the transformation occurring within the electricity sector. Those developments are happening so rapidly that the emission-reduction targets of the CPP Rule were achieved more than a decade in advance, even though that rule did not go into effect.[3] This transformation is being driven, not by federal regulation, but by advances in renewable generation technologies and associated cost reductions, increasing consumer demand for low-carbon power, and other forces.[4]

Respondents here, Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Sacramento Municipal Utility District and a coalition that includes the Los Angeles Department of Water and Power, Pacific Gas and Electric Company, and Seattle City Light ("Power Company Respondents"), are acutely aware of the fundamental shifts that are driving reductions of carbon dioxide pollution throughout the electricity sector. The Power Company Respondents have operations in 49 States and the District of Columbia, and collectively provide electricity service to more than 20 million homes and businesses, amounting to a total

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[3] *See* Office of Air Quality Planning and Standards, EPA, *Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units* § 2.2.2 (June 2019).

[4] *See id*. § 2.2 ("The anticipation of a lower emissions future in the baseline is due to large-scale market trends that are multifaceted in nature. These include fundamental shifts in fuel supply, continued advances and cost declines for key power generating technologies, market operation and policy evolution, and end-use demand influences.").

service population of more than 40 million. They also own or operate more than 70,000 megawatts of electric generating capacity from an increasingly diverse set of resources, including coal, oil, natural gas, nuclear, wind, solar, hydropower, geothermal and biomass.

Even since promulgation of the ACE Rule, the pace of reductions within the electricity sector has continued to accelerate. That has supported widespread adoption of increasingly aggressive targets to reduce or eliminate electricity-sector carbon dioxide emissions by mid-century.[5] The technological and market forces driving these reductions will undoubtedly bear upon the agency's identification of the "best system of emission reduction" for purposes of 42 U.S.C. § 7411. The agency should be afforded the opportunity to apply the statutory criteria in making this decision

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[5] *See*, *e.g.*, Exec. Order No. 3 (Conn. Sept. 3, 2019). (requiring state Department of Energy and Environmental Protection to recommend strategies for achieving 100% zero carbon target for electric sector by 2040); Pub. L. No. 2019, ch. 477 (Me. 2019) (amending Me. Stat. tit. 35-A, § 3210 to require that, by January 1, 2030, 80% of retail electricity sales in state will come from renewable resources and, by January 1, 2050, 100% will come from such resources); H.B. 2021, 81st Leg. Assemb., Reg. Sess. (Or. 2021) (requiring investor-owned utilities in state to reduce greenhouse gas emissions associated with the electricity they sell to 80% below baseline emissions levels by 2030, 90% below baseline emissions levels by 2035, and 100% below baseline emissions levels by 2040); H.B. 1526, 2020 Reg. Sess. (Va. 2020) (requiring Virginia electric utilities to produce their electricity from 100% renewable sources by no later than 2050); Exec. Order No. 38 (Wis. Aug. 16, 2019) (creating a state Office of Sustainability and Clean Energy and charging it, with other agencies and state utilities, to achieve a goal of ensuring all electricity consumed within the state is 100% carbon-free by 2050).

based on the current state of technology and available scientific expectations for future developments.

This Court's assessment of agency authority in the abstract, without an extant agency rule, and based on speculation of what the agency might do in the future as urged by Petitioners, would require review of issues that may not be necessary to resolve after the current, ongoing agency action is completed. The case therefore does not present an appropriate vehicle for this Court's review.

B. The stay entered years ago against the CPP Rule does not provide grounds for this Court's review.

Petitioners make much of the fact that this Court entered a stay of the CPP Rule a few years ago. *See* 20-1530 Pet. 2; 20-1351 Pet. 15–17; 20-1778 Pet. 2–4; 20-1780 Pet. 6, 11, 32–33. One Petition goes so far as to ask "this Court to finish what it started when it stayed the CPP." 20-1778 Pet. 4. But the Court's entry of a stay does not reflect a determination on the merits. And the court of appeals earlier dismissed as moot challenges to the CPP Rule—including the case in which the Court entered a stay—because that Rule was repealed. *See* 20-1778 Pet. 16 ("[T]he case [against the CPP Rule] was ultimately dismissed as moot based on EPA's subsequent actions.").

