

IN THE  
**Supreme Court of the United States**

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WEST VIRGINIA, *et al.*,

*Petitioners,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

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THE NORTH AMERICAN COAL CORPORATION,

*Petitioner,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

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*(For Continuation of Caption See Inside Cover)*

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

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**BRIEF OF NON-GOVERNMENTAL  
ORGANIZATION AND TRADE  
ASSOCIATION RESPONDENTS**

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WESTMORELAND MINING HOLDINGS LLC,

*Petitioner,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

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NORTH DAKOTA,

*Petitioner,*

*v.*

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

## **QUESTIONS PRESENTED**

1. Whether this dispute remains a justiciable case or controversy under Article III of the Constitution.
2. Assuming jurisdiction, whether Section 7411 of the Clean Air Act restricts the “best system of emission reduction” that is “adequately demonstrated” to measures applied “to and at” each individual source.

**RULE 29.6 STATEMENT**

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 & Policy Center; Minnesota Center for Environmental Advocacy; Natural Resources Defense Council; and Sierra Club, all of which were petitioners and respondent-intervenors in the court of appeals, are non-profit public health and environmental organizations. Advanced Energy Economy, American Clean Power Association (successor of the American Wind Energy Association), and Solar Energy Industries Association, all of which were petitioners in the court of appeals, are nonprofit trade associations. None of these entities has any corporate parent, and no publicly held corporation owns an interest in any of them.

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## INTRODUCTION

This dispute involves the 2019 repeal of an Environmental Protection Agency (EPA) rule—the 2015 Clean Power Plan (CPP)—that has never been, and will never be, in effect. The agency has made clear that it will not reinstate either the CPP or the 2019 Affordable Clean Energy (ACE) Rule that replaced it, and instead will promulgate a new rule for power plant emissions of carbon dioxide (CO<sub>2</sub>) on a clean slate.

For all the sensational assertions in the petitioner-side briefing, the only truly dramatic feature of this proceeding is a conspicuous absence of Article III jurisdiction. The court below vacated the ACE Rule and ordered that the CPP Repeal remain in place until EPA completes its new rulemaking. Thus, no power plant is currently subject to regulation under either rule and no power companies petitioned this Court for review. Nor can any petitioning state or coal company show harm from the disposition below. There is no serious possibility that the CPP will take effect, and even if it did, market-driven trends in the electric power sector have rendered its emission-reduction targets immaterial. Indeed, when EPA repealed the CPP in 2019, it projected that the repeal would result in no cost savings for anyone. Petitioners themselves term the CPP a “legal nullity” (N.D. Br. 32 n.2) and a “relic” (N. Am. Coal Pet. 18). And their only standing proffers to date are the coal companies’ declarations asserting injury *from the ACE Rule*,

which they now claim was wrongly vacated by the court of appeals. Petitioners thus have not established their standing to invoke this Court's jurisdiction to review the decision below.

Petitioners' primary complaints, then, are about how EPA might exercise its authority in a *future* rulemaking. But such anticipatory claims are unripe. Litigants must await the result of EPA's new rulemaking, which will both define the issues for judicial review and avoid entangling the Court in an unnecessary advisory exercise over an abstract and technical policy dispute. In the absence of any extant regulation (or evidence of a concrete injury), there is no case or controversy for this Court to adjudicate.

If the dispute were justiciable, petitioners' claims would fail. This Court has already determined that Section 7411, a core provision of the Clean Air Act, "speaks directly" to power plants' emissions of CO<sub>2</sub>; gives EPA authority to decide "whether and how" to regulate those emissions; and assigns EPA the "complex balancing" task required to determine the best pollution-control systems in the context of a technical and complex record for particular industrial categories. *Am. Elec. Power Co. v. Connecticut (AEP)*, 564 U.S. 410, 424-27 (2011).

The CPP Repeal, not the CPP itself, was before the lower court and is before this Court now. EPA based that repeal on the contention that the Clean Air Act unambiguously bars the agency, in identifying the "best system of emission reduction" under Section

7411(a)(1), from considering any emission-reduction systems that do not apply “to and at” each source. This novel “fenceline” restriction—which contradicts past EPA rules—lacks any support in the statute’s text. It also goes far beyond disapproving the CPP, instead categorically and unreasonably prohibiting EPA from considering proven emission-reductions tools including economic incentives such as emissions averaging or trading among sources, which can be cost-effective means of reducing pollution.

Nor is this novel restriction justified by major questions (or nondelegation) principles. The Court has never applied those principles to a defunct rule that would impose no meaningful compliance costs even if reinstated. “Were it not for the hundreds of pages of briefing” that petitioners present on the issue, *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 465 (2001), the major questions cases’ inapplicability in such circumstances would be beyond dispute. Regardless, those cases still would not affect the outcome here, particularly in light of *AEP*’s holding (which petitioners simply ignore) that Section 7411 assigned the decision how to regulate power plants’ CO<sub>2</sub> emissions to EPA’s “expert determination.” 564 U.S. at 426.

### JURISDICTION

The D.C. Circuit entered judgment on January 19, 2021. The petitions for certiorari were timely. This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1). As explained in Part I, *infra*, no justiciable

case or controversy is presented under Article III of the Constitution.

## STATEMENT OF THE CASE

### **A. Congress Enacted the Clean Air Act To Ensure Effective Control of Air Pollution Over Time**

The Clean Air Act of 1970 established the modern federal regulatory framework governing control of air pollution. 42 U.S.C. §§ 7401 *et seq.* Rejecting the nation’s prior approaches to air pollution control, in which the federal government had little authority beyond encouraging state action, *see Train v. Nat. Res. Def. Council*, 421 U.S. 60, 63-64 (1975), the 1970 Act was a “remedy to what was perceived as a serious and otherwise uncheckable problem of air pollution,” *Union Elec. Co. v. EPA*, 427 U.S. 246, 256 (1976).

Congress established a comprehensive regulatory framework to address not only the dangerous air pollutants identified at that time, but also to equip EPA and states with tools to address new air pollution dangers and to embrace evolving pollution control techniques. *See, e.g.*, 116 CONG. REC. 32,901-02 (1970) (statement of Sen. Muskie). For this purpose, Congress built in provisions to ensure the statute’s continued effectiveness over decades, including technology-forcing mechanisms to spur innovation, requirements for EPA to periodically review and update standards, and the duty to list and regulate

additional pollutants when their dangers became apparent.

The Act’s architects were aware of—and concerned about—the potential for air pollution to cause climate change. *See, e.g.*, 42 U.S.C. § 7602(h) (defining “effects on welfare” as including “effects on . . . weather . . . and climate”); 116 CONG. REC. 32,914 (1970) (statement of Sen. Boggs) (“Air pollution alters climate and may produce global changes in temperature” (quoting Council on Env’tl. Quality, *First Annual Report* 71 (1970))). Congress thus gave EPA tools to address climate-altering air pollution and, indeed, required EPA to do so upon finding that it endangers public health or welfare. *Massachusetts v. EPA*, 549 U.S. 497, 528-34 (2007).

In short, the Clean Air Act, by design, has enabled EPA to adapt to “changing circumstances and scientific developments” in tackling major air pollution problems, including those not yet fully understood at the time of enactment. *Id.* at 532; *see also Whitman*, 531 U.S. at 462-63 (describing EPA’s statutory duty to review and revise air quality standards). And it has been remarkably effective: the Act has saved hundreds of thousands of lives every year,<sup>1</sup> while the U.S. economy nearly tripled in value

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<sup>1</sup> Jason Price *et al.*, *The Benefits and Costs of U.S. Air Pollution Regulations*, Industrial Economics, Inc. (May 2020), <https://www.nrdc.org/sites/default/files/iec-benefits-costs-us-air-pollution-regulations-report.pdf>; *see also EPA, The Benefits and*

over the Act’s 50-year history.<sup>2</sup> Key American industries, from automobiles to manufacturing to electric power generation, are more productive than in 1970—and vastly cleaner thanks to this law.

### **B. Section 7411 of the Act Ensures “No Gaps” in the Control of Stationary Source Pollution**

Congress established a trio of Clean Air Act programs to ensure “no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.” S. Rep. No. 91-1196, at 20 (1970). Under Sections 7408 and 7409, EPA sets national ambient air quality standards for “criteria” air pollutants emitted from numerous and diverse stationary and mobile sources. States then adopt implementation plans under Section 7410, subject to EPA approval, to attain or maintain these standards.

Under Section 7412, EPA sets emissions standards for controlling “hazardous” (i.e., especially toxic) air pollutants from categories of new and existing industrial sources. These federal standards apply directly to the applicable sources, although EPA may delegate enforcement to states.

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*Costs of the Clean Air Act from 1990 to 2020* (Mar. 2011), <https://www.epa.gov/sites/default/files/2015-07/documents/summaryreport.pdf>.

