No. 20-____

IN THE

Supreme Court of the United States

THE NORTH AMERICAN COAL CORPORATION,

Petitioner,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In 2015, the EPA promulgated its "Clean Power Plan," which for the first time imposed carbon dioxide emissions limits on existing coal- and gas-fired power plants. The EPA developed those standards based not on any technology that the plants could themselves apply in their operations, but instead on an industry-wide system of "generation shifting"—a cap-and-trade-style regime that effectively required many existing power plants to be shuttered or to scale back while subsidizing renewable energy sources.

This Court stayed that rule even before any lower court had reviewed it. And no court ever *did* review it, because the EPA soon changed course. It repealed the Clean Power Plan, reasoning that the Clean Air Act authorized it only to promulgate standards based on technology actually applicable to a given existing source—not to devise its own national, systemic solution to greenhouse gas emissions.

Now, in the whiplash-inducing opinion below, the D.C. Circuit has held that this *repeal* was arbitrary and capricious, because the Act supposedly *does* grant the EPA the requisite authority after all.

With that background, the question presented is:

Whether 42 U.S.C. § 7411(d), which authorizes the EPA to impose standards "for any existing source" based on limits "achievable through the application of the best system of emission reduction" that has been "adequately demonstrated," grants the EPA authority not only to impose standards based on technology and methods that can be applied at and achieved by that existing source, but also allows the agency to develop industry-wide systems like cap-and-trade regimes.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

The D.C. Circuit consolidated numerous cases under Case No. 19-1140. Respondents in the D.C. Circuit proceeding below were the Environmental Protection Agency and its Administrator.*

Petitioners and intervenors in the D.C. Circuit proceedings below were as follows.

No. 19-1140: Petitioners were American Lung Association and American Public Health Association.

Intervenor for petitioners was: State of Nevada.

Intervenors for respondents were: AEP Generating Company, AEP Generation Resources Inc., America's Power, Appalachian Power Company, Chamber of Commerce of the United States of America, Indiana Michigan Power Company, Kentucky Power Company, Murray Energy Corporation, National Mining Association, National Rural Electric Cooperative Association, Public Service Company of Oklahoma, Southwestern Electric Power Company, Westmoreland Mining Holdings LLC, Wheeling Power Company, Basin Electric Power Cooperative, Phil Bryant, Governor of the State of Mississippi, Georgia Power Company, Indiana Energy Association, Indiana Utility Group, Mississippi Public Service Commission, Nevada Gold Mines LLC, Nevada Gold Energy LLC, Powersouth Energy Cooperative, the States of Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky, by and through Governor Matthew

* During the pendency of the proceedings below, the Administrator of the EPA was Andrew Wheeler. The current officeholder is Michael Regan, who is automatically substituted as a party.

G. Bevin, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming.

No. 19-1179: Petitioner was The North American Coal Corporation (Petitioner here).

Intervenors for respondents were: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., City and County of Denver Colorado, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, District of Columbia, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

No. 19-1165: Petitioners were the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, Wisconsin, District of Columbia, Commonwealths of Massachusetts, Pennsylvania, and Virginia, People of the State of Michigan, City of Boulder, City of Chicago, City of Los

Angeles, City of New York, City of Philadelphia, and City of South Miami.

No. 19-1166: Petitioners were Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club.

Intervenors for respondents were: Indiana Energy Association and Indiana Utility Group.

No. 19-1173: Petitioner was Chesapeake Bay Foundation, Inc.

Intervenors for respondents were: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, International Brotherhood of Electrical Workers, AFL-CIO, and United Mine Workers of America, AFL-CIO.

No. 19-1175: Petitioners were Robinson Enterprises, Inc., Nuckles Oil Company, Inc., doing business as Merit Oil Company, Construction Industry Air Quality Coalition, Liberty Packing Company, LLC, Dalton Trucking, Inc., Norman R. Brown, Joanne Brown, Competitive Enterprise Institute, and Texas Public Policy Foundation.

Intervenors for respondents were: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., City and County of Denver Colorado, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Clean Air

Council, Clean Wisconsin, Conservation Law Foundation, District of Columbia, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

No. 19-1176: Petitioner was Westmoreland Mining Holdings LLC.

Intervenors for respondents were: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., City and County of Denver Colorado, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, District of Columbia, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

No. 19-1177: Petitioner was City and County of Denver Colorado.

No. 19-1185: Petitioner was Biogenic CO2 Coalition.

Intervenors for respondents were: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club.

No. 19-1186: Petitioner was Advanced Energy Economy.

No. 19-1187: Petitioners were American Clean Power Association and Solar Energy Industries Association.

No. 19-1188: Petitioners were Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District.

Pursuant to Supreme Court Rule 29.6, The North American Coal Corporation is a wholly-owned subsidiary of NACCO Industries, Inc. NACCO Industries, Inc., is a publicly-traded corporation that owns more than 10% of the stock of The North American Coal Corporation. No other publicly-held corporation owns more than 10% of the stock of The North American Coal Corporation.

STATEMENT OF RELATED CASES

American Lung Association and American Public Health Association v. EPA, et al., No. 19-1140, consolidated with Nos. 19-1165, 19-1166, 19-1173, 19-1175, 19-1176, 19-1177, 19-1179, 19-1185, 19-1186, 19-1187, 19-1188 (D.C. Cir. 2021).

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INTRODUCTION

In 2015, the EPA issued its so-called "Clean Power Plan," a sweeping command-and-control overhaul of the nation's electric power generation grid, based on a little-used, ancillary provision of the Clean Air Act, 42 U.S.C. § 7411(d). That provision allows the agency to publish emissions guidelines that govern the creation of standards of performance "for any existing source" of air pollution (here, carbon dioxide). The EPA's long-held understanding of § 7411(d), consistent with its text and structure, was that it requires the agency to base those guidelines on "standards of performance" that could be *performed by* the existing source, using technology *applicable to* that source—*e.g.*, a filter on a smokestack, or leak-resistant pipes. But in the Clean Power Plan, the EPA promulgated standards based instead on a novel, industry-wide national "system" for reducing carbon dioxide emissions by shifting power generation *away from* the existing sources in favor of other, "cleaner" ones. The EPA's rule was based on the concept that existing coal and gas plants could "shift" their production elsewhere or buy credits from lower-emitting sources—and, in effect, demanded just that. In other words, rather than identify the best available system to reduce emissions "for any existing source," the EPA decided that the best overall "system" of emissions reduction would be to close the existing sources or force them to subsidize others.