Petitioners claim that the agency will promulgate a rule in the future that mirrors the CPP Rule. *See* 20-1530 Pet. 15, 22; 20-1531 Pet. 14, 20; 20-1778 Pet. 24–25; 20-1780 Pet. 33. Even if that were true, it would not justify this Court's review of the court of appeals' decision here. The agency has not promulgated

such a rule, and what final agency action it will take in the future is far from certain. Judicial review should be based on review of agency authority in fact exercised, and in the context of the administrative record supporting that agency action.

Some Petitioners concede that the CPP Rule "itself is now a relic; its timeline and schedules are years out of date, and it is unlikely that President Biden's EPA would revive it in identical form." 20-1531 Pet. 18. Speculation as to what an agency may do in the future is not a basis for this Court's review. *See Nat'l Park Hospitality Ass'n*, 538 U.S. at 812 ("judicial resolution" of the lawfulness of a rule "should await a concrete dispute about a particular" application of the rule).

II. THE DECISION BELOW IS CORRECT AND DOES NOT PRESENT THE BROAD ISSUES URGED BY PETITIONERS.

In an effort to distract from the poor vehicle presented by this case, Petitioners misstate the holding of the decision below.

The court of appeals clearly held that it vacated the ACE Rule because that Rule "rests squarely on the erroneous legal premise that the statutory text expressly foreclosed consideration of [emission-reduction] measures other than those that apply at and to the individual source," which the agency had concluded required repeal of the CPP Rule. 20-1530 Pet. App. 162a. The Court thus directed that the "ACE Rule must be vacated and remanded to the EPA so that the Agency may consider the question afresh

in light of the ambiguity [it] see[s]." *Id.* (internal quotation marks omitted).

Petitioners suggest that, under the court of appeals' decision, there are "no limits" to agency authority under Section 7411(d). The decision indicated no such thing. The court ruled only that the ACE Rule was incorrect in its conclusion that the statute *required* the "at the source" interpretation, and, therefore mandated repeal of the CPP Rule. The decision did not rule on whether the CPP Rule had been a lawful exercise of statutory authority, nor did the court opine as to the boundaries of lawful exercise of authority under Section 7411(d).

The decision below did not alter the longstanding regulatory framework in which the EPA, States, and regulated industries have worked together using flexible mechanisms under the Clean Air Act to reduce power sector emissions. The decision did not mandate a specific rule and would not cause the massive consequences Petitioners suggest.

A. The decision below correctly vacated and remanded the ACE Rule because it was based on the erroneous view that the Rule was unambiguously mandated by statute.

The EPA promulgated the ACE Rule, which repealed and replaced the CPP Rule, on the basis that the agency was "statutorily compelled" to do so. The agency reasoned that the text of Section 7411(a) and (d)(1) "unambiguously limits the [best system of emission reduction] to those systems that can be put into operation *at* a building, structure facility, or installation." 20-1530 Pet. App. 37a (quoting ACE Rule, 84

Fed. Reg. at 32,524). It is that reasoning that the court of appeals rejected. *Id.* at 54a.

The court of appeals correctly explained that "[n]othing in Section 7411(a)(1) itself dictates the 'at and to the source' constraint on permissible ingredients of a 'best system' that the Agency now endorses." The court was correct that there is no basis, in the plain language, grammatically, contextually, or otherwise, that requires the ACE Rule. *Id.* at 54a–55a.

Section 7411(a)(1) defines "standard of performance" as a "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." Section 7411(d) requires States to submit plans that "establish[] standards of performance for any existing source for any air pollutant."