<sup>2</sup> EPA, *Our Nation’s Air* (2020), [https://gispub.epa.gov/air/trendsreport/2020/#air\\_trends](https://gispub.epa.gov/air/trendsreport/2020/#air_trends).

Rounding out the trio is Section 7411, which serves to limit other harmful emissions from stationary sources. As the Court has explained:

Section [7411] of the Act directs the EPA Administrator to list “categories of stationary sources” that “in [her] judgment . . . caus[e], or contribut[e] significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare.” § 7411(b)(1)(A). Once EPA lists a category, the Agency must establish standards of performance for emission of pollutants from new or modified sources within that category. § 7411(b)(1)(B); *see also* § 7411(a)(2). And, most relevant here, § 7411(d) then requires regulation of existing sources within the same category. For existing sources, EPA issues emissions guidelines, *see* 40 CFR §§ 60.22, 60.23 (2009); in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction, § 7411(d)(1).

*AEP*, 564 U.S. at 424. Section 7411(d) applies only to existing sources’ emissions of dangerous pollutants that are not listed as criteria or hazardous

pollutants—that is, not covered by Sections 7408-7410 or 7412.

A “standard of performance” is:

a standard for emissions of air pollutants which reflects the degree of emission limitation achievable through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

42 U.S.C. § 7411(a)(1).

In developing emissions guidelines, EPA: (1) identifies all “system[s] of emission reduction” that are “adequately demonstrated” for the source category in question; (2) identifies the “best” of those systems, considering emission-reducing efficacy, costs, and other factors; and (3) identifies “the degree of emission limitation achievable through the application” of that system. *Id.* In other words, EPA sets an emission limit for the source category, which is incorporated into the guideline. The guideline provides procedures for states to submit plans establishing a standard for each existing source that is “no less stringent” than the guidelines’ emission limit, acknowledges states’ authority to consider source-specific factors including “remaining useful life,” and establishes parameters

for EPA to approve or disapprove the plans. 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.24a(c). If a state “fails to submit a satisfactory plan,” or simply chooses not to submit one, EPA must step in to prescribe a federal plan that imposes emission performance standards directly on the state’s existing sources. 42 U.S.C. § 7411(d)(2). EPA has issued regulations under Section 7411(d) in 13 instances for source categories ranging from municipal waste combustors to landfills to aluminum plants, based on a variety of systems tailored to the category and pollutant.<sup>3</sup>

### **C. EPA’s Authority Includes Regulation of Greenhouse Gas Pollution from Power Plants**

In *Massachusetts*, this Court held that the Clean Air Act’s “definition of ‘air pollutant’” unambiguously encompasses greenhouse gases—compounds like CO<sub>2</sub> that “act[] like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat.” 549 U.S. at 505, 528-29. The Court held that EPA *must* regulate these air pollutants if the agency concluded their emissions “cause, or contribute to, air pollution which may reasonably be anticipated to endanger public health or welfare.” *Id.* at 528 (quoting 42 U.S.C. § 7521(a)(1)).

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<sup>3</sup> Robert R. Nordhaus & Ilan W. Gutherz, *Regulation of CO<sub>2</sub> Emissions From Existing Power Plants Under §111(d) of the Clean Air Act: Program Design and Statutory Authority*, 44 ENVTL. L. REP. 10,366 (2014).

Two years later, EPA issued an “endangerment determination” for CO<sub>2</sub> and other greenhouse gases after completing a comprehensive assessment of the scientific evidence. 74 Fed. Reg. 66,496 (Dec. 15, 2009). EPA determined that the risks from greenhouse gas pollution include intensified heat waves, worsened air quality, greater frequency and intensity of storms and droughts, rising sea levels, and increased spread of food- and water-borne pathogens, among many other effects. *Id.* at 66,497, 66,524-36. EPA concluded that emissions of greenhouse gases, including CO<sub>2</sub>, endanger the public health and welfare of current and future generations and thus require Clean Air Act regulation. *Id.* at 66,516-36.

Years before *Massachusetts*, states and land trusts brought federal common law nuisance suits against five electric power companies, seeking injunctive relief to limit the companies’ CO<sub>2</sub> emissions. *AEP*, 564 U.S. at 418-19. This Court held in 2011 that the plaintiffs’ federal common law claims were superseded by the Clean Air Act, explaining: “*Massachusetts* made plain that emissions of carbon dioxide qualify as air pollution subject to regulation under the Act. . . . And we think it equally plain that the Act ‘speaks directly’ to emissions of carbon dioxide from [fossil fuel-fired power] plants.” *Id.* at 424. The Court found it “altogether fitting that Congress designated an expert agency, here, EPA, as best suited to serve as primary regulator of greenhouse gas emissions” from power plants under Section 7411(d).

*Id.* at 428. To that end, Congress directed the agency to perform the “complex balancing” of “the environmental benefit potentially achievable, our Nation’s energy needs and the possibility of economic disruption.” *Id.* at 427.

In the decade since *AEP*, the impacts of climate change have become more evident and severe. The 2018 Fourth National Climate Assessment—a Congressionally-mandated report by 13 federal agencies—concluded that “the evidence of human-caused climate change is overwhelming and continues to strengthen, that the impacts of climate change are intensifying across the country, and that climate-related threats to Americans’ physical, social, and economic well-being are rising.”<sup>4</sup> In 2021 “the U.S. experienced 20 separate billion-dollar weather and climate disasters that killed at least 688 people—the most disaster-related fatalities for the contiguous U.S. since 2011.”<sup>5</sup>

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<sup>4</sup> U.S. Global Change Research Program, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States* 36 (2018), <https://www.globalchange.gov/nca4>; see also Global Change Research Act of 1990, 15 U.S.C. §§ 2921-2961.

<sup>5</sup> National Oceanic and Atmospheric Administration, *U.S. saw its 4th-warmest year on record, fueled by a record-warm December* (Jan. 10, 2022), <https://www.noaa.gov/news/us-saw-its-4th-warmest-year-on-record-fueled-by-record-warm-december>.

#### **D. EPA Promulgates the Clean Power Plan**

In 2015, EPA promulgated the CPP to address existing power plants' CO<sub>2</sub> emissions. 80 Fed. Reg. 64,662 (Oct. 23, 2015), JA273. The CPP established emissions guidelines under Section 7411(d) for the fossil fuel-fired power plant source category, including steam electric generators (primarily coal-fired plants) and combustion turbines (primarily gas-fired plants). JA483-90.

The CPP based its “best system of emission reduction” on the primary techniques already used by states and power companies to curtail CO<sub>2</sub> emissions from existing power plants. Relying on extensive stakeholder input, EPA determined the “best system” was a combination of three “building blocks”: (1) improving efficiency (heat rate) at coal-fired plants; (2) substituting electricity generation from lower-emitting gas plants for generation from higher-emitting coal plants; and (3) substituting generation from new zero-emitting renewable energy sources for generation from coal- and gas-fired plants. JA298-99. EPA found that these measures, at the selected level of stringency, were widely employed in practice, achieved emission reductions cost-effectively, and would not adversely affect the reliable supply of electricity. JA654-90. The agency identified other technologies, such as carbon capture and co-firing natural gas with coal, that were “technically feasible and within price ranges that the EPA has found to be cost effective,” but determined that the three

“building block” measures in combination were less expensive. JA578.

EPA applied the “best system” to quantify the degree of CO<sub>2</sub> emission limitation achievable by covered sources. The agency set limits in the form of two uniform emission rates for coal and gas plants respectively, to be phased in from 2022 to full implementation in 2030. JA301. EPA determined that each plant could achieve the applicable limit at a reasonable cost by reducing its own emissions and by acquiring “emission rate credits” from expanded lower-emitting or new zero-emitting generation, thus reducing its adjusted CO<sub>2</sub> emission rate to meet the limit. JA690-92, 969-71. EPA also provided states with considerable flexibility in developing their plans, giving states the option to apply the uniform rates to individual sources within the state, or to adopt trading programs or other compliance strategies to meet equivalent state goals. JA1063-88.

In 2015 EPA projected that, upon full implementation of the CPP, power sector CO<sub>2</sub> emissions in 2030 would be 32 percent below 2005 levels.<sup>6</sup> JA354. The agency estimated that the CPP’s climate and health benefits (projected at \$19 to \$29 billion in 2025 and \$32 to \$48 billion in 2030) would vastly outweigh its compliance costs (projected at \$1.0

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<sup>6</sup> In 2015, power sector CO<sub>2</sub> emissions were already 12 percent below 2005 levels. U.S. Energy Information Administration, *Today in Energy* (May 9, 2016), <https://www.eia.gov/todayinenergy/detail.php?id=26152>.

to \$3.0 billion in 2025 and \$5.1 to \$8.4 billion in 2030). JA354-56. As discussed *infra* pp. 16-17, EPA in 2015 greatly overestimated the CPP's effect and costs, as the CPP's emission-reduction projections were achieved more than a decade ahead of schedule, and with no Section 7411(d) regulation at all.