In response to this unprecedented rule, this Court took equally unprecedented action, staying the Clean Power Plan even before the D.C. Circuit reviewed it on the merits. Soon after, the EPA took this Court's hint and went back to the drawing board, so that litigation never proceeded to the merits.

The EPA ultimately repealed the Clean Power Plan on the grounds that it exceeded statutory authority. The EPA explained that § 7411(d) directs standards "for any existing source," based on the best achievable "system of emission reduction" that can be applied *at and by* that source. But the agency cannot formulate a "system of emission reduction" for an entire sector as a whole, demanding that certain electricity providers "shift" generation elsewhere. The "system," in short, must be *source-based*, not *industry-wide*. Accordingly, the EPA instituted a new rule, the Affordable Clean Energy plan, which based its emissions standards for coal and gas plants on systems and limits that a coal or gas plant itself could actually adopt and achieve.

A group of petitioners then challenged the EPA's repeal and replacement of the Clean Power Plan. Over Judge Walker's dissent, a D.C. Circuit panel (Judges Millett and Pillard) held that the EPA *does* have the authority to refashion the electric generation industry as a whole. And because the EPA was thus ostensibly wrong about the extent of its legal authority, the D.C. Circuit vacated the repeal of the Clean Power Plan as arbitrary and capricious. So five years after this Court *stayed* the Clean Power Plan because it so clearly went beyond the EPA's authority, the D.C. Circuit held that the EPA has *precisely that authority*, and overturned the agency's action foreswearing it.

The issue this Court addressed in its stay order has thus returned, and it is critically important that the D.C. Circuit's damage be undone. This Court already recognized the gravity of these issues by granting the extraordinary relief of a stay. The only difference is that merits review is now ripe, since a lower court has answered the legal question (wrongly, at that).

Nobody contests that these issues have enormous importance. "Climate change has staked a place at the very center of this Nation's public discourse," with "[p]oliticians, journalists, academics, and ordinary Americans discuss[ing] and debat[ing] various aspects of climate change daily—its causes, extent, urgency, consequences, and the appropriate policies for addressing it." *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 348 (2019) (Alito, J., dissenting from denial of certiorari). Those debates will not be resolved anytime soon. But what *must* be resolved as soon as possible is who has the authority to decide those issues on an industry-wide scale—Congress or the EPA. The Court was deprived of the opportunity to definitively resolve that question in the context of the Clean Power Plan, but should not miss the opportunity to address it now. Absent review, these crucial decisions will be made by unelected agency officials without statutory authority, as opposed to our elected legislators. This Court should grant the petition for certiorari and return this "major question" to Congress, where it belongs.

OPINIONS BELOW

The D.C. Circuit's panel decision (Pet.App.1a) is reported at 985 F.3d 914.

JURISDICTION

The D.C. Circuit issued its decision on January 19, 2021. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The core statutory provision at issue is 42 U.S.C. § 7411(a)-(d), which is printed at Pet.App.204a.

STATEMENT

A. Statutory Background.

"The Clean Air Act establishes a series of regulatory programs to control air pollution from stationary sources (such as refineries and factories)." *Michigan v. EPA*, 576 U.S. 743, 747 (2015). Each program has a different target and its own regulatory structure.

For instance, the National Ambient Air Quality Standards program, 42 U.S.C. §§ 7408-7410, requires the EPA to publish ambient air quality standards for certain pollutants; the states then implement plans to ensure compliance with those standards. *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 498 (2014). Meanwhile, the National Emissions Standards for Hazardous Air Pollutants Program, 42 U.S.C. § 7412, directly regulates "more than 180 specified 'hazardous air pollutants.'" *Michigan*, 576 U.S. at 747.

Sandwiched between those programs is § 7411, at issue in this case. Entitled "Standards of performance for new stationary sources," 42 U.S.C. § 7411, that provision "directs the EPA ... to list 'categories of stationary sources' that '[it believes] ... caus[e], or contribut[e] significantly to, air pollution.'" *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (*AEP*). After listing a category of sources, the EPA must set rules establishing federal standards of performance for new sources within that category. 42 U.S.C. § 7411(b)(1)(B). "[N]ew source[s]" are those that are built after the relevant regulation takes effect. *Id.* § 7411(a)(2).

Notwithstanding its title, § 7411 can also apply to certain *existing* stationary sources, via § 7411(d), the provision at issue here. Section 7411(d) can be used to

regulate existing sources where neither the relevant pollutant nor the relevant source is already covered by the National Ambient Air Quality Standards program or National Emissions Standards for Hazardous Air Pollutants Program, respectively. *Id.* § 7411(d)(1)(A). It uses a regulatory approach that is sometimes called "cooperative federalism." After the EPA publishes federal "standards of performance" for *new* sources, it must "prescribe regulations" that provide for each state to submit a "plan" that "establishes standards of performance for any existing source" in that category (subject to the exclusions noted above). *Id.* § 7411(d). A "standard of performance" is defined 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" that the EPA "determines has been adequately demonstrated," while considering cost, environmental impact, and energy needs. *Id.* § 7411(a)(1). And an existing source includes any "building, structure, facility, or installation which emits or may emit any air pollutant," and which is built *before* the regulation kicks in. *Id.* § 7411(a)(3), (6).

In practice, this is a multi-step process. The EPA first issues an "emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities." 40 C.F.R. § 60.22. States then impose a "standard of performance" that is based on the achievable emission reductions identified by the EPA "for any existing source" in the category. 42 U.S.C. § 7411(d)(1). If a state fails to impose or enforce a plan, the EPA can do so directly. *Id.* § 7411(d)(2).

B. The Clean Power Plan.

For many years, the EPA maintained that carbon dioxide was outside its purview, but that changed with *Massachusetts v. EPA*, 549 U.S. 497, 511 (2007). That decision held that greenhouse gases, such as carbon dioxide, can be "air pollutants" subject to regulation under the Clean Air Act. Two years later, the EPA made an "endangerment finding," concluding that a mix of six greenhouse gases emitted by motor vehicles may "reasonably be anticipated both to endanger public health and to endanger public welfare." Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009).

