

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

IN THE
Supreme Court of the United States

STATE OF WEST VIRGINIA, *et al.*,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

Respondents.

**On Writ of Certiorari to the
United States Court of Appeals
for the District of Columbia Circuit**

**REPLY OF PETITIONER WESTMORELAND
MINING HOLDINGS LLC, No. 20-1778**

MARTIN T. BOOHER
JOSHUA T. WILSON
BAKER & HOSTETLER LLP
2000 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 621-0200

MARK W. DELAQUIL
ANDREW M. GROSSMAN
Counsel of Record
JENNA M. LORENCE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

TABLE OF CONTENTS

REPLY BRIEF 1

I. Section 111 Does Not Authorize EPA
To Restructure the Nation’s
Electricity Sector 2

A. Turning Off Sources Is Not a
“System of Emission Reduction” 2

B. Whether and How To Restructure
an Entire Industrial Sector Is a
Paradigmatic Major Question 7

C. No Respondent Identifies Clear
Congressional Authorization for
EPA To Restructure Industries 13

II. Respondents’ Interpretation of
Section 111 Brooks No Intelligible
Principle Cabining EPA Discretion 16

III. Respondents’ Various Justiciability
Arguments Are Meritless 19

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

<i>Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.</i> 141 S. Ct. 2485 (2021).....	10, 12, 13
<i>Am. Elec. Power Co. v. Connecticut,</i> 564 U.S. 410 (2011).....	15
<i>City of Chicago v. Fulton,</i> 141 S. Ct. 585 (2021).....	21
<i>Diamond v. Charles,</i> 476 U.S. 54 (1986).....	19
<i>Essex Chem. Corp. v. Ruckelshaus,</i> 486 F.2d 427 (D.C. Cir. 1973).....	3, 9, 17
<i>FERC v. Elec. Power Supply Ass’n,</i> 577 U.S. 260 (2016).....	4
<i>Friends of the Earth v. Laidlaw Envt’l Servs., Inc.,</i> 528 U.S. 167 (2000).....	22
<i>Gundy v. United States,</i> 139 S. Ct. 2116 (2019).....	19
<i>Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.,</i> 448 U.S. 607 (1980).....	19
<i>J.W. Hampton, Jr., & Co. v. United States,</i> 276 U.S. 394 (1928).....	17

<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	21
<i>Morrison v. Olson</i> , 487 U.S. 654 (1988).....	8
<i>New Jersey v. EPA</i> , 517 F.3d 574 (D.C. Cir. 2008).....	7
<i>NFIB v. OSHA</i> , 142 S. Ct. 661 (2022).....	11, 13, 14
<i>Oneok, Inc. v. Learjet, Inc.</i> , 575 U.S. 373 (2015).....	13
<i>Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n</i> , 461 U.S. 190 (1983).....	13
<i>U.S. Forest Serv. v. Cowpasture River Pres. Ass'n</i> , 140 S. Ct. 1837 (2020).....	13, 16
<i>U.S. Telecom Ass'n v. FCC</i> , 855 F.3d 381 (D.C. Cir. 2017).....	14
<i>Util. Air Regul. Grp. v. EPA</i> , 573 U.S. 302 (2014).....	10, 19
<i>Whitman v. Am. Trucking Assn's, Inc.</i> , 531 U.S. 457 (2001).....	18

STATUTES

42 U.S.C. § 7409	18
42 U.S.C. § 7411	<i>passim</i>
42 U.S.C. § 7416	6

REGULATIONS

40 C.F.R. § 60.5710	21
40 C.F.R. § 60.5740	20
40 C.F.R. § 60.6855	20
70 Fed. Reg. 28,606 (May 18, 2005)	7
80 Fed. Reg. 64,662 (Oct. 23, 2015)	<i>passim</i>
80 Fed. Reg. 64,966 (Oct. 23, 2015)	11
84 Fed. Reg. 32,520 (July 8, 2019).....	<i>passim</i>
85 Fed. Reg. 18,448 (April 2, 2020)	10

OTHER AUTHORITIES

Decl. of Jeremy Cottrell, <i>Am. Lung Assoc. v.</i> <i>EPA</i> , (No. 19-1140) (D.C. Cir. Aug. 13, 2020).....	20
EPA, Clean Air Markets, Facility Level Comparisons, “Coal-fired Characteristics and Controls: 2020” (Feb. 3, 2021)	20
EPA, Emissions & Generation Resource Integrated Database	20