States and industry parties challenged the CPP in the D.C. Circuit. Asserting that the rule would be extremely costly and would prompt immediate large-scale coal retirements,<sup>7</sup> the petitioners sought an emergency stay of the CPP, which was denied by the D.C. Circuit, Order, *West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Jan. 21, 2016), ECF No. 1594951, but granted by this Court in February 2016, *West Virginia v. EPA*, 577 U.S. 1126 (2016). These challenges to the CPP were held in abeyance following a change of administration, and ultimately dismissed as moot after the new administration's repeal and replacement rule took effect. Order, *West Virginia v. EPA*, No. 15-1363, (D.C. Cir. Sept. 17, 2019), ECF No. 1806952.

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<sup>7</sup> See, e.g., Coal Indus. Appl. for Immediate Stay at 4, *Murray Energy Corp. v. EPA*, No. 15A778 (U.S. Jan. 27, 2016) (citing Seth Schwartz, *Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry*, Energy Ventures Analysis (Oct. 2015)); States Appl. for Immediate Stay at 46, *West Virginia v. EPA*, No. 15A773 (U.S. Jan. 26, 2016) (citing same).

**E. EPA Repeals the Clean Power Plan, and Replaces It with the ACE Rule, Based Solely on a Newly Constrained Legal Interpretation**

In July 2019, EPA finalized the rulemaking at issue here, which repealed the CPP and replaced it with the ACE Rule. 84 Fed. Reg. 32,520 (July 8, 2019), JA1725. EPA based its CPP repeal on a single ground: a new interpretation of the Act, under which Section 7411 unambiguously limits the best system of emission reduction to emission controls applied “to and at the level of the individual source.” JA1731, 1769. EPA’s General Counsel explained at the time: “We have not chosen to ask the Court to defer to our policy judgment. We are asking the court to rule on the face of the statute. It’s a bold move.”<sup>8</sup>

The consequence of EPA’s new “to and at” limitation was not only to prohibit any reliance on shifting generation between fossil-fueled power plants and renewable energy facilities that were outside the designated Section 7411 source category. It reached even further to also bar the agency—and states and industry—from any use of economic incentives such as emissions averaging and trading, even among fossil-fueled power plants in the same source category,

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<sup>8</sup> Lee Logan, *Facing Risks, EPA’s Counsel Defends ‘Bold’ ACE Rule Legal Interpretation*, INSIDE EPA (Aug. 2, 2019), <https://insideepa.com/daily-news/facing-risks-epa-s-counsel-defends-bold-ace-rule-legal-interpretation>.

when establishing and complying with standards.<sup>9</sup> Prohibiting any averaging or trading tools conflicted with past EPA actions under Section 7411(d), including regulations for nitrogen oxide emissions from municipal waste combustors, 60 Fed. Reg. 65,387, 65,402 (Dec. 19, 1995), and for mercury emissions from coal-fired power plants, 70 Fed. Reg. 28,606, 28,620 (May 18, 2005), *vacated on other grounds, New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008). *See* Power Cos. Br. 38-41.

In the 2019 rules, EPA also acknowledged “significant changes in the electric sector” that had occurred since EPA finalized the CPP in 2015. JA1675. These changes included “large-scale market trends” that were “anticipated to result in the continued decline of coal-fired generation and capacity,” and an expectation that renewable energy sources would “account for a significant portion of all new capacity into the future.” JA1675, 1679. Power sector CO<sub>2</sub> emissions were also declining accordingly: EPA observed that, “[e]ven after the CPP was stayed,” sources in 2018 were “30 percent below 2005 levels,” on the verge of meeting the CPP’s 2030 projections.

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<sup>9</sup> *See, e.g.*, JA1896 (“In this final action, the EPA determines that: Neither (1) averaging across designated facilities located at a single plant; nor (2) averaging or trading between designated facilities located at different plants are permissible measures for a state to employ in establishing standards of performance for existing sources or for sources to employ to meet those standards.”); *see also* JA1903 (“Accordingly, trading is not permissible under CAA Section [74]11.”).

JA1690-91. As a result—and in contrast to the CPP challengers’ earlier claims of substantial harm—EPA concluded that repealing the CPP was “not anticipated to have a meaningful effect on emissions of CO<sub>2</sub> or other pollutants or regulatory compliance costs.” JA1719-20. In fact, 2019 power sector emissions were 32 percent below 2005 levels, achieving the CPP’s 2030 projections more than a decade ahead of schedule.<sup>10</sup>

The ACE Rule, which EPA promulgated to replace the CPP, reflected EPA’s new limited view of its authority under Section 7411. For existing coal-fired power plants, EPA determined that the best system of emission reduction could include only minor improvements to plants’ operational efficiency. JA1787. The ACE Rule did not specify any minimum emission limitation for performance standards in state plans, instead providing only an advisory list of seven “candidate technologies” to improve plant efficiency. JA1808. EPA directed states to “evaluate the applicability” of these “candidate technologies” to each source in the state, and then derive an individual standard for each unit. JA1870. However, EPA did not mandate any minimum level of efficiency improvement, and indeed confirmed that standards need not reflect *any* efficiency or emissions improvement at all. JA1808-09, 1887.

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<sup>10</sup> U.S. Energy Information Administration, *Today in Energy* (June 9, 2021), <https://www.eia.gov/todayinenergy/detail.php?id=48296>.

EPA rejected other available measures that would have offered far greater emission reductions while still comporting with the ACE Rule's newly constrained statutory interpretation. *See, e.g.*, JA1839-44 (rejecting co-firing with natural gas); JA1853-58 (rejecting carbon capture). According to EPA's own analysis, the ACE Rule's minimal "best system of emission reduction" would achieve little, if any, emission reduction. EPA's one modeled scenario projected that the Rule would reduce CO<sub>2</sub> emissions from coal plants by approximately one percent relative to business as usual, and would reduce overall power-sector emissions by considerably less than one percent.<sup>11</sup>

Even though EPA continued to include existing gas-fired power plants in the listed category of sources, it did not identify any best system of emission reduction for them under the ACE Rule and thus left those sources unregulated. JA1791-92.

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<sup>11</sup> *See* 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*, at 3-11, tbls. 3-3 & 3-15, tbl. 3-8 (June 2019) [hereinafter ACE RIA] [https://www.epa.gov/sites/default/files/2019-06/documents/utilities\\_ria\\_final\\_cpp\\_repeal\\_and\\_ace\\_2019-06.pdf](https://www.epa.gov/sites/default/files/2019-06/documents/utilities_ria_final_cpp_repeal_and_ace_2019-06.pdf).

### **F. The Court of Appeals Reviews, and Rejects, EPA’s Sole Ground for the Repeal**

State and local governments, power companies, environmental and public health groups, and clean energy trade associations petitioned the D.C. Circuit for review of the CPP Repeal and the ACE Rule. The court of appeals majority confined its review to the “sole ground” EPA asserted for the repeal—i.e., that Section 7411’s text unambiguously constrains EPA to determine a best system of emission reduction using only improvements “at and to existing sources.” JA103. The court granted the petitions for review, concluding that “nothing in the text, structure, history, or purpose of Section 7411 . . . compels the reading the EPA adopted.” JA131.

The court also explained that the dispute did not “fit the major-question mold of prior cases.” JA139. It noted that EPA had “not just the authority, but a statutory duty” to regulate greenhouse gas emissions from power plants, and the Act already “contains its own limits on regulation, like mandating that the EPA take into account such factors as available technology and the cost of compliance.” JA138-39. The court concluded that “each critical element of the Agency’s regulatory authority on this very subject has long been recognized by Congress and judicial precedent.” JA136.

Because EPA defended the CPP Repeal and ACE Rule solely on an erroneous legal interpretation, the

court did not decide whether the ACE Rule approach was “permissible . . . as a matter of agency discretion.” JA102-03. Nor did it address numerous record challenges to that rule. Likewise, the court did not consider the legality of the CPP itself, which was no longer before it.

The dissent below would have held that EPA lacked authority to promulgate either the CPP or the ACE Rule because power plants’ emissions of mercury and other hazardous air pollutants are regulated under Section 7412. JA217.