Largely on the basis of that finding, the EPA in 2015 published a rule, known as the "Clean Power Plan," regulating emission of carbon dioxide from existing power plants. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) ("CPP").[1] The EPA's stated "authority for this rule" was § 7411(d). *Id.* at 64,710. In the Clean Power Plan, the EPA set "final emission guidelines" for states to use in establishing performance standards for existing power plants. *Id.* at 64,662; *see also* 40 C.F.R. § 60.22. The "guidelines" included "performance rates" for fossil-fuel-fired plants, derived from what the EPA identified as the "best system of emission reduction" for existing plants. CPP, 80 Fed. Reg. at 64,662.

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[1] The EPA issued a separate rule for *new* power plants. *See* Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015).

The EPA defined that "best system" as comprising three "building blocks." *Id.* at 64,707. The first was relatively uncontroversial: "[i]mproving heat rate at affected coal-fired" plants. *Id.* But the next two "building blocks" were not technologies or systems that could be adopted or applied by any given plant; instead, they were methods of so-called "generation shifting" *across the electricity grid as a whole*, meaning reducing the electricity generated by the source in favor of more generation from *other* energy sources. The first such "method" was moving generation from (higher emitting) coal-fired plants to (relatively lower emitting) gas-fired plants. *Id.* The second was to shift generation from the gas-fired plants to zero-emission energy sources like solar or wind power. *Id.*

Calling those "building blocks" the best achievable system for emission reductions, the EPA then derived "subcategory-specific emission performance rates" for coal- and gas-fired plants. *Id.* at 64,707, 64,728-29. Those rates—pounds of carbon dioxide per megawatt hour of energy—were based on reductions that could be achieved only by "generation-shifting," *i.e.*, if the source scaled back or stopped operating, or if it bought "credits" from other power sources. Remarkably, the rates for existing sources were lower than those for *new* sources. *Compare* 80 Fed. Reg. at 64,510, 64,513 *with* CPP, 80 Fed. Reg. at 64,707. The EPA demanded, in other words, that existing power plants reduce their emissions below even the requirements for *new* plants (themselves so stringent that new coal-fired plants are virtually never built, *see* Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. at 64,526).

Under the EPA's rule, existing power plants would thus have to rely on tradeable "rate-based emission credits," an "integral part" of the EPA's "analysis" in determining the best system of emission reduction. CPP, 80 Fed. Reg. at 64,733-34. That is, the "best system of emission reduction," in the EPA's view, was akin to a cap-and-trade regime that would necessarily force certain coal- and gas-fired plants to shut down, reduce their generation, or subsidize lesser-emitting power plants. *Id.* at 64,769-70 (explaining that coal and gas plants can reduce their emissions by buying electricity from lower-emitting producers or reducing their own production, shifting generation elsewhere).

Thus, the EPA recognized that its standards were, by definition, not based on technology or reductions that actually could be applied at or achieved by most existing coal- and gas-fired plants on their own, like improved efficiency or carbon capture. "Rather, most of the CO_2 controls need to come in the form of ... replacement of higher emitting generation with lower- or zero-emitting generation." *Id.* at 64,728; *see also, e.g.*, *id* at 64,729 ("[T]he magnitude of emission reductions included in the proposed rule *from generation shifting* is achievable." (emphasis added)).

Given its narrow scope, the EPA had previously issued only six rules under § 7411(d). *See* 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, 32,526 & n.63 (July 8, 2019) ("ACE"). Never had it imposed standards based on emission reduction measures that were not actually achievable by an existing source itself. *Id.* at 32,526 & n.65.

The EPA's textual basis for this new, sweeping authority was actually the definition subsection of the Clean Air Act provision, 42 U.S.C. § 7411(a). Section 7411(d) contemplates setting "standards of performance for any existing source," and the definition of "standard of performance," *id.* § 7411(a)(1), is where the EPA hung its hat. A "standard of performance," as noted above, must "reflect[] the degree of emission limitation achievable through the application of the best system of emission reduction." *Id.* In the phrase "best system of emission reduction," the EPA believed it had found a concept "sufficiently broad," CPP, 80 Fed. Reg. at 64,720, to include not only the technologies and other systems that existing sources could adopt, but also "generation shifting." . The EPA interpreted "system" to encompass any "set of measures that work together to reduce emissions," regardless of whether they could be used at or achieved by any existing source on its own, thereby massively expanding the agency's own power to address climate change by transforming the national economy and electricity system. *Id.*

C. This Court Stays the Clean Power Plan.

Not surprisingly, the Clean Power Plan sparked immediate challenge. Consistent with the Clean Air Act's judicial review provisions, 42 U.S.C. § 7607(b)(1), a group of states and private parties filed petitions for review in the D.C. Circuit, seeking to bar enforcement of the Clean Power Plan. *See, e.g.*, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015). They also sought a stay of the CPP in that court, but the court denied it. *Id.*, Doc. No. 1594951. The challengers then sought a stay in this Court. *See West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

Reportedly for the first time ever,[2] this Court stayed a regulation before a lower court reviewed it. *Id*. The EPA had defended the rule on the merits and also claimed there was no irreparable harm because it "does not require sources to begin reducing their CO2 emissions until 2022 at the earliest." Mem. for Fed. Resps. in Opp. at 54, *West Virginia v. EPA*, 136 S. Ct. 1000 (No. 15A773). The Court did not accompany its order with an opinion, but in granting relief a majority of Justices necessarily concluded that there was at least: "(1) 'a reasonable probability' that th[e] Court w[ould] grant certiorari, (2) 'a fair prospect' that the Court w[ould] then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

D. The Affordable Clean Energy Rule.

In the wake of the stay, the EPA chose to reassess its position, and the litigation "was held in abeyance and ultimately dismissed." Pet.App.36a. Rather than continue to defend the Clean Power Plan, the EPA took this Court's hint and replaced it.

In its 2019 Affordable Clean Energy rule, the EPA explained that the prior rule "read the statutory term 'best system of emission reduction' so broadly as to encompass measures the EPA had never before envisioned in promulgating performance standards under [§ 7411]." ACE, 84 Fed. Reg. at 32,523. "This was the first time the EPA interpreted the [best system of emission reduction] to authorize measures wholly outside a particular source." *Id*. at 32,526.

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[2] Courtney Scobie, *Supreme Court Stays EPA's Clean Power Plan*, AM. BAR ASS'N PRAC. POINTS (Feb. 17, 2016).