The ACE Rule adopted the erroneous view that "application" in Section 7411(a)(1) must have an indirect object, and that object must be "any existing source" under Section 7411(d), so that the best system of emission reduction is unambiguously limited to measures that are applied "at" and "to" an existing source. But, as the court of appeals found, "application" is not a verb, but rather a noun and "[g]rammar assigns direct or indirect objects only to verbs." 20-1530 Pet. App. 60a–61a. Moreover, even the verb "apply" may be properly used with or without an explicit

indirect object, and if one were required, its absence in Section 7411(a)(1) did not command that the agency borrow one from Section 7411(d)(1) or the specific one selected, when other "equally logical" candidates could be found, such as the source category or the emissions. *Id.* at 62a.

In addition, the ACE Rule erroneously substituted two prepositions appearing in neither section ("at" and "to"), for the one actually appearing in Section 7411(d)(1) ("for"), to conclude that the statute unambiguously forbade the agency from considering anything other than systems that can be put into operation "at" or "to" an individual power plant.

As the court of appeals found, the statute does not support this replacement of the preposition "for" an existing source (which just means that the system is "with regard or respect to" or "concerning" the source), with the two different prepositions "at" and "to," which are more restrictive and connote direct physical proximity or contact. 20-1530 Pet. App. 63a–65a. These errors caused the agency to manufacture restrictions that are not supported by the plain text of Section 7411, let alone unambiguously commanded. *Id.* at 65a–66a.

Petitioners are wrong to suggest that the court of appeals' vacatur and remand effectively ratified the previous interpretation that the agency took under the CPP Rule. They also are wrong that the court of appeals' decision foreclosed the agency from adopting an interpretation limiting the best system to measures that can be installed at an individual source. *See* 20-1530 Pet. 2–3; 20-1531 Pet. 2, 13; 20-

1780 Pet. 26. In fact, the court of appeals did not endorse any particular statutory interpretation.

The decision below follows the routine practice of vacating and remanding an agency action when the agency wrongly believed its action was compelled by statute. *See, e.g.*, *Peter Pan Bus Lines, Inc. v. FMCSA*, 471 F.3d 1350, 1354–55 (D.C. Cir. 2006) (collecting cases); *Prill v. NLRB*, 755 F.2d 941, 943 (D.C. Cir. 1985) (holding that agency's determination that employee conduct was unprotected by the statute was based on erroneous view that statutory interpretation was mandated by the statute, and remanding to agency to reconsider its interpretation without the court adopting its own statutory interpretation). It is standard practice for the court to vacate and remand when an agency decision is based on the erroneous view that a statute unambiguously requires a certain agency action. *See*, *e.g.*, *Prime Time Int'l Co. v. Vislack*, 599 F.3d 678, 683 (D.C. Cir. 2010); *Labor, Mine Safety & Health Admin. v. Nat'l Cement Co. of Cal.*, 494 F.3d 1066, 1077 (D.C. Cir. 2007); *City of L.A. Dep't of Airports v. Dep't of Transp.*, 103 F.3d 1027, 1032–39 (D.C. Cir. 1997).

The court of appeals' decision does not require the agency to adopt on remand any particular interpretation of the statute, nor does it prevent the agency from taking the same action if it provides a valid rationale for that interpretation that is not based on the erroneous view of a statutory mandate. *See Negusie v. Holder*, 555 U.S. 511, 522–23 (2009) (agency's action based on mistaken interpretation that statute mandated disregard of a defense of compulsion required remand for agency to reconsider interpretation and

"[w]hether the statute permits such an interpretation based on a different course of reasoning must be determined in the first instance by the agency.").