Shortly after the D.C. Circuit’s ruling, the incoming Administrator announced that, under his leadership, EPA would undertake a new rulemaking to address power plant CO<sub>2</sub> emissions, starting from a “clean slate.”<sup>12</sup> EPA moved for a partial stay of the court’s mandate, explaining that the agency did not intend to implement either the CPP or the ACE Rule and stating that “no Section 7411(d) rule should go into effect until [a new rulemaking] is completed.” JA258. The agency explained that the CPP’s initial compliance deadlines had “long since passed” and that “ongoing changes in electricity generation” mean that the CPP’s 2030 emission-reduction projection has “already been achieved by the power sector.” JA265. Granting EPA’s unopposed motion, the D.C. Circuit ordered that the CPP Repeal remain in effect “until

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<sup>12</sup> *Hearing on the Nomination of Michael S. Regan to be Administrator of the Environmental Protection Agency Before the S. Comm. on Env't. & Pub. Works*, 117th Cong. 42-43 (2021).

the EPA responds to the court's remand in a new rulemaking action." JA271. Thus, with the ACE Rule vacated and the CPP Repeal still in place, JA272, no Section 7411(d) regulation for CO<sub>2</sub> emissions from existing power plants is in effect: states face no planning deadlines, and regulated entities face no compliance obligations.

### SUMMARY OF ARGUMENT

The CPP is not, and has never been, in effect. The lower court ordered that it remain inoperative until EPA completes a new rulemaking. Thus, neither petitioners nor any other parties are subject to any obligations under the CPP (or under the ACE Rule that replaced it). The CPP's deadlines for submitting state plans passed more than three years ago, and its emission-reduction goals have been rendered immaterial, even in the absence of regulation.

Petitioners have therefore failed to satisfy their burden to establish standing to invoke this Court's jurisdiction. No petitioner is, has been, or will be injured by the inoperative CPP. Nor has any petitioner demonstrated that it will be reinstated; that any reinstatement, should it somehow occur, would harm them; or that the vacatur of the ACE Rule injures them either. The parties' disputes about the CPP Repeal have been overtaken by events and no longer present a live case or controversy.

Similarly non-justiciable are petitioners' hypotheticals about regulations that EPA *might* adopt

in the future. The court of appeals' decision did not pass upon such regulations or bless any particular regulatory design. Review of forthcoming regulations must await their final promulgation and the availability of a new administrative record.

Even if this dispute were justiciable, petitioners' claims are meritless. The court of appeals properly confined its review to the sole ground asserted in the CPP Repeal—i.e., that Section 7411 unambiguously precludes EPA from considering any emission-reduction systems that do not apply “to and at” a source. Section 7411 does not contain the unwritten “to and at” restriction the CPP Repeal posited. When Congress wished to add any such restriction in the Act, it did so expressly, by using words like “retrofit” or “technology.” Petitioners' labored efforts to insert such a restriction into Section 7411 lack support in the statute. And they would unreasonably preclude not just the CPP, but *any* kind of emissions averaging and trading among sources—prohibiting common and cost-effective measures that have long been used throughout the power industry and that EPA used in multiple prior rules.

Unable to locate their preferred restriction in the statute, petitioners resort to invoking major questions principles. But such principles have never applied in a situation resembling the one here—a dispute about the repeal of a never-implemented rule that EPA found would impose “no costs” even if implemented. In any event, the major questions cases do not change

the outcome. This Court has already held that Section 7411 “speaks directly” to power plants’ emissions of CO<sub>2</sub> and assigns to EPA the decisions “whether *and how*” to regulate them. *AEP*, 564 U.S. at 424, 426 (emphasis added). Petitioners simply ignore those prior holdings.

Finally, North Dakota alone contends that the CPP was unlawful because it established binding emission limits in its guidelines. This Court should not consider the claim, which EPA did not assert as a basis for the CPP Repeal and which the court of appeals therefore did not address. The claim is wrong, in any event. Congress modeled Section 7411(d) on the cooperative federalism framework that appears elsewhere in the Act. North Dakota would upend that archetypical framework, however, and invite the pollution problems that Congress designed the modern Clean Air Act to address.

## ARGUMENT

### I. These Cases Are Not Justiciable

These petitions should be dismissed because they do not present a justiciable case or controversy. “Article III demands that an ‘actual controversy’ persist throughout all stages of litigation.” *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 340 (2006) (the Court has an “obligation” to assure itself of Article III jurisdiction). This means

both that standing must be shown to invoke this Court's jurisdiction, and that a case must be dismissed if it becomes moot. *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 64-73 (1997). And when an underlying cognizable injury dissipates during litigation, parties cannot substitute an alternative theory of injury premised on contingent future actions that have not yet taken shape. *Trump v. New York*, 141 S. Ct. 530, 533-35 (2020) (per curiam). Here, petitioners identify no redressable injury caused by the disposition below; recent events and ongoing changes in the industry have mooted the parties' dispute over the CPP Repeal; and any complaints about future EPA rulemakings are unripe. The cases have therefore each "lost [their] character as a present, live controversy of the kind that must exist if [the Court is] to avoid advisory opinions." *Hall v. Beals*, 396 U.S. 45, 48 (1969) (per curiam).

1. No petitioner has satisfied its burden to "explain how the elements essential to standing are met." *Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). Although most standing cases consider whether a plaintiff met those elements when initiating suit, Article III also requires that a party have standing when invoking an appellate court's jurisdiction to review a judgment below. *Id.*; *Hollingsworth*, 570 U.S. at 705. And parties that do not seek such review cannot supply the requisite standing. *See Diamond v. Charles*, 476 U.S. 54, 63-64 (1986). This Court has thus "repeatedly recognized" that when an intervenor below asks this Court to

reverse a judgment that the primary party did not challenge, *Bethune-Hill*, 139 S. Ct. at 1951, the intervenor must show that it “independently ‘fulfills the requirements of Article III’”—i.e., that it has been injured by the disposition below, and that a favorable ruling from this Court would redress the injury, *Wittman v. Personhuballah*, 578 U.S. 539, 543-44 (2016) (quoting *Arizonans for Off. Eng.*, 520 U.S. at 65). The petitioning party also “bears the burden” of establishing a non-obvious redressable injury in this Court through “record evidence.” *Id.* at 545. Petitioners here have failed to do so.

a. Consider, first, the petitioning coal companies in Nos. 20-1531 and 20-1778. Below, these companies argued primarily that coal-fired power plants were *exempt* from regulation under Section 7411(d). *See* JA176-98. This Court declined to grant review of that question, however, 142 S. Ct. 418 (limiting Case No. 20-1778 to Question 2), and neither company identifies any injury that would be redressed by a favorable decision on the remaining questions presented. *See Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1650 (2017) (“standing is not dispensed in gross”).

The companies cite no evidence, for example, that the court of appeals’ disposition of the CPP Repeal will result in any decreased consumption of their coal. The CPP is not—and never has been—in effect. Nor do the companies show any “serious likelihood” that the CPP will take effect in the future. *TransUnion LLC v.*

*Ramirez*, 141 S. Ct. 2190, 2212 (2021). EPA does not intend to resurrect the CPP, Fed. Resps. Br. in Opp’n 16-17, and the D.C. Circuit ordered that EPA’s repeal remain in effect until it completes a superseding rulemaking, JA270-71. One of the companies itself describes the CPP as a “relic” that is “years out of date” and “unlikely” ever to be reinstated. N. Am. Coal Pet. 18. And even if the CPP were somehow to take effect, the coal companies “have not identified record evidence” that it would injure them. *Wittman*, 578 U.S. at 545. To the contrary, the record before this Court indicates that the CPP’s emission-reduction targets are now immaterial, JA269, such that, as EPA put it in 2019, there would likely be “no difference between a world where the CPP is implemented and one where it is not,” JA1921.

Petitioner North American Coal contends that its case is nonetheless justiciable because the Court could reinstate the ACE Rule, the vacatur of which purportedly “harms Petitioner.” N. Am. Coal Cert. Reply 1, 3. But the company appeared below only as a petitioner *challenging* the ACE Rule. And its present contention is contrary to the only evidence submitted in support of its standing: a declaration asserting that the ACE Rule *harmed* the company, and that “[t]hese harms will be alleviated if the Rule is vacated.” Coal Indus. Pet’rs Opening Br. at ADD3, *Am. Lung Ass’n v. EPA*, No. 19-1140 (D.C. Cir. Apr. 17, 2020), ECF No. 1838666. Petitioner Westmoreland Mining Holdings (which, unlike North American Coal, also intervened to defend the CPP Repeal) submitted a similar

declaration below, *id.* at ADD4-ADD6, and continued to base its standing before this Court on harms to the company from the ACE Rule, Westmoreland Cert. Reply 11. Neither company can thus now argue—nor has either company attempted to show—that it would benefit from reinstatement of the ACE Rule, which EPA projected would decrease coal production through 2035. ACE RIA at 3-25 to 3-26.

b. The petitioning states in Nos. 20-1530 and 20-1780 have likewise failed to “independently demonstrate standing” before this Court. *Bethune-Hill*, 139 S. Ct. at 1951. These states did not submit evidence or present argument in support of their standing below. It may not have been incumbent on them to do so as intervenors then, but the “situation changed” when they invoked this Court’s jurisdiction as petitioners. *Id.* And yet the states still marshal no evidence supporting their standing to challenge the disposition below, which does not require them “to do or refrain from doing anything.” *Hollingsworth*, 570 U.S. at 705.