The EPA now concluded that the statute would not bear this interpretation. For one, the text was clear: "Congress expressly limited the universe of systems of emission reduction from which the EPA may choose ... to those systems whose 'application' to an 'existing source' will yield an 'achievable' 'degree of emission limitation.'" *Id.* at 32,524. For another, the EPA also "believe[d] that [the major questions] doctrine should apply … and that its application confirm[ed]" a narrow reading. *Id.* at 32,529. After all, "[a]t the time the CPP was promulgated, its generation-shifting scheme was projected to have billions of dollars of impact," it "would have affected every electricity customer (i.e., all Americans)," and "would have disturbed the state-federal and intra-federal jurisdictional scheme." *Id.* Such vast power cannot be inferred without a clearer statement vesting it in the agency. *See id.*

The EPA thus "conclude[d] that the interpretation relied upon in the CPP ignored or misinterpreted critical statutory elements and rules of statutory construction," and repealed it. *Id.* at 32,527. In its place, the EPA issued standards and limits that could be applied at and achieved by a source itself.

E. Procedural History.

Numerous states, activist groups, and industry participants challenged various aspects of the rule in the D.C. Circuit. Most objected to repeal of the Clean Power Plan, arguing that § 7411 *does* provide the EPA with authority to require generation-shifting, ergo the repeal was unlawful because it was premised on an erroneous, narrower view. Petitioner here, The North American Coal Corporation, was also a party below, but supported repeal of the Clean Power Plan.

The D.C. Circuit agreed with the challengers. The *per curiam* majority—Judges Millett and Pillard—believed the statutory phrase "best system of emission reduction" could be interpreted broadly to include source-category-wide systems, as opposed to systems applicable to particular existing sources. Pet.App.56a-58a. And the court also rejected reliance on the major questions doctrine, concluding it did not apply because regulation of greenhouse gases was in "the EPA's wheelhouse." Pet.App.85a. The court dismissed, too, the need for a clear statement to support the intrusion on state authority, holding that "federalism concerns" are not implicated by merely "incidental effects" on areas of traditional state power. Pet.App.104a. Incredibly, the majority did not so much as *mention* this Court's stay of the Clean Power Plan.

Judge Walker dissented. "Hardly any party in this case," he observed, "makes a serious and sustained argument that § [7411(d)] includes a clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting." Pet.App.165a (Walker, J., dissenting). "And because the rule implicates 'decisions of vast economic and political significance,' Congress's failure to clearly authorize the rule means the EPA lacked the authority to promulgate it." *Id.* He would have upheld the repeal.[3]

After the decision, the EPA sought and secured a stay of the mandate so that the agency could consider a new plan consistent with the decision, as the Clean Power Plan itself had become outdated.

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[3] He also reasoned that § 7411(d) does not permit regulation of power plants' carbon dioxide emissions because the plants are regulated by § 7412. Pet.App.181a (Walker, J., dissenting).

REASONS FOR GRANTING THE PETITION

The EPA's longstanding construction of § 7411(d)—abandoned only briefly to prop up the revolutionary Clean Power Plan—calls on the agency to undertake a source-level inquiry into what emissions reductions are "achievable" by that source, and then to derive performance standards from those achievable limits. Under that commonsense understanding, the EPA can mandate that gas power plants use the most up-to-date equipment to avoid gas leaks, or direct coal plants use the most up-to-date heat transfer technology to improve efficiency and reduce emissions. In short, the EPA can ensure that these existing sources operate as efficiently as feasible—but it cannot simply ban those sources or "generation shift" them into obsolescence, as that would defeat the entire premise of regulating them as "existing" sources.

By contrast, the D.C. Circuit interpreted the statute to allow the EPA to impose a "best system of emission reduction" at an *industry-wide* level. Under this view, the EPA need not concern itself with what technology an existing source could actually use or what emission reductions it could actually achieve by modernizing or upgrading its own operations. Instead, the EPA can pick and choose the sources it prefers—and essentially regulate the rest out of existence. Indeed, the EPA's authority is nearly unlimited: It can impose a carbon tax, a cap-and-trade regime, or any other systemic policy it wants—any of these could qualify as the "best system" as defined by the D.C. Circuit. Section 7411 is thereby effectively transformed from a narrow and rarely-used means of keeping older facilities up-to-date into an open-ended mandate for the EPA to solve the problem of climate change writ large.

Whatever one thinks of the merits, it is impossible to deny the importance of this statutory dispute—and that is why this Court's intervention is warranted.

Indeed, this Court already recognized the weight of this issue, and its worthiness for plenary review, when it stayed the Clean Power Plan. Review is even more urgent now, as the D.C. Circuit has insisted that the EPA has the very authority and can impose the very rule this Court stayed—or even further reaching rules. That decision does not endanger just the Nation's coal and gas power plants and electricity supply chain. It also gives the EPA near-carte-blanche authority to mandate a national response to climate change, "one of the most hotly debated issues of the day." *Mann*, 140 S. Ct. at 347 (Alito, J., dissenting from denial of certiorari). Given § 7411's broad definition of a "source," the EPA could impose a carbon tax on emissions from any building, demand that residential housing be shunted toward solar power, set up a complex cap-and-trade system in or across nearly every industry—all of these would count as "systems" of emission reduction under the decision below. And this is hardly fanciful; the EPA will assuredly run with the power it is given. The Court should clarify the bounds of that power now, not wait for an inevitable emergency motion to stay Clean Power Plan 2.0, which promises to be more revolutionary than the original.

Review is all the more urgent because the lower court's interpretation is deeply wrong. The court went out of its way to find ambiguity in a text that has none. Section 7411 allows the EPA to direct states to impose a "standard for emissions" that is "achievable" through "application" of the "best system of emission reduction" "for" "any existing source." On its face, this

language requires the "best system" to be *achievable by and applicable to* the existing source—it does not allow the EPA to declare it "best" to reshape the industry by shifting generation from coal plants to wind farms. Statutory context and structure confirm the point. And were any doubt remaining, the major questions doctrine and federalism clear statement rule each demand that the court favor a narrower reading of § 7411 over one that grants sweeping powers to the EPA in an area of traditional state concern.

None of this is to deny that regulating greenhouse gases is a serious issue that may require some difficult choices. But the Court should grant the petition to ensure these economy-shaking trade-offs are made by Congress, as our Constitution contemplates.