Oliver Wendell Holmes, Jr., <i>The Common Law</i> (1881).....	4
National Climate Task Force, <i>President Biden’s Whole-of-Government Effort to Tackle the Climate Crisis</i> (2021).....	8
U.S. Energy Info. Admin., <i>State Electricity Profiles</i> (Nov. 4, 2021).....	21

REPLY BRIEF

The fundamental issue in this case is the Environmental Protection Agency's asserted power to restructure entire industries by setting emission limitations based on turning off regulated sources—what the Clean Power Plan called “reduced utilization” or, when accompanied with increased production by other sources, “shifting.” 80 Fed. Reg. 64,662, 64,780, 64,728 (Oct. 23, 2015). In the ACE Rule, EPA concluded that those contrivances are “precluded by the statute” under “the major questions doctrine,” justifying repeal of the CPP. 84 Fed. Reg. 32,520, 32,529 (July 8, 2019). The court below disagreed and therefore vacated the repeal.

Although Respondents defend that decision, they refuse to grapple with statutory language and context that preclude reduced utilization of sources from being a component of a “system of emission reduction.” And they do not seriously engage the implications of empowering EPA to target any category of sources in the Nation—from refineries to factories to home-kitchen ranges—for reduced utilization in service of the agency's decarbonization objectives. Whether and how to restructure entire sectors of the economy to drive down emissions is a question of overriding economic and political significance. Respondents do not even contend that Congress conferred on EPA the awesome power to answer *that* question. As EPA was constrained to conclude in the ACE Rule, Congress did not.

I. Section 111 Does Not Authorize EPA To Restructure the Nation’s Electricity Sector

A. Turning Off Sources Is Not a “System of Emission Reduction”

1. No Respondent explains how, as a textual matter, reduced utilization of a source qualifies as a “system of emission reduction.” The Government, like other Respondents, emphasizes (at 31) capacious definitions of “system” that it says do not distinguish between “inside- and outside-the-fenceline measures.” But then it simply asserts, without elaboration, that “system” therefore encompasses measures like shifting and trading that employ reduced utilization of sources to achieve emission reductions. *See also* ConEd.Br.28–29; States.Br.21; NGO.Br.34. This obvious *non sequitur* reveals the emptiness of the claim that turning off a source—the thing that brings about the emission reduction—is a “system of emission reduction.”

Nor do Respondents attempt to reconcile that claim with the broader context and specific terms of the “standard of performance” definition. That definition circumscribes EPA discretion through its requirements that emission guidelines be “achievable” by sources and based on “system[s] of emission reduction” that are “adequately demonstrated.” 42 U.S.C. § 7411(a)(1). Those requirements limit how far down EPA can drive emissions because the most stringent candidate systems may not be “adequate demonstrated” as to a given source category or may not re-

sult in a broadly “achievable” level of emission reduction. In this way, the statute contemplates that EPA will choose from among the class of “system[s] of emission reduction” susceptible to that kind of analysis. *See* 84 Fed. Reg. at 32,524 (concluding that “Congress expressly limited the universe of systems of emission reduction from which the EPA may choose the BSER....”). Traditional measures like control technologies and work practices fit the bill.

But reduced utilization does not. It is inherently “demonstrated” for any source and inherently “achievable” all the way down to zero, leaving EPA free to set rates at any level—the very thing Congress rejected by enacting specific statutory criteria to cabin the agency’s discretion. *See* Westmoreland.Br.36–37, 42–43. Likewise, reduced utilization writes out of the statute the other factors—“cost,” “energy requirements,” and “any nonair quality health and environmental impact”—because they are applicable only to the determination of whether an emission-reduction system is “adequately demonstrated.” 42 U.S.C. § 7411(a)(1).¹ As noted, reduced

¹ Respondents’ arguments assume that these factors apply directly to EPA’s consideration of a candidate system, as opposed to whether such system is adequately demonstrated. *E.g.*, U.S.Br.36, 49; ConEd.Br.24; NGO.Br.48; States.Br.35–36. But the statute directs that these factors be “tak[en] into account” in “determin[ing] [whether a system] has been adequately demonstrated,” 42 U.S.C. § 7411(a)(1); *see also* ConEd.Br.48 (acknowledging as much); NGO.Br.34 (same). The statute has been so understood from the very beginning. *See Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973).

utilization always is. Moreover, if Congress had intended EPA to base emission rates on reduced utilization, it would have set some standard defining how far down EPA should go. The standard it did legislate, “best,” provides no clue: is it best to run a coal-fired power plant half the time, one-third, or not at all? All of this demonstrates that reduced utilization—that is, turning off the source—is not what Congress had in mind when it directed EPA to identify the “best system of emission reduction.”