The only evidence here that arguably bears on the states’ standing is now years out of date and not traceable to the judgment below. *See California v. Texas*, 141 S. Ct. 2104, 2118 (2021) (evidence of harm from a materially different time period insufficient to establish states’ standing). North Dakota has cited evidence from its 2016 stay application, for example, asserting that the CPP would have injured the state had it taken effect on its original timeline. N.D. Pet. 17-18. Other states that sought a stay six years ago

also complained at that time about the burden of preparing state plans to comply with the CPP. *See, e.g.*, States Appl. for Immediate Stay, 41-46, *West Virginia v. EPA*, No. 15A773 (U.S. Jan. 26, 2016). But no petitioning state identifies comparable evidence of actual or imminent harm that it faces from the CPP *now*, particularly following the lower court order (which the states did not oppose, and which they do not challenge here) that leaves the CPP's *repeal* in place until EPA completes a new rulemaking.

Even if the defunct CPP could somehow spring to life, it is doubtful that it would still harm the petitioner states, given “significant changes” in the electric power sector and the fact that the “deadline for state plan submittals in 2018 has already passed.” JA1675, 1694. EPA projected in 2019 that, if the CPP had taken effect then, it already would have been “non-binding” in more than half the states, including ten of those petitioning here, because emissions had already fallen below the CPP's targets. JA1673, 1717-19. EPA further explained that this projection was conservative, as it did not account for recent market developments, implementation delays, or interstate trading, which were likely to eliminate any remaining emission-reduction requirements in other states and to render a reinstated CPP “non-binding entirely.” JA1674-1719. Ongoing market trends and the passage of time have made this outcome all the more likely. Thus, irrespective of whether the petitioning states had standing when they first intervened below, they have not proffered the requisite evidence that

they “possess standing now.” *Wittman*, 578 U.S. at 544.<sup>13</sup>

2. For similar reasons, the parties’ dispute as to the CPP Repeal has been overtaken by events and is now moot. *See Arizonans for Off. Eng.*, 520 U.S. at 66-67 (distinguishing between an intervenor’s standing to seek appellate review, and whether an originating plaintiff’s claim has become moot). It is “not enough” for purposes of Article III that a live controversy existed “when suit was filed, or when review was obtained in the Court of Appeals.” *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477-78 (1990). Rather, to support this Court’s jurisdiction, a claim must remain live “at all stages of review.” *Arizonans for Off. Eng.*, 520 U.S. at 67. And here, for the reasons described above, the parties’ dispute about the CPP Repeal has “lost the essential elements of a justiciable controversy.” *Id.* at 48. Reinstatement of the CPP now cannot “reasonably be expected” to occur. *Camreta v. Greene*, 563 U.S. 692, 711 (2011); *see also* N.D. Br. 33 n.2 (describing the CPP as a “legal nullity”). Nor would that occurrence likely result in decreased

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<sup>13</sup> Alone among the states, North Dakota asserts standing to seek reinstatement of the ACE Rule, N.D. Cert. Reply 1-11, but it never explains how vacatur of that rule caused it any concrete injury, nor how it would benefit from reinstatement. At most, North Dakota vaguely suggests the rule’s vacatur somehow harmed its sovereign authority to regulate emissions from coal plants in the state. *Id.* at 3, 10. North Dakota identifies no state regulation that it cannot adopt now, however, in the absence of an EPA rule.

emissions in any event, given the ongoing changes and trends in the power sector. Thus, although the parties “continue to dispute the lawfulness” of the CPP Repeal, those disputes are now “abstracted from any concrete actual or threatened harm” and “fall[] outside the scope” of Article III. *Alvarez v. Smith*, 558 U.S. 87, 93 (2009).

3. Because power plants are presently subject to no regulation under Section 7411(d), several petitioners instead press unripe complaints about hypothetical future regulations that, they claim, the judgment below authorizes. *See, e.g.*, W. Va. Br. 19-26; N. Am. Coal Br. 22-32. These petitioners misconstrue the D.C. Circuit’s holding: that court did not “bless” even the CPP, much less give EPA “unfettered” authority in future Section 7411(d) rulemakings. *See supra* pp. 18-20. Regardless, any prediction about what regulations will result from EPA’s inchoate rulemaking is “no more than conjecture’ at this time.” *Trump*, 141 S. Ct. at 535 (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 108 (1983)). Petitioners make bold assertions about what they expect EPA will do, but the truth is they “cannot know” what regulations will materialize. *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 203 (1983). It would be “wholly novel,” and “amount to the rendering of an advisory opinion,” for this Court to pass upon regulations “not yet promulgated.” *EPA v. Brown*, 431 U.S. 99, 104 (1977).

Instead, consistent with regular practice, the new rulemaking process must first “run its course”—both to sharpen the questions for the Court, *Trump*, 141 S. Ct. at 536, and to shield it from unnecessary entanglement in policy disputes until the agency’s decision “has been formalized and its effects felt in a concrete way,” *Ohio Forestry Ass’n, Inc. v. Sierra Club*, 523 U.S. 726, 732-33 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)). In the meantime, petitioners will suffer no concrete harm, as neither any extant rule nor the disposition below requires them “to do anything or to refrain from doing anything.” *Id.* at 733. If EPA’s new rule implicates any of petitioners’ present concerns, petitioners can challenge that rule in a new suit, 42 U.S.C. § 7607(b)(1)—including by seeking a stay, if warranted. But contrary to petitioners’ contentions, e.g., N. Am. Coal Cert. Reply 9, W. Va. Cert. Reply 6, neither the costs of such further litigation, nor any legal uncertainty that may exist in the interim, suffices to “justify review in a case that would otherwise be unripe.” *Ohio Forestry*, 523 U.S. at 735; see also *Nat’l Park Hosp. Ass’n v. Dep’t of Interior*, 538 U.S. 803, 811 (2003).

Petitioners would prefer this Court’s review now, of course, and some parties might feel that they need to take steps in the meantime to prepare for “what they think is likely to come in the form of new regulations.” *In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). But such anticipatory costs have “never been a justification” for courts to review

the scope of an agency's statutory authority in the midst of an ongoing rulemaking. *Id.* Instead, Article III requires that courts "put aside" any impulse to settle the merits of an important dispute "for the sake of convenience and efficiency." *Hollingsworth*, 570 U.S. at 704-05. Allowing parties to obtain judicial review based on "hypothetical" future actions that may not occur as anticipated, or that might not occur at all, would "water[] down the fundamental requirements of Article III." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416 (2013).

In short, for reasons of standing, mootness, and ripeness, these petitions do not present a "proper case or controversy," *DaimlerChrysler*, 547 U.S. at 341, 352, and therefore must be dismissed.

## **II. Section 7411 Does Not Contain the Restriction That Was EPA's Sole Basis for Repealing the Clean Power Plan**

EPA premised its repeal of the CPP on a novel construction that Section 7411 restricts the "best system of emission reduction" to measures applied "to and at" the source. That restriction finds no support in the statute. Instead, the Act calls on EPA to evaluate emission-reduction measures used in particular source categories, subject to express constraints that do not include the Repeal's atextual invention. Petitioners' attempts to find such a "fenceline" restriction in various and sundry cues fall short. Moreover, this restriction would unreasonably bar commonplace, cost-effective trading and

averaging measures among regulated sources, forcing EPA (and states and industry) to rely on emission-reduction techniques that are both more expensive and less effective. This Court should reject the restriction, just as the court of appeals correctly did below.

1. Assuming these cases are justiciable, the only actions under review are those EPA took in 2019—the CPP Repeal and the replacement ACE Rule. It is a “foundational principle of administrative law” that courts must limit their review of agency action to the “grounds that the agency invoked when it took the action.” *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1907 (2020) (quoting *Michigan v. EPA*, 576 U.S. 743, 578 (2015)); see *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947). The actions at issue here relied on a single statutory ground: that Section 7411 “unambiguously limits the [best system of emission reduction] to those systems that can be put into operation *at* a building, structure, facility or installation.” JA1746; see also JA1787, 1796, 1893 (“at and to”); JA1769, 1893 (“to and at”); JA1836 (“at or to”); JA1758 n.65 (“to or at”). The court of appeals properly confined its review to this asserted ground, and therefore did not consider (let alone resolve) whether EPA could have repealed the CPP for other reasons, or whether the CPP itself was arbitrary, capricious, or otherwise contrary to law. 42 U.S.C. § 7607(d)(9)(A). Litigation raising such claims was previously dismissed as moot. *Supra* p. 14. And here, the court of appeals correctly concluded that Section

7411 does not contain the atextual “to and at” restriction that EPA invoked in the CPP Repeal.