I. THIS ISSUE IS IMMENSELY IMPORTANT AND WORTHY OF THIS COURT'S ATTENTION.

This Court has already decided that this issue is unusually important, as it granted a stay of the Clean Power Plan in 2016 when faced with the exact same question. Indeed, in an area where there is little common ground, *everyone* agrees that this issue is important. The power industry is most directly in the crosshairs of this particular rule, but the significance of the legal question extends beyond any one industry. The D.C. Circuit's decision grants vast, legislative-like power to the EPA to address "one of the most hotly debated issues of the day." *Mann*, 140 S. Ct. at 347 (Alito, J., dissenting from denial of certiorari). Until that ruling is affirmed or reversed, every industry linked to global warming (*i.e.*, all of them) will be left in limbo. The Court should rectify that untenable situation now that it finally has opportunity to do so.

A. This Court Has Already Recognized That The EPA's Claimed Authority Warrants Certiorari.

It is hardly necessary to explain why the legal issue in this case is important enough to deserve this Court's attention, because the Court already implicitly agreed by staying the Clean Power Plan. That order signified that a majority of the Court believed that certiorari on this issue would likely be granted. *See King*, 567 U.S. at 1302 (Roberts, C.J., in chambers).

And it is easy to see why. "All sides agree that the [Clean Power Plan], if it stands, could substantially alter the U.S. energy landscape," and fundamentally "change the way millions of Americans get their electricity." Joby Warrick, *White House Set To Adopt Sweeping Curbs On Carbon Pollution*, WASH. POST (Aug. 1, 2015). Industry studies predicted hundreds of billions of dollars in compliance costs.[4] And those costs would end up hitting consumers, who would pay "an additional $214 billion for electricity between 2022 and 2030."[5] Projections showed that 46 states stood to face "double digit increases in wholesale electricity cost [if] the CPP is fully implemented in 2030, with 16 states projected to experience a 25+ percent increase."[6]

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[4] *See, e.g.*, NERA Economic Consulting, *Potential Energy Impacts of the EPA Proposed Clean Power Plan*, at 21 (Oct. 2014), http://www.globalwarming.org/wp-content/uploads/2014/10/NERA_ACCCE-CPP-Report_Final-Oct-16-20141.pdf.

[5] National Mining Association, *EPA's Clean Power Plan: An Economic Impact Analysis*, at 4 (2015), http://nma.org/wp-content/uploads/2017/02/11.13.15-NMA_EPAs-Clean-Power-Plan-An-Economic-Impact-Analysis.pdf.

[6] *Id.*

Thousands or tens of thousands of jobs would have been lost. *See, e.g.*, Mot. of Util. & Allied Pet'rs for Stay of Rule, Att. C, Am. Coal. for Clean Coal Elec., *A Survey of Near-Term Damages Associated with the EPA's Clean Power Plan* at 36 (Oct. 16, 2015), *Util. Air Regul. Grp. v. EPA*, No. 15-1370 (D.C. Cir. Oct. 23, 2015), Doc. 1580014.

For their part, environmental advocates disputed the effect of the Clean Power Plan, but not its scale or significance. President Obama called it "the biggest, most important step we've ever taken to combat climate change." Warrick, *supra.* The National Resources Defense Council—one petitioner below—celebrated the "first-ever national limits on carbon pollution from power plants,"[7] and the Environmental Defense Fund cheered the regulation as of "historic" consequence.[8] Unsurprisingly, environmentalists later decried the EPA's replacement plan as "deadly,"[9] calling it the "Dirty Power Plan."[10]

Simply put, all sides agree that the EPA's authority to "generation-shift" under § 7411(d) is important and historic, even if they have wildly differing views on whether doing so is catastrophic or redemptive.

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[7] National Resource Defense Council, *Clean Up U.S. Power Plants*, https://www.nrdc.org/issues/clean-us-power-plants.

[8] Environmental Defense Fund, *The Clean Power Plan*, https://www.edf.org/clean-power-plan-resources.

[9] Olivia Rosane, *Trump's EPA Signs 'Deadly' Clean Power Plan Replacement*, ECOWATCH (June 20, 2019).

[10] Alex Ruppenthal, *EPA's Rollback of Obama Rule Decried as 'Dirty Power Plan,'* WTTW NEWS (June 20, 2019).

B. Under The Decision Below, The EPA Has Staggering, Virtually Unfettered Power To Overhaul Entire Industries.

Of course, the Clean Power Plan 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. That is why the EPA sought and secured a stay of the mandate below—to come up with a new approach using the power newly conferred upon it. But the legal issue transcends any particular rule and remains exceedingly important going forward. If the EPA has the power the D.C. Circuit says it has, it could (and will) issue similarly broad regulations again, not only for power plants, but for potentially *any* industry. The decision below was a virtual call to arms, empowering the EPA to circumvent Congress and "solve" climate change on a systemic basis. Denying review here would implicitly applaud that mandate, and allow it to stand as the definitive pronouncement on EPA authority.

1. In promulgating standards of performance, the EPA must determine the "best system of emission reduction." 42 U.S.C. § 7411(a)(1). The D.C. Circuit held that the "ordinary meaning" of "system" was so broad as to have no meaningful limits. Pet.App.56a-58a. Indeed, the panel used those very words: "no limits." Pet.App.56a. In its view, the EPA can impose any requirements as long as they are "'diverse parts subject to a common plan or serving a common purpose.'" Pet.App.56a-57a (quoting *System*, Webster's Third New International Dictionary of the English Language Unabridged 2322 (2d ed. 1968)).

Under that extraordinarily broad understanding, the economic and political significance of this case does not stop with a potential takeover of the electrical grid. Power plants are far from the only "stationary source" of greenhouse gases like carbon dioxide; every building that emits the gases, including residential homes and every commercial facility, is also subject to regulation under § 7411(d). And if the EPA can adopt any "common plan" to reduce their emissions, nothing would constrain its authority to cap emissions across sectors, demand that certain sources shut down in favor of others, mandate cap-and-trade regimes across categories of sources, or take any number of other imaginable courses of action that seek to reduce greenhouse gas emissions systemically on a national and industrial basis. If the agency is not limited to source-level and source-achievable systems, the next Clean Power Plan could be the "Green New Deal"—without need for a single vote in Congress.

In a bid to downplay that risk, the D.C. Circuit tried to suggest that the EPA's authority was indeed limited because the statute requires it to take into account "cost" and "energy requirements" in defining the best system of emission reduction. Pet.App.87a-88a. But the statute does not even hint at a limitation on agency discretion in balancing those incommensurate and competing factors, and no court could second-guess how it does so. Moreover, many people believe climate change portends "catastrophic, civilization-ending consequences."[11] What economic "cost" or energy need could possibly outweigh *that*?