At base, Respondents’ interpretation allows EPA to free itself from every statutory constraint on its discretion and set emission limits at any level merely by choosing to go with reduced utilization. That is absurd. The only sound conclusion is that the statute contemplates traditional emission-reduction measures and rules out the measure of simply turning off the source.

2. Rather than confront the statutory context, Respondents deny that there is any difference between reduced utilization and traditional emission-control measures that may increase costs and thereby incidentally reduce utilization. U.S.Br.40; ConEd.Br.41. But “[e]ven a dog distinguishes between being stumbled over and being kicked.” Oliver Wendell Holmes, Jr., *The Common Law* 3 (1881). This Court recognized that distinction in *FERC v. Electric Power Supply Ass’n*, holding that, while FERC may regulate wholesale electricity rates in ways that “have natural consequences at the retail level,” it may not regulate retail markets directly. 577 U.S. 260, 280–81 (2016).

The former is “of no legal consequence,” but the latter “exceed[s] FERC’s authority.” *Id.*

So too here. EPA has the authority to identify (say) scrubbers as the “best system of emission reduction” for a source category, even though that may well competitively disadvantage regulated facilities. That is qualitatively different from setting a BSER based on turning them off. The former regulates emissions, but the latter regulates industrial production, which has never been EPA’s domain. To conflate the two is to blink both reality and decades of case law observing the difference between incidental consequences and intended outcomes. *See Westmoreland.Br.33–35.*

3. Respondents’ statutory arguments focus on the latitude historically afforded States in complying with Section 111(d) rules, on the premise that EPA’s discretion in identifying a BSER is equivalent to State discretion in compliance. U.S.Br.30; States.Br.28–33. This line of argumentation is wrong because the premise is wrong. Section 111 on its face decouples the setting of BSER from compliance. States’ discretion in compliance—an issue not before the Court—does not inform EPA’s discretion in setting the BSER.

Section 111(d) regulation involves two steps. First, EPA identifies “the best system of emission reduction” that has been adequately demonstrated. 42 U.S.C. § 7411(a)(1). Second, States submit plans “establish[ing] standards of performance” for existing sources that “reflect[] the degree of emission limitation achievable through the application of the [BSER].” *Id.* § 7411(d), (a)(1).

The statute makes clear that States, in undertaking that second step, enjoy discretion that exceeds EPA’s discretion in setting the BSER: their standards need not impose the specific BSER (e.g., a control technology) on sources, need only “reflect” (rather than “achieve”) the emission performance of the BSER, and may “take into consideration” “the remaining useful life” of a given source and any “other factors” relevant to setting the standard. *Id.* None of these things figure into EPA’s identification of the BSER; the discretion they confer is for the States alone. In addition, separate and apart from the federal Clean Air Act, States have the inherent police power and discretion to adopt practically any measure that reduces emissions from sources within their borders, up to and including targeting facilities for closure. *Cf.* 42 U.S.C. § 7416 (savings clause). EPA, a creature of statute, does not.

So how could it possibly matter to the question of EPA authority in setting the BSER that “[n]othing in Section [111(d)] bars *States* from including outside-the-fenceline measures in their plans”? U.S.Br.28 (emphasis added). The Government, despite making the supposed linkage between the two its lead statutory argument, gives no explanation. But it does acknowledge elsewhere in its briefing (at 36–37, 45–46) that the statute *decouples* EPA’s identification of the BSER from State compliance measures. Whatever power States have to compel reduced utilization of their sources—whether standing alone or as part of a trading program or “shifting” regime—is irrelevant to

the scope of EPA's discretion in selecting the "best system of emission reduction" for a category of sources.

4. Against all this, Respondents point to the Clean Air Mercury Rule, which they say established the precedent of including reduced utilization (through a trading program) as a component of the BSER. U.S.Br.37–38; ConEd.Br.38–41; NGO.Br.16; States.Br.27. That is a heavy burden to place on a single rule that never took force and was vacated before any court could pass judgment on its substance. *See New Jersey v. EPA*, 517 F.3d 574, 578 (D.C. Cir. 2008). And the rule itself cannot bear that burden. Although CAMR authorized States to employ trading as a compliance mechanism, 70 Fed. Reg. 28,606, 28,619 (May 18, 2005), its levels were based on EPA's assessment of control technologies, not reduced utilization, *id.* at 28,620. CAMR provides no precedent for the CPP or Respondents' interpretative position here.