2. Section 7411 assigns to EPA, as the “expert agency,” the “complex balancing” of considerations, *AEP*, 564 U.S. at 427-29, that goes into determining the “best system of emission reduction” for designated categories of stationary sources. 42 U.S.C. § 7411(a)(1). Congress knew that Section 7411 would apply to a wide array of different source categories and pollutants, from sewage sludge incinerators to grain elevators to magnetic tape coating facilities, and scores more. *See, e.g.*, 40 C.F.R. Pt 60, Subparts Cb-UUUUa. In that context, Congress sensibly declined to spell out particular pollution-reduction techniques for each of these many industrial categories and pollutants. Instead, by using the term “system,” Congress directed EPA to examine means of reducing emissions across a diverse, evolving range of categories. A. Scalia & B. Garner, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 32-33 (2012) (“general terms... are adopted to cover a multitude of situations that cannot practicably be spelled out in detail or ever foreseen”). It assigned to EPA’s expert judgment the technical and record-dependent questions concerning which pollution-reduction techniques are “adequately demonstrated,” taking account of cost and other specified factors. 42 U.S.C. § 7411(a)(1). As the court of appeals recognized, these statutory criteria Congress enacted “simply do not include” a limitation that the system be contained

within the physical confines of a single regulated source. JA106.

Section 7411’s text, structure, and function thus make it highly improbable that Congress would have *impliedly* restricted the range of adequately demonstrated systems of emission reduction that EPA may consider in seeking the “best” one. And that is particularly so given that Congress clearly “knew how to draft the kind of statutory language” that the CPP Repeal “seeks to read into” Section 7411. *State Farm Fire & Cas. Co. v. U.S. ex rel. Rigsby*, 137 S. Ct. 436, 444 (2016). In multiple provisions of the Clean Air Act, Congress *expressly* limited pollution-control measures to those integrated into the physical design or processes of a source. For instance, another provision applicable to stationary sources directs EPA to predicate standards upon the “best available *retrofit* technology.” 42 U.S.C. § 7491(b)(2)(A), (d)(2) (emphasis added). A different section of the Act requires EPA to consider “the retrofit application of the best system of continuous emission reduction, taking into account available technology.” *Id.* § 7651f(b)(2). And yet another provision requires EPA to identify the “best available control technology” at the source level. *Id.* § 7479(3); *see also id.* § 7412(g)(2) (requiring source-specific “maximum achievable control technology” for hazardous air pollutants with

comparatively localized health effects); Power Cos. Br. 32-35.<sup>14</sup>

These other provisions of the Act make the “absence” of any comparable textual limitation in Section 7411(a)(1) “all the more telling.” *Romag Fasteners, Inc. v. Fossil Grp., Inc.*, 140 S. Ct. 1492, 1495 (2020). This Court generally does not assume that Congress “omitted from its adopted text requirements that it nonetheless intends to apply,” especially when, as here, “Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.” *EPA v. EME Homer City Gen., L.P.*, 572 U.S. 489, 510 (2014) (quoting *Jama v. ICE*, 543 U.S. 335, 341 (2005)).

3. Particularly against this statutory backdrop, petitioners’ various arguments for why the “best system of emission reduction” can include only “measures implemented at the source level,” W. Va. Br. 13; see N.D. Br. 47-48; N.A. Coal. Br. 33-40, are

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<sup>14</sup> Even within Section 7411, Congress has paid particularly close attention to the contours of the best system. In 1977 Congress inserted a modifier—the “best *technological* system...”—but solely for new sources. Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 685, 700 (1977) (emphasis added). In 1990, Congress removed the word “technological” for new sources and reverted to the original formulation for both new and existing sources. Pub. L. No. 101-549, § 403(a), 104 Stat. 2399, 2631 (1990). The current version of Section 7411 also retains requirements concerning “technological system[s] of continuous emission reduction” for certain applications not at issue in this case. 42 U.S.C. § 7411(a)(7); see, e.g., *id.* § 7411(b)(5), (j)(1).

unavailing. As explained in greater detail in Respondent States and Municipalities’ brief (at Sec. I.A.1.b), the scattered words and phrases at which petitioners grasp would be a “surprisingly indirect route” for Congress to have conveyed such an “important and easily expressed message.” *Cnty. of Maui v. Hawaii Wildlife Fund*, 140 S. Ct. 1462, 1474 (2020) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 262 (1994)).

First, the court of appeals properly rejected the convoluted contention, *cf.* W. Va. Br. 37-38, that the term “application” in Section 7411(a)(1) implies the indirect object “any existing source” in Section 7411(d)(1). JA110-116. As the court explained, even assuming (wrongly) that an indirect object must be found, petitioners’ candidate (“any existing source”) is not a plausible referent. *Id.*; *see also* States & Muns. Br. Sec. I.A.1.b.

Second, the terms “achievable” and “adequately demonstrated” (*see* W. Va. Br. 34-35; N.D. Br. 48) likewise do not limit a permissible “system of emission reduction” to measures implemented “to and at” each source. Systems based on emissions trading, for example, manifestly can yield “achievable” emission limits and are, in fact, already “adequately demonstrated” for the source category. *See* Power Cos. Br. Sec II.B.; *see also supra* pp. 15-16 (noting that EPA had relied on such commonplace and cost-effective trading and averaging measures in prior Section 7411 rules).

Third, contrary to petitioners' suggestion otherwise, W. Va. Br. 33-34; N. Am. Coal Br. 34-35; Westmoreland Br. 35-36, neither the phrase "standard of *performance*" nor "*existing* source" requires EPA to guarantee that sources maintain historical levels of output (nor does either phrase in any way support petitioners' claimed "to or at" requirement). "Existing" merely distinguishes between new and modified sources, subject to direct federal regulation under Section 7411(b), and already-built sources, which are regulated through state plans issued under Section 7411(d)(1). "Performance" in this context plainly refers to a source's quantitative *emissions* performance, not its production or output levels. See 42 U.S.C. § 7411(a)(1) ("standard of performance" means a "standard *for emissions*" (emphasis added)); see also *id.* § 7602(k) (defining "emission standard" as a "requirement . . . which limits the quantity, rate or concentration of emissions"). A source may comply with the emission limit specified in a standard of performance through any means that reduces emissions.<sup>15</sup> And even standards based on inside-the-fenceline measures, such as end-of-stack pollution controls, would violate

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<sup>15</sup> In this respect, Section 7411 distinguishes standards of performance from "design, equipment, work practice, or operational standard[s]," which must be met in the specific manner prescribed by regulation. 42 U.S.C. § 7411(h)(1), (2). EPA is permitted to set design standards only when performance standards cannot be issued because it is not practicable to confine or measure sources' emissions. *Id.*

petitioners' output-maintenance conception, as such standards commonly affect how much plant operators choose to run their plants, or even whether they continue to operate at all. Power Cos. Br. Sec. II.B.; *see also* Westmoreland Br. 33-34 (acknowledging onsite controls' "incidental impacts on generation").

Fourth, petitioners wrongly assert that various terms in Section 7411(d)(1) govern the scope of the "best system of emission reduction" that EPA must identify under Section 7411(a)(1). *See, e.g.*, N. Am. Coal Br. 34-35 ("for"); W. Va. Br. 34-35 ("source"). But there is "no basis—grammatical, contextual, or otherwise"—to read the language of Section 7411(d) "upstream" in that way. JA106; *see* States & Muns. Br. Sec. I.A.1.b. And even if there were, the terms still do not establish the limitations petitioners are seeking. That Section 7411(d)(1) requires standards of performance for any existing source "in the singular," N. Am. Coal Br. 33-34, for example, does not dictate how the "best system" must be determined in Section 7411(a)(1). It simply means that performance standards must cover each such existing source within the state, not leaving any unregulated.

It is also telling that Congress used the less restrictive preposition "*for* an existing source" in Section 7411(d)(1), which does not import a "fenceline" limit, in contrast to the prepositions "to" or "at" that petitioners try to smuggle into the statute. A performance standard that permits a source to comply through use of marketable emission credits, for

example, is plainly a standard “for” that source. *See* JA107. And Section 7411(d) notably cross-references Section 7410, which expressly authorizes the use of “economic incentives such as fees, marketable permits, and auctions of emissions rights,” 42 U.S.C. § 7410(a)(2). A blanket ban on using such tools in Section 7411(d)—which is the consequence of the CPP Repeal’s interpretation—would contravene Congress’s decision to allow EPA and states to carry out that provision using the same kinds of emission-reduction measures that are available under Section 7410. That result would needlessly and unreasonably raise the cost and reduce the effectiveness of regulation.