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[11] Al Gore, Opinion, *The Climate Crisis Is the Battle of Our Time, and We Can Win*, N.Y. TIMES, Sept. 20, 2019.

Even less credible is the notion that the EPA "tied its own hands" by limiting the "best system" to those that affect only "supply-side activities." Pet.App.91a & n.9. As that formulation recognizes, the D.C. Circuit's interpretation would—absent voluntary hand-tying—allow the agency to regulate "demand-side" activities too. Meaning the EPA could base its standards for existing residential homes on, *e.g.*, the emission reductions achievable by keeping the home's thermostat higher in the summer and lower in the winter, or by engaging in composting.[12] States would be effectively locked into mandating those policies. Or, more along the lines of the Clean Power Plan, the EPA could require residential homes to install solar panels or buy emissions credits from houses that do. It could demand that residential activities be "shifted" from older, higher emitting homes to newer, lower emitting homes. Put simply, the D.C. Circuit's rule is so broad that the EPA could effectively rewrite local zoning and building codes, if it so chose.

2. It would be naive to think that the EPA will *not* push the envelope of this new authority. President Biden campaigned on the idea that "climate change poses an existential threat" and has called for a "Clean Energy Revolution," which is not a phrase suggesting modest ambitions.[13] In a recent executive order, the President proclaimed that the world faces "a profound climate crisis," with only a "narrow moment to pursue

[12] Rachel Steffan, *Things in Your House That Cause Global Warming*, SFGATE, https://homeguides.sfgate.com/things-house-cause-global-warming-78827.html.

[13] Biden Harris, *The Biden Plan for a Clean Energy Revolution and Environmental Justice*, https://joebiden.com/climate-plan/.

action at home and abroad in order to avoid the most catastrophic impacts of that crisis."[14] If the decision below is left to stand, the EPA will grasp that "narrow moment" and effectuate the promised "Revolution."

The legislative branch, meanwhile, will be sidelined as proponents of radical action sit back and let the EPA impose their preferences by fiat, sparing them political downside. *Cf. Gundy v. United States*, 139 S. Ct. 2116, 2135 (2019) (Gorsuch, J., dissenting) (noting that legislators often "face rational incentives to pass problems to the executive branch"). Again, this is not mere speculation. "Congress considered and rejected bills that would have" produced similar (even less-far-reaching) schemes. *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 144 (2000). Congress did not enact the American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009), which would have created a cap-and-trade regime to limit greenhouse gases and imposed renewable energy mandates on retail electricity providers. Congress likewise failed to pass the Save Our Climate Act, H.R. 3242, 112th Cong. (2011), which would have imposed an excise tax based on the amount of carbon dioxide produced by burning fossil fuels. Nor did Congress adopt the American Renewable Energy and Efficiency Act, H.R. 5301, 113th Cong. (2014), which sought to cut carbon emissions by imposing a complex renewable energy credit scheme on retail electricity suppliers. *See also* Pet.App.169a n.19 (Walker, J., dissenting). No matter: Per the decision below, the EPA can do all of this and more—unilaterally.

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[14] The White House, *Executive Order on Tackling the Climate Crisis at Home and Abroad* (Jan. 27, 2021).

In short, if the D.C. Circuit is wrong, Congress has been wrongly shut out of a hugely controversial and consequential policy debate. The EPA will be the last word on climate change—until this Court decides whether the EPA actually is the last word on climate change. That is a question worth answering.

C. Any Further Delay Would Cause Years Of Intolerable Regulatory Uncertainty.

Respondents will presumably urge the Court to kick the can down the road until the EPA determines how to exercise its newfound authority. That would be a mistake. For more than five years, this issue has ping-ponged between the EPA and D.C. Circuit, leaving the industry in regulatory limbo. The EPA first asserted a new, unprecedented authority—then reversed itself. This Court indicated in its stay order that the EPA likely has no such authority—but now the D.C. Circuit has published a binding opinion saying it does. Power plants and their suppliers—not to mention everyone else with a stake in electricity generation—need to know whether they are inevitably facing a massive, agency-driven upheaval.

This Court has recognized that industrial actors, especially those in the electrical utility chain, have to make decisions *years* in advance. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201-02 (1983). Unless this Court intervenes, Petitioner and other suppliers, as well as power plants and the states that regulate them, will have to make decisions involving "millions of dollars over a number of years, without any certainty" as to the environment they will face. *Id.* "Delaying judicial resolution would force" actors "to gamble millions of dollars on an

uncertain legal foundation." *North Dakota v. Heydinger*, 825 F.3d 912, 918 (8th Cir. 2016); *see also*, *e.g.*, Mot. of Util. & Allied Pet'rs for Stay of Rule at 15, *Util. Air Regul. Grp. v. EPA*, No. 15-1370 (D.C. Cir. Oct. 23, 2015), Doc. 1580014 (explaining that "electric sector is a long lead-time industry," and building new units can take up to "seventeen years"). The chilling effect on development is palpable.

And the situation is worse than uncertain; the only controlling legal authority right now is *wrong*. *Infra* Part II. This issue evaded review for six years, and if the Court declines to grant review now, it will evade review for the foreseeable future, while the decision below is used to justify even more radical next steps. Meanwhile, industries face existential uncertainty as to whether the EPA really holds command-and-control authority over every carbon-emitting building (*i.e.*, all of them). This Court should weigh in *now*.

II. THE D.C. CIRCUIT ERRED IN UNTETHERING PERFORMANCE STANDARDS FROM THE EXISTING SOURCE BEING REGULATED.

Review is warranted in this case whether or not the D.C. Circuit got the result right; the question is so important that this Court should answer it. But the lower court did err. It interpreted § 7411(d) to allow the EPA to impose an emissions standard based on a "system" of shuttering or diminishing certain sources and shifting electric generation to other sources. The text does not support that counterintuitive reading, which would confer extraordinary authority on the EPA to restructure every carbon-emitting industry in the country. That is not what Congress did, much less *clearly* did, and this Court should hold as much.

A. The Statutory Text Requires The EPA To Base Its Standards On Limits Achievable By and Applicable To Existing Sources.

As always, the analysis "start[s] with the statutory text." *Tanzin v. Tanvir*, 141 S. Ct. 486, 489 (2020). It provides for the EPA to prescribe regulations that result in state-established "standards of performance for any existing source." 42 U.S.C. § 7411(d). Even on its face, that language all but demands standards that are *applicable to* and *achievable by* such a source, not those derived from a national system-wide rejiggering of an entire industry. The context and structure of the statute then drive that conclusion home.