Petitioners also are wrong in claiming that the decision below holds that there are "no limits" under Section 7411(d). Petitioners take the phrase out of context. *See* 20-1530 Pet. 16; 20-1531 Pet. 16–18; 20-1778 Pet. 1, 4, 16–17; 20-1780 Pet. 14. In its summary of various provisions in Section 7411, the court of appeals observed that "Congress imposed no limits on the type of measures the EPA may consider *beyond three additional criteria*: cost, any nonair quality health and environmental impacts, and energy requirements." 20-1530 Pet. App. 56a (emphasis added). The court of appeals did not conclude that there are *no limits* under Section 7411, but merely observed that Congress did not specify any limits on what could be considered beyond these three enumerated criteria. As the court of appeals observed elsewhere, those criteria, along with the requirement that the system must be adequately demonstrated, "significantly rein[] in the EPA's judgment." *Id.* at 90a. Petitioners' repeated use of the phrase "no limits" and selective quotation is an incorrect characterization of the court of appeals' holding and provides no basis for this Court's review.

B. The decision below does not present the broad range of other issues urged by Petitioners.

The effort by the various Petitioners to tee up a list of unrelated, broader legal issues in an attempt to identify some basis for review should be rejected.

1. The broad concerns raised by Petitioners about the major questions doctrine are not implicated by the court of appeals' decision that the statute does not unambiguously require the interpretation adopted by the ACE Rule. *See* 20-1530 Pet. 17, 21; 20-1531. Pet. 3, 30–33; 20-1531 Pet. 28–32; 20-1778 Pet. 33. The major questions doctrine counsels that in "extraordinary cases," a court should look for a clear statement before concluding that Congress delegated to an agency a "decision of deep economic and political significance," particularly in an area where the agency has "no expertise." *See King v. Burwell*, 576 U.S. 473, 486 (2015); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000). In such cases, "based on [a statute's] overall regulatory scheme" and "subsequent legislation," a court may conclude "that Congress has directly spoken to the question at issue and precluded the [agency] from regulating" in that area. *Brown & Williamson Tobacco Corp.*, 529 U.S. at 160–61.

This is not such a case. The major questions doctrine is not implicated here, where the agency is expressly authorized by Congress to implement a statute in a particular area, and the only question is how it answers a particular question assigned to it by Congress: What is the "best system of emission reduction" for a given source? *See Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (holding that Section 7411 authorizes EPA to decide whether and how to regulate carbon dioxide emissions from power plants). There is no question that EPA is charged with implementing 42 U.S.C. § 7411. The statute is explicit that EPA "shall prescribe regulations" for

States to establish standards of performance for existing sources of air pollutants. 42 U.S.C. § 7411(d)(1). It also expressly confers upon the EPA the duty to determine the "best system of emission reduction" that is "adequately demonstrated," taking into account enumerated criteria. 42 U.S.C. § 7411(a)(1).

The agency does not "claim[] to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Cf. Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324, 333–34 (2014) (holding that EPA could not interpret statutory authorization to regulate motor-vehicle greenhouse-gas standards to trigger stationary-source permitting requirements for thousands of smaller-emitting sources the agency acknowledged Congress did not intend to be regulated). First, the ACE Rule that the decision below vacated specifically adopted a statutory interpretation that *narrowed* the EPA's authority. Second, power plants that would be regulated by the agency under Section 7411(d) have long been regulated for their emissions under the Clean Air Act and Section 7411. Third, the agency's interpretations had heretofore, across political parties, consistently concluded that it has authority to regulate the establishment of standards of performance under Section 7411(d) that could be met by means other than installation of control technology "at" and "to" each individual source. *See* 20-1530 Pet. App. 73a–77a. There is no sudden transformation of authority here.

2. One Petitioner argues that the Court should grant review to address the reach of a narrow exception to Section 7411(d)(1) for air pollutants regulated

under Section 7412. *See* 20-1778 Pet. 26–38. But the parties do not dispute that the statutory exception has always applied to exclude hazardous air pollutants regulated under Section 7412 from regulation under Section 7411.