4. For all these reasons, the court of appeals correctly concluded that the CPP Repeal’s interpretation of Section 7411 was “simply not supported by the text, let alone plainly and unambiguously required by it.” JA117-18. As a result, the court held the rule invalid and remanded it to the agency.

The absence of a “to and at” restriction in the statute does not leave EPA’s determination of the best system unconfined, however. In addition to the express limitations in Section 7411(a)(1) mentioned above, EPA’s choice must meet the tests of reasoned decisionmaking and be adequately supported by the record. 42 U.S.C. § 7607(d)(9). These constraints are real and substantial. *See infra* Sec. III.b.

Moreover, rejecting the CPP Repeal’s atextual and unreasonably rigid restriction does not require resolving the legality of the CPP or any of its constituent elements. Petitioners complain that the CPP’s “best system” went beyond prior applications of emissions averaging and trading by predicated its standards for coal plants in part on emission-reduction credits made available by new renewable generating facilities, which are not “stationary sources” of air pollution, *see* 42 U.S.C. § 7411(a)(3), and thus are not in the EPA-designated category of fossil-fueled power plants. This particular aspect of the CPP is the target of petitioners’ repeated claim that the CPP unlawfully required coal plants to purchase credits from new, non-emitting power generators. *E.g.*, W. Va. Br. 1, 7, 8, 25; N. Am. Coal Br. 24; N.D. Br. 9.

The CPP, however, was not before the lower court. Consequently, the court of appeals did not consider whether that rule’s reliance on new renewable electricity generation—or, for that matter, any other aspect of that rule—exceeded EPA’s authority or was arbitrary and capricious. *Supra* pp. 18-20. Rather, it properly confined its review to the grounds that EPA asserted in the CPP Repeal. Should EPA, in a future rulemaking, adopt any measures that resemble features of the CPP, its action will be subject to judicial review. But this Court should reject petitioners’ invitation to pass judgment now on the legality of a hypothetical future rule.

### III. Reliance on Major Questions Principles Is Misplaced

Unable to locate their preferred reading of Section 7411 in the statute, petitioners contend that either the CPP or some future EPA rule would run afoul of the Court’s major questions cases. This contention confuses what rule is before the Court, misconstrues the Court’s relevant cases, and would not provide a basis for upholding the EPA actions at issue in any event.

1. The agency actions before this Court are the CPP Repeal and the ACE Rule—not the CPP itself, or any future rule that EPA might adopt. And contrary to petitioners’ heavy reliance on major questions cases, the record before this Court—which is the agency’s record at the time it took the repeal action under review—indicates that the CPP would *not* have had any “vast ‘economic or political significance.’” *Util. Air Regulatory Grp. v. EPA (UARG)*, 573 U.S. 302, 324 (2014) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)). In fact, that record shows that EPA’s initial projections of the CPP’s impact were vastly overstated. And it also shows that petitioners’ claims, made originally in support of the 2016 stay but repeated here, were even far more exaggerated. *Supra* pp. 16-18. EPA thus concluded in 2019 that there was likely “no difference between a world where the CPP is implemented and one where it is not,” JA1921, and that repealing the CPP would “not . . . have a meaningful effect on

emissions of CO<sub>2</sub> or other pollutants or regulatory compliance costs.” JA1719-20.

This Court has never applied major questions principles to an agency rule that is defunct, not under review, and that would have no meaningful impact even if it were reinstated. Nor has the Court ever applied such principles to a hypothetical future rule whose impacts are not yet knowable. *See* *Power Cos. Br. Sec. I.A.* Regardless, even if the Court did consider those principles here, they still would not affect the outcome.

2. Petitioners invoke the Court’s expectation that Congress will “speak clearly” when assigning to an agency certain highly significant “decisions.” *UARG*, 573 U.S. at 324. But this Court held in *AEP*, over ten years ago, that Section 7411 “speaks directly” to power plant CO<sub>2</sub> emissions; and further, that Congress assigned to EPA the “decisions” both “whether *and how*” to regulate them. 564 U.S. at 424, 426 (emphasis added). Petitioners conspicuously ignore these key holdings.

The major questions cases are thus simply inapposite here. Particularly in light of *AEP*, this dispute does not resemble the types of category errors at issue in those cases, each of which involved agency actions that would “significantly expand [an agency’s] regulatory authority” into new areas that “fall[] outside of [its] sphere of expertise.” *Nat’l Fed’n of Indep. Bus. v. OSHA*, 595 U.S. \_\_\_, slip op. at 6-7 (2022) (per curiam) (rejecting emergency vaccination

standard where agency had authority to promulgate “*workplace* safety standards, not broad public health measures”); *see also, e.g., Ala. Ass’n of Realtors v. HHS*, 141 S. Ct. 2485, 2488 (2021) (per curiam) (public health agency’s eviction moratorium would “intrude” in landlord-tenant relationships in a way “markedly different” from other authorized regulatory measures); *UARG*, 573 U.S. at 324 (EPA interpretation would cause an “enormous and transformative expansion” of regulatory authority by applying a permitting program intended for a few hundred large sources to millions of smaller ones).

Here, by contrast, power plants have long been one of the most intensively regulated sources of air pollution under the Clean Air Act. Indeed, regulating those sources’ emissions, under several different provisions of the Act, is one of EPA’s core functions. *E.g.*, 42 U.S.C. §§ 7410-12, 7470-79, 7491-92, 7501a *et seq.*, 7651-51o. And this Court has further recognized that Section 7411 assigns the decision of “how to regulate” power plants’ CO<sub>2</sub> emissions, specifically, to EPA’s “expert determination.” *AEP*, 564 U.S. at 426.

a. EPA’s determination of the “best system of emission reduction” for power plant CO<sub>2</sub> emissions thus “does not fit the major-question mold of prior cases.” JA138. Petitioners nonetheless claim that the CPP was so “significant” that Congress needed to pre-approve the specific system that EPA chose. But absent the kind of category error described above, nothing within the grab-bag of various, imprecise

factors petitioners invoke—such as compliance costs, the age of the statute, or the degree of subsequent congressional attention, *e.g.*, W. Va. Br. 20, Westmoreland Br. 30—can justify such an onerous and unprecedented requirement.<sup>16</sup>

First, Congress knew that Clean Air Act regulations could impose significant costs on polluters, *cf. Union Elec.*, 427 U.S. at 256-57, and it specifically directed EPA to consider “cost” when establishing emission limits based on the best system of emission reduction. *See* 42 U.S.C. § 7411(a)(1). Compliance costs might therefore be relevant in determining whether a Section 7411 rule is arbitrary and capricious, *id.* § 7607(d)(9)(A), but they cannot be a principled threshold barrier to agency rulemaking altogether. *See* States & Muns. Br. Sec. II.A.2. Indeed, this case highlights why cost would be an unpredictable basis for imposing such a barrier: As noted above, projections about the CPP’s effect proved grossly overstated. Contrary to petitioners’ claims

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<sup>16</sup> Nor can any such requirement be justified by federalism principles. *See* W. Va. Br. 26-31. Pollution limits for regulated sources may affect private sector decisions on power plants’ dispatch order or resource mix, but those effects do not usurp other state authority or require additional authorization from Congress. *See FERC v. Elec. Power Supply Ass’n*, 577 U.S. 260, 286, 295-96 (2016) (rejecting argument that demand response regulation was a federal “power grab,” and distinguishing regulations that “inevitably[] influenc[e]” areas of state control from those that “intrude on the States’ power”); *see also* States & Muns. Br. Sec. II.A.3; *infra* Sec. IV (discussing Section 7411(d)’s cooperative federalism framework).

that the CPP would have cost “hundreds of billions of dollars,” W. Va. Br. 20, EPA’s initial projections were orders of magnitude smaller,<sup>17</sup> and the record for the agency decision before this Court indicates it would have had *no* meaningful effect on regulatory compliance costs at all, JA1719-20.

Second, Section 7411 does not contain a sell-by date. To the contrary, Congress designed this provision (and the Act as a whole, *supra* pp. 5-6) to equip EPA with tools to address new pollution problems and to impose new regulatory requirements over time. Indeed, Congress specifically tasked EPA with periodically reviewing and updating its best system determinations and emission limits at least every eight years. 42 U.S.C. § 7411(b)(1)(B). Applying Section 7411 to achieve reductions based on evolving systems of emission reduction is thus a feature, not a bug, of the provision.

Third, that Congress later considered, but did not pass, a variety of bills related to climate change does not give license to construe Section 7411 narrowly. *See* W. Va. Br. 24-25; N. Am. Coal Br. 26-27; Westmoreland Br. 31-32. This Court rejected a nearly identical argument in *Massachusetts*, 549 U.S. at 529-

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<sup>17</sup> EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule*, at tbl. ES-5, ES-9 (Aug. 2015) (projecting compliance costs of \$1-\$3 billion in 2025 and \$5.1-\$8.4 in 2030) [https://www3.epa.gov/ttnecas1/docs/ria/utilities\\_ria\\_final-nspsegus\\_2015-08.pdf](https://www3.epa.gov/ttnecas1/docs/ria/utilities_ria_final-nspsegus_2015-08.pdf).