1. To start, the provision requires standards of performance "for any existing source," *singular*. If Congress wanted standards derived from systems that operate across multiple sources or entire categories of sources, it could have said that. Indeed, Congress could have used a phrase like "category of sources" (which it used numerous times elsewhere in § 7411) to show that standards should be derived from, applied to, and achievable by the category of sources viewed as a whole. *See, e.g.*, *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020) (refusing to "read into statutes words that aren't there," especially "when Congress ... included the term in question elsewhere in the very same statutory provision").

Congress also explicitly provided that the standards are "for" the "existing source"—*not* "for" the "owner or operator" of the source, which is a separate defined term in § 7411(a)(5). If Congress wanted to authorize generation-shifting or emission-credit trading, it could have regulated owners or operators (who can comply

with such regimes by buying credits or operating new plants), as opposed to *sources* (which are physical structures that produce power). The EPA confessed to this misalignment of terms in the Clean Power Plan, when it admitted its standards were based on systems that must be "implemented[,] … as a practical matter, by actions taken by the owners or operators." CPP, 80 Fed. Reg. at 64,720; *id.* at 64,731 (explaining that source "owner/operator" can "invest" in lesser-emitting sources or "purchase" the "CO2-reducing" credits).

Further, the provision refers to an "*existing* source." That presupposes that the source will *continue to exist* and operate. Devising a standard based on shifting the source's generation elsewhere, thus rendering it obsolete, defeats the purpose of separately and more leniently regulating "existing" sources as such. And it is wholly implausible to believe Congress intended for the EPA to exercise *more* rigorous control over existing sources than new ones. *See supra* at 7.

Moving on, Congress used the phrase "standard of *performance*," which implies that the existing source can, in fact, "perform" under the standard.[15] But no such performance at the source-level is needed under the D.C. Circuit's reading. Rather, it is permissible to impose generation-shifting, which is premised on the idea that sources will diminish production, shut down entirely, or purchase credits from other sources. A source that diminishes capacity or shuts down is not "performing" anything. So here, too, § 7411(d)'s scope is properly read as limited to measures "perform[able]"

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[15] *See, e.g.*, Merriam-Webster Online, *Performance* ("the execution of an action," "something accomplished"), https://www.merriam-webster.com/dictionary/performance.

by a source. To be sure, "standard of performance" is itself a defined term, as discussed below, but the term itself retains meaning. *See, e.g.*, *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 171-72 (2001) (although defined by the statute, "navigable waters" retains meaning).

2. Digging deeper, the statutory definitions of the various phrases in § 7411(d) confirm that the EPA's authority is limited to defining emissions standards achievable by a given source through modifications to that source's technology or systems.

To start, inserting the definition of "source" into the operative provision leaves it requiring a "standard[] of performance for any existing [building, structure, facility, or installation]." 42 U.S.C. § 7411(a)(2), (3), (6), (d). That emphasizes the individualized, concrete nature of what is being regulated: the unitary source. The standard of performance is not "for" an industry or a category of buildings or even, as noted above, "for" owners and operators. It is "for" an existing "building, structure, facility, or installation."

The definition of "standard of performance" likewise supports a narrower reading, even though it is this definition upon which the Clean Power Plan and D.C. Circuit heavily relied. A "standard of performance" is a standard "which reflects the degree of emission limitation achievable through the application of the best system of emission reduction." *Id.* § 7411(a)(1). The D.C. Circuit believed that this concept—"the best system of emission reduction"—was so broad that it allowed a "standard of performance" to be derived from a macro-analysis of an entire industry, an aggregate industry-wide "system." Pet.App.56a-58a.

But reading that definitional provision in isolation, as the lower court did, makes no sense. The degree of emission reduction must be "achievable" by what? The best system of emission reduction must be "appli[ed]" to whom? These phrases are meaningless without some referent, and the only reference offered by the text is the "source." Plus, even if the definition in the abstract could support the D.C. Circuit's reading, "where [a defined] term … appears in the [Clean Air] Act's operative provisions," this Court has held that it must often be "given" a "narrower, context-appropriate meaning." *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 316 (2014) ("*UARG*"); *see also id.* at 320 (a defined term "'may take on distinct characters from association with distinct statutory objects'").

Read in context, the definition actually clarifies the limited reach of § 7411(d). Substituting in defined terms, the provision directs "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 for any building, structure, facility or installation." A definition that on its own lacked key terms fits into § 7411(d) like a glove. Construed with that context, the statute makes clear that the "best system of emission reduction"—the benchmark the EPA must provide—is "for" a given "facility." There is no way to read this phrase as providing authority for category-wide emission credit regimes or "generation shifting" schemes. Those are by definition not "best system[s] of emission reduction" "for" an "existing source" *that cannot use them* (and indeed might have to shut down entirely). Thus, far from burnishing the Clean Power Plan interpretation, the definitional provisions refute it.

3. Context and structure confirm this plain reading of the text. To start, the D.C. Circuit's alternative, broader reading would create an untenable structural problem. As noted above, if interpreted to allow the EPA to promulgate industry-wide "systems," there is little limit to what the EPA could demand. *See supra* Part I.B. *Cf. UARG*, 573 U.S. at 310 (recognizing that treating greenhouse gases as air pollutants would sweep in "numerous small sources not previously regulated"). The EPA could impose a cap-and-trade regime on virtually the entire country at once, and § 7411(d) would become an open-ended mandate for the agency to solve climate change.

That § 7411 lacks anything remotely addressing this issue reaffirms that it does not *create* this issue in the first place. *Cf. Brown & Williamson*, 529 U.S. at 126 ("Such authority is inconsistent with the intent that Congress has expressed in … overall regulatory scheme."). Indeed, if § 7411(d) truly provided such broad authority, the EPA would likely have to "exclude greenhouse gases from the class of regulable air pollutants" altogether, because "their inclusion would be inconsistent with the statutory scheme." *UARG*, 573 U.S. at 319.

Moreover, that § 7411 is bifurcated into two distinct schemes—one for new sources and one for existing sources—confirms that the EPA's authority cannot extend to industry-wide regulations that effectively ban existing sources. *See also supra* at 25. Congress was aware that existing sources implicate reliance interests and therefore must be approached differently than *new* sources. But that is only true if the existing sources *continue to exist*. If Congress intended to grant the EPA the authority to restructure industries, ban

sources, favor others, and generally pick and choose *which* sources would continue operating, there would be no reason to separate new and existing sources.