Petitioner's argument arises, instead, from a 1990 amendment that created a new framework for regulation of hazardous air pollutants under Section 7412. The Senate and House of Representatives each passed their own conforming amendments to Section 7411 to account for this modification. Both versions ended up being enacted into law but only one, the House version, was codified in the U.S. Code. Petitioner claims that this latter version extends beyond hazardous air pollutants regulated by Section 7412 to any source that emits one of those pollutants, effectively allowing the exception to swallow Section 7411(d) altogether.

The court of appeals analyzed the provisions and acknowledged that, although the Senate "took the most direct textual path to updating Section 7411(d)'s cross-reference" and the House version was "less efficient," neither version created the expansive exception that Petitioner claims. *See* 20-1530 Pet. App. 124a–146a. The court correctly rejected Petitioner's argument based on the text of both versions, and the context in which they were passed. It correctly declined to read those versions—both designed to update a cross-reference and respectively labeled a "[c]onforming [a]mendment" and "[m]iscellaneous [g]uidance"—as working a major substantive change in the law. *Id.* at 129a–132a. The court also declined to give any weight to the fact that the House Amendment alone was codified by the Office of Law Revision

Counsel because that office "has no license … to change the substantive meaning of enacted law or throw away an entire statutory provision," which "is why the Public Law prevails over the United States Code in case of conflict." *Id.* at 139a.

The court of appeals noted that, at the same time Congress amended Section 7411(d), it added a savings clause to Section 7412, which provides that no emission standard promulgated under the latter section "shall be interpreted, construed, or applied to diminish or replace *** applicable requirements established pursuant to section [7411]." 20-1530 Pet. App. 133a–134a (brackets in original). The court held that this simultaneously enacted savings clause affirms Section 7411(d)'s complementary role in the statutory scheme and does not allow interpretation of the cross-reference to render Section 7411(d) meaningless. *See id.* at 133a. Based on this analysis, the court of appeals correctly concluded that "the better and quite natural reading of all the relevant enacted statutory text, structure, context, purpose, and history is one that harmonizes the House and Senate Amendments"—and thereby preserves Section 7411(d)'s gap-filling role—rather than one that would assume "one chamber of Congress smuggled dramatic and unlikely changes to the Agency's regulatory authority in this Act through miscellaneous 'guidance.'" *See id.* at 141a–143a.[6]

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[6] Tellingly, the Petitioner that asks the Court to grant review of this question is simultaneously challenging the agency's authority to regulate hazardous air pollutants from power plants under

3. Another Petitioner argues that the decision below is contrary to Supreme Court and D.C. Circuit opinions concluding that various agency rules were invalid because they required States to adopt particular standards in violation of cooperative federalism requirements under various statutes. 20-1780 Pet. 19–27. But the court of appeals' decision "never mentions those opinions" because that issue, and the CPP Rule through which the Petitioner raises that issue, were outside the scope of the court of appeals' review of the ACE Rule, which did not implicate those issues. *See* 20-1780 Pet. 27 n.2.

4. The decision also does not merit review because it does not, as one amicus attempts to claim, expand *Massachusetts v. EPA*, 549 U.S. 497 (2007). That case interpreted a different statutory provision. *See* Br. of Amicus Curiae Commonwealth of Kentucky at 9–12. The court of appeals vacated and remanded the ACE Rule based on the text of Section 7411 itself. 20-1530 Pet. App. 45a–83a. The court of appeals invoked *Massachusetts v. EPA* only in addressing the major questions doctrine to explain that the Court has "ruled specifically that greenhouse gases are 'air pollutants' covered by the Clean Air Act," but noted that "[m]ore to the point," "the Court has told the EPA directly that it is the Agency's job to regulate power plants' emissions of greenhouse gases under Section

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Section 7412. *See* Petition for Review, Statement of Issues, *Westmoreland Mining Holdings LLC v. EPA*, No. 20-1160 (D.C. Cir. May 22, 2020, Aug. 21, 2020), Doc. Nos. 1844031, 1857810 (Petitioner arguing that agency must rescind its regulation of hazardous air pollutants from power plants based upon agency's 2020 finding that such regulation is not appropriate and necessary).