30, and has since reiterated that failed legislation is a “particularly dangerous’ basis on which to rest an interpretation of an existing law,” *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1747 (2020) (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 650 (1990)). That is especially so here, where the failed bills include at least as many proposals to block climate action as to extend that authority.<sup>18</sup> One recent instance of *successful* legislation, by contrast, is more telling: In June 2021 Congress adopted, and the President signed into law, a Congressional Review Act resolution that reinstated EPA Section 7411 regulations for climate-destabilizing methane emissions, underscoring EPA’s responsibility to regulate existing greenhouse gas sources under Section 7411(d).<sup>19</sup>

b. Petitioners also try to justify their reliance on major questions cases by invoking purported nondelegation concerns. But Section 7411 is at least as richly elaborated as Section 7409, which this Court held to be “well within the outer limits” of any nondelegation problems. *Whitman*, 531 U.S. at 472-

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<sup>18</sup> See, e.g., S. Amdt. 359 to S. Con. Res. 8, 113th Cong. (2013); H.R. 2081, 113th Cong. (2013); S. 2365, 112th Cong. (2012); H.R. 3409, 112th Cong. (2012); S.J. Res. 26, 111th Cong. (2010); S. 1622, 111th Cong. (2009); H.R. 2846, 111th Cong. (2009); S. 570, 111th Cong. (2009).

<sup>19</sup> See Pub. L. No. 117-23, 135 Stat. 295 (2021); H.R. Rep. No. 117-64, at 7-8 (2021) (noting the “critical importance of section [74]11(d) in Congress[’s] scheme” and referring to the attempt to rescind EPA’s authority to regulate existing oil and gas sources’ methane emissions as “enormously consequential”).

74. And once again petitioners ignore *AEP*, which described Section 7411's detailed assignment of rulemaking authority to EPA and praised it as "altogether fitting." 564 U.S. at 424-28.

Section 7411 directs EPA to, among other things, reduce pollution by basing "achievable" "emission limitation[s]" on "adequately demonstrated" measures taking into account "cost" and "energy" considerations. 42 U.S.C. § 7411(a)(1). These and other "numerous substantial and explicit constraints," JA146, provide more than the "intelligible principle" required under this Court's cases. *See Gundy v. United States*, 139 S. Ct. 2116, 2123 (2019) (plurality op.). They also set forth standards "sufficiently definite and precise" to enable courts to review "whether Congress's guidance has been followed." *Id.* at 2136 (Gorsuch, J., dissenting) (cleaned up). Indeed, the D.C. Circuit has not hesitated to strike down Section 7411 regulations for failing to reasonably account for the factors Congress listed in the statute. *E.g., New York v. Reilly*, 969 F.2d 1147 (D.C. Cir. 1992); *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416 (D.C. Cir. 1980). Accordingly, there is no need to resort to nondelegation principles to police EPA's exercise of authority under the provision.

3. As noted previously, the court of appeals properly limited its review of the CPP Repeal to the grounds asserted therein, and thus had no occasion to consider whether the CPP and each of its constituent

elements complied with Section 7411. This is true regarding the court's major questions analysis, too.

The court of appeals correctly concluded that major questions principles do not “confine” EPA to adopting solely those emission standards that can be implemented “to and at” a source. JA135. Notably, the CPP Repeal invoked major questions principles *not* as an independent basis for repealing the CPP, but only in passing to purportedly “confirm[]” its particular interpretation of Section 7411. JA1770.

As noted above, the consequence of that atextual restriction was to prohibit *all* emissions averaging and trading, even among plants within the same source category—a regulatory approach that EPA had used in prior Section 7411(d) rules going back more than two decades. *Supra* pp. 15-16. These cases thus do not present the narrower issue of how major questions principles might apply to the more innovative aspect of the CPP, which premised Section 7411(d) standards on emission-reduction credits from new renewable generating facilities that are not themselves regulated sources. That is a question for another day, if EPA includes that feature in a future rule.

#### **IV. North Dakota's Arguments Are Meritless**

North Dakota alone defends the CPP Repeal on a different ground: that EPA purportedly lacks authority to include binding emission limitations in its guidelines; and that states may determine the

limits for existing sources untethered from any federal requirements. N.D. Br. 14, 35. But contrary to North Dakota’s contention, Br. 32-33, EPA did not assert this as a ground for repealing the CPP, see JA1739-86. As a result, the court of appeals did not address it either. Thus, even if the issue were properly presented here, *but see Chenery*, 332 U.S. at 196, this Court should “not decide in the first instance issues not decided below,” *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012) (quoting *Nat’l Collegiate Athletic Ass’n v. Smith*, 525 U.S. 459, 470 (1999)); see also *Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 800 (2017) (this “is a court of final review and not first view” (quoting *Dep’t of Transp. v. Ass’n of Am. Railroads*, 575 U.S. 43, 56 (2015))).

If this Court does consider North Dakota’s arguments, it should reject them. North Dakota radically misconstrues the cooperative federalism structure of Section 7411(d). Congress modeled this program on the Act’s archetypical cooperative federalism provision, Section 7410, which provides for federal requirements implemented through state plans. See *Train*, 421 U.S. at 64-65.<sup>20</sup> Section 7411(d) directs EPA to “prescribe regulations which shall establish a procedure similar to that provided by [S]ection [74]10,” and provides that the agency “shall

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<sup>20</sup> See also *Hodel v. Va. Surface Min. & Reclamation Ass’n*, 452 U.S. 264, 289 (1981) (describing a similar statute’s “program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs”).

have the same authority . . . as [it] would have under Section [74]10(c)” to prescribe a federal plan if a state fails to submit a satisfactory one. 42 U.S.C. § 7411(d)(1)-(2). EPA promulgated the Section 7411(d) regulations in 1975 (and repromulgated them in 2019 without pertinent change), providing for EPA to issue industry-specific emission guidelines. *See* 40 Fed. Reg. 53,340 (Nov. 17, 1975); JA 1933-65; 40 C.F.R. Part 60, Subparts B and Ba (2019). As this Court has explained, “in compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction.” *AEP*, 564 U.S. at 424. *See* JA1947 (“The EPA is finalizing a definition of ‘emission guidelines’ that requires them to reflect the degree of emission limitation of emission [*sic*] achievable through application of the [best system]”). Notably, North Dakota did not challenge the 2019 regulations below.

Under this framework, EPA determines the degree of emission limitation that reflects the best system of emission reduction adequately demonstrated, considering the quantity of pollution reduced, cost, and other factors. 42 U.S.C. § 7411(a)(1). Thus, while states may issue plans that “take the first cut” at directly regulating existing sources “within [their] domain[s],” those plans must “*achieve EPA’s] emission standards,*” *AEP*, 564 U.S. at 428 (emphasis added), on which basis EPA then determines whether state plans are “satisfactory,” 42 U.S.C. § 7411(d)(2)(A); *see also* 40 C.F.R. § 60.24a(c)

(performance standards in state plans “shall be no less stringent than [EPA’s] corresponding emission guideline(s)”). If North Dakota were correct, EPA and reviewing courts would have no clear basis for determining whether a state plan was “satisfactory.” Far from prohibiting EPA from establishing the amount of emission reduction achievable for regulated sources, the statute *requires* EPA to do so. North Dakota is therefore simply wrong to assert that states, not EPA, may determine “what ‘emissions limitations’ are ‘achievable’” on their own. N.D. Br. 14, 35.

North Dakota is likewise wrong in asserting that states may “make source-specific determinations in setting th[e] standards of performance ‘for any existing source’” without substantive EPA oversight. *Id.* at 35. Section 7411(d) does permit a state to issue a variance from “generally applicable emissions standards” to a particular source, *AEP*, 564 U.S. at 427, in light of factors such as its “remaining useful life,” 42 U.S.C. § 7411(d)(1). But a state must “demonstrate[]” in the plan it submits to EPA that each such variance is warranted due to unreasonable costs related to factors such as a source’s age. 40 C.F.R. §§ 60.24(f), 24a(e). This limited and fact-based authority to issue variances is thus not the free pass that North Dakota imagines to ignore federal emission limits broadly achievable by sources in a given category.

North Dakota’s inversion of the statutory structure would take the country back to a world

before the modern Clean Air Act provided for minimum federal standards for industrial pollution control. Congress replaced that prior approach in 1970, *see Train*, 421 U.S. at 64, with a framework that has greatly reduced air pollution and stands guard to meet new dangers as they arise today.

### CONCLUSION

The cases should be dismissed. If not, the judgment below should be affirmed.

Respectfully submitted,

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