Moreover, Congress's other Clean Air Act programs also undermine any reading that would grant the EPA power to institute industry-wide "systems" like cap-and-trade regimes. In Title IV, 42 U.S.C. §§ 7651-7651o, and Title VI, 42 U.S.C. §§ 7671-7671q, of the Clean Air Act, Congress specifically provided for the sort of detailed, industry-wide systems that the Clean Power Plan tried to impose on power plants. Title IV (aimed at acid rain) sets out emission caps for entire categories and a trading program for credits. *See generally Indianapolis Power & Light Co. v. EPA*, 58 F.3d 643, 644 (D.C. Cir. 1995). Title VI directed the EPA to phase out certain ozone-depleting substances. *See generally Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 454 (D.C. Cir. 2017). The Clean Power Plan's "reliance" on a suddenly discovered "delegation of ... authority" in § 7411(d) "is especially questionable here, given that Congress has used express language in other" parts of the same statute to grant the EPA the type of authority it believes it uncovered in § 7411(d). *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1850 (2020).

B. Interpretive Canons Confirm That The EPA Cannot Base Its Standards On An Exogenous Industry-Wide Scheme.

Even if the text left a hint that § 7411(d) could be interpreted more broadly, at least two canons of construction confirm that it cannot be interpreted as the D.C. Circuit construed it. Congress would need to speak more clearly to effectuate that extreme result.

Major Questions Doctrine. Most obviously, the panel's reading of § 7411(d) is "unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *UARG*, 573 U.S. at 324. That canon has become known as the "'major questions' doctrine." *Gundy*, 139 S. Ct. at 2141 (Gorsuch, J., dissenting). Certain questions hold such economic or political resonance that it is implausible to read an ambiguous law as having delegated them to an agency. This is a corollary of the teaching that "Congress … does not … hide elephants in mouseholes." *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006). Interpretation must instead "be guided to a degree by common sense as to the manner in which Congress is likely to delegate a policy decision of … economic and political magnitude to an administrative agency." *Brown & Williamson*, 529 U.S. at 133; *see also U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 420 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc) ("[T]he Supreme Court has repeatedly rejected agency attempts to take major regulatory action without *clear* congressional authorization.").

The D.C. Circuit's interpretation would authorize precisely the "transformative expansion" in regulatory power that this Court has rejected in the past—even where the statutory text seemed closer. In *UARG*, for instance, the question was "whether EPA permissibly determined that a source may be subject to [certain] permitting requirements on the sole basis of the source's potential to emit greenhouse gases." 573 U.S. at 314. The statutory basis for that action was textually plausible: The EPA argued that the "general,

Act-wide definition of 'air pollutant' includes greenhouse gases; the Act requires permits for major emitters of 'any air pollutant'; therefore, the Act requires permits for major emitters of greenhouse gases." *Id.* at 316. But this Court still rejected that reading because it threatened to "overthrow" the statutory design. *Id.* at 321. The Court pointed to the rule's draconian effects: "[D]ecade-long delays ... would become common." *Id.* at 322. "The number of sources required to have [Title V] permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from $62 million to $21 billion; and collectively the newly covered sources would face permitting costs of $147 billion." *Id.* Expressing skepticism about the agency's claim that it "discover[ed] in a long-extant statute" an "unheralded power to regulate 'a significant portion of the American economy,'" the Court reasoned that it would "expect Congress to speak clearly if it wishe[d] to assign to an agency decisions of vast 'economic and political significance.'" *Id.* at 323-24.

The power that the Clean Power Plan purported to have "discover[ed]" in § 7411(d)—and that the court below claimed to see too—is even more "vast" than in *UARG*, *id.*, with even *greater* "economic and political significance," *id.*, yet is based on statutory text even *less* capable of bearing it. As shown, the Clean Power Plan alone would have engendered billions (or even hundreds of billions) in compliance costs and price hikes, as well as tens of thousands of lost jobs.[16] It triggered *4.3 million* public comments. CPP, 80 Fed.

[16] *See supra* at 16-17 & nn.4-10; *see also* EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, 3-21, 3-22, tbl.3-8, tbl.6-5 (Oct. 23, 2015).

Reg. at 64,663. All of this in a substantive area—regulation of the nation's electrical grid—where the EPA has little or no expertise. *See King v. Burwell*, 576 U.S. 473, 474 (2015). And those are not the *limits* of the EPA's authority under the decision below—only the starting point for a climate "Revolution."

If nothing else, Congress did not *clearly* grant such expansive power to the EPA in an ancillary provision that went virtually unused for five decades.

Federalism Clear Statement Rule. Reflecting similar concerns is the "well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 572 U.S. 844, 858 (2014). To ensure that certainty, this Court requires a "clear statement" from Congress that it meant to extend vague "federal statutes" into areas of "traditional state responsibility." *Id.*

"[T]he regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983). The Clean Power Plan, however, would have consigned states to a minimal role in regulating electricity, and the D.C. Circuit decision blesses that wholesale transfer of regulatory power to the EPA. The mix of energy sources would become largely a question of EPA fiat, instead of reflecting state and local preference. Electricity prices, relative utilization at individual sources, and nearly everything else that is important about electrical generation would become subject to the EPA's effective control via § 7411(d).

One would expect that if Congress intended to hand over control of the industry to the EPA, it would make itself clear, but Congress did no such thing. Properly read, § 7411 does no more than allow the EPA to require the best systems of emission reduction that individual sources can actually use. This does little to intrude on utility regulation. But the very purpose of "generation shifting" is to reorganize the entire power industry. By way of analogy, it is as if the EPA moved beyond setting vehicle emissions standards and began directing traffic, banning SUVs, mandating subway construction, and rearranging roads—all in putative service of reducing emissions. Nothing in § 7411 comes close to establishing that Congress authorized that kind of federal intrusion on state authority.

The "requirement of [a] clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision." *United States v. Bass*, 404 U.S. 336, 349 (1971). Section 7411(d) makes clear the opposite; it is totally implausible that Congress, when it enacted this obscure and narrow provision decades ago, thought it was nationalizing regulation of the electrical grid.

* * *

The question presented is critically important to the parties and industries in this case, it is the crucial underpinning of any future regulation that the EPA says it will pursue, and the only binding decision on offer is wrong. The Court should grant review and confirm that the EPA does not have authority under § 7411 to remake entire industries.

CONCLUSION

This Court should grant the petition.

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