7411." *Id.* at 85a (citing *Am. Elec. Power Co.*, 564 U.S. at 426–47).

C. The decision below maintains the longstanding regulatory environment in which the EPA, States, and the regulated industry use flexible compliance mechanisms to reduce power sector emissions under the Clean Air Act.

The decision below is not a sea change. It is not "a virtual call to arms, empowering the EPA to circumvent Congress and 'solve' climate change on a systematic basis." *See* 20-1531 Pet. 18. The holding establishes no new agency powers.

The ACE Rule that the decision vacated would have been a sea change. It would have eliminated, as per se unlawful, certain longstanding, fundamental means of reducing electricity-sector emissions. Under the ACE Rule, the agency would have been prohibited from considering the actual strategies applied by sources to substantially and cost-effectively reduce this sector's emissions. The ACE Rule would also have precluded emissions trading and other flexible compliance mechanisms that prior administrations, across political parties, found to be permissible under the Clean Air Act. Thus, the decision below preserves agency consideration of, but does not require, the primary means by which the electricity sector has reduced (and plans to continue to reduce) emissions from affected fossil fuel-fired generating units.

The electricity sector, including Respondents here, has long relied upon shifting of power generation from

one plant to another in order to reduce emissions. Unlike other source categories regulated under Section 7411, power plants are unique in that they produce a fungible product in synchrony with one another across the interconnected power grid. Electric utilities and grid operators shift generation among plants as their fundamental strategy for ensuring delivery of a reliable source of power at least cost to consumers, taking into account constraints like restrictions on transmission and emissions. These shifts are a natural consequence of both the physics and economics that dictate how the power grid operates. The court of appeals held that the agency had misread the statute as constraining its authority to consider this strategy in its selection of the best system. 20-1530 Pet. App. 65a–66a. But the decision does not require that the agency select generation shifting as the best system on remand.

The court of appeals rejected the ACE Rule's exclusion of averaging and trading because the agency had erroneously interpreted the statute to allow only measures that can be taken "at" an individual plant. 20-1530 Pet. App. 80a. The court of appeals did not hold that averaging and trading must be allowed as a means of compliance, only that the agency erred in declaring them to be categorically barred by the statute. The decision below maintains traditional tools that have long been relied upon by the agency and States to reduce emissions under the Clean Air Act and that the electricity sector broadly favors as more economically efficient than prescriptive mandates at each individual plant.

D. The decision below will not result in the massive consequences claimed by Petitioners.

Petitioners suggest that the "consequences of the decision below are massive—for the electricity sector and the rest of the economy alike." *See* 20-1530 Pet. 3. They claim that EPA will become the regulator of everything from commandeering greenhouse-gas emitting houses to imposing a carbon tax on any building that emits greenhouse gases. *See* 20-1530 Pet. 13–19; 20-1531 Pet. 13–14. And they claim that EPA could override every determination made by States by setting rigid guidelines that mandate outcomes. 20-1780 Pet. 50. These hypotheticals are not based on any agency action or policy before the Court. Nor are they mandated by the court of appeals' narrow decision.

Petitioners lament the changing rules and uncertainty in the industry. *See, e.g.*, 20-1531 Pet. 2, 15, 22 ("every industry linked to global warming (*i.e.*, all of them) will be left in limbo"); 20-1778 Pet. 1 ("industry has been whipsawed and frustrated in making the long-term decisions and investments necessary to meet the Nation's energy needs"). But these concerns are not a result of the decision below. These concerns are properly brought in the first instance to the agency that has announced it is considering a new rule on a clean slate. These concerns also do not reflect the experience of all members of industry. As Respondents have indicated, *see supra* Section II.C, many power companies have and will continue to reduce emissions in response to forces other than federal regulation under Section 7411(d).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

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