B. Whether and How To Restructure an Entire Industrial Sector Is a Paradigmatic Major Question

The upshot of Respondents' interpretation of Section 111(d) is that EPA has the power to restructure any emitting sector of the economy by using reduced utilization to set emission limits that existing sources cannot achieve in operation. Whether and how to wield that awesome power is a major question by any measure, as confirmed by EPA's wielding it for the stated purpose of transforming the electricity sector. *See Westmoreland.Br.13–14, 30–31.* The Government

(at 47–48) contends otherwise, assuring the Court that EPA will exercise this newfound power modestly and responsibly. The Court should not be taken in. With the President having declared a “Climate Crisis” and ordered an “whole-of-government effort...to take direct actions that will reduce greenhouse gas emissions,”² it is no exaggeration to observe that “this wolf comes as a wolf,” *Morrison v. Olson*, 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

1. Respondents identify no limitation on EPA’s power to restructure entire industries through the contrivance of reduced utilization and measures employing it like “shifting.” The Government (at 49) averts to statutory factors that it says serve as “constraints” against “transformative” application of Section 111. *See also* ConEd.Br.48; NGO.Br.48; States.Br.44, 48. But factors like the “adequately demonstrated” requirement provide no constraint at all when EPA settles on reduced utilization as a BSER. EPA had no trouble concluding in the CPP that “reduced generation” is an adequately demonstrated means of emission reduction, 80 Fed. Reg. at 64,780, and it is difficult to imagine that EPA could reach the opposite conclusion as to any category of sources—all of which can be turned off. No Respondent contends otherwise.

² National Climate Task Force, President Biden’s Whole-of-Government Effort to Tackle the Climate Crisis, available at <https://www.whitehouse.gov/climate/> (last visited Feb. 15, 2022).

Yet, as discussed above, the other statutory factors cited by Respondents like “cost” and “energy requirements,” U.S.Br.49; ConEd.Br.24; NGO.Br.34; States.Br.35–36, only figure in to whether a candidate BSER is “adequately demonstrated,” 42 U.S.C. § 7411(a)(1); *see also supra* n.1 (discussing *Essex Chemical*, 486 F.2d at 433). These factors have bite when applied to traditional emission-reduction measures, where exorbitant expense or energy losses might render a candidate technology or work practice inadequately demonstrated for a particular source category. But they are toothless as to reduced utilization, imposing no constraint on EPA’s discretion to ratchet down emission limits to any level that it chooses.

That is, in fact, what EPA did in the CPP through its application of reduced utilization. Section 111 contemplates that the agency will identify BSER candidates, identify the ones that are “adequately demonstrated” and result in the “best” performance, and then issue a guideline based on the degree of emission limitation they achieve. The CPP reversed that sequence: EPA chose the “magnitude” of emission reductions to target—right in line with the President’s “climate pledge”—and then set the BSER to achieve it through reduced utilization of disfavored sources. *See* 80 Fed. Reg. at 64,727 (stating that, given “the magnitude of the environmental problem and projections by climate scientists,” “the quantity of emissions

reductions resulting from the application of [traditional] measures is too small”); *id.* at 64,817–18 (assessing “replacement” of fossil-fuel-fired generation).

Respondents quibble over the CPP’s economic impacts, U.S.Br.47; ConEd.Br.26–27; NGO.Br.45–46,³ but none dispute that the CPP’s aim was to “transform[]” the electricity sector by forcing a “transition” from existing sources to renewables, *see* Westmoreland.Br.13. The CPP provides the blueprint for EPA to transform any carbon-emitting industry or even transform the home by forcing a “shift” away from common appliances like gas ranges and furnaces.⁴

2. This is precisely the kind of agency claim to “extravagant statutory power,” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (“*UARG*”), or “breath-taking...authority,” *Ala. Ass’n of Realtors v. Dep’t of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021), that implicates the major questions doctrine, 84 Fed. Reg. at 32,530 (so reasoning in the ACE Rule). If there

³ And they assume, without basis, that EPA’s hanging the Sword of Damocles over the fossil-fuel-fired generation fleet had nothing to do with the changes to the generation mix that ensued.

⁴ The Government denies (at 43) that Section 111 authorizes EPA to regulate emissions from homes, but it has done so for decades. *See* 85 Fed. Reg. 18,448 (April 2, 2020) (updating Section 111 standards for “residential wood heaters,” a category that includes wood-fired stoves, furnaces, and boilers used in homes). The Government cites *UARG* on this point, but unlike the major-source programs at issue there, 573 U.S. at 309, Section 111 has no minimum emissions threshold for regulated sources, *see* 42 U.S.C. § 7411(a)(3).

is “little doubt” that a workplace vaccination-or-testing mandate or an eviction moratorium fits the bill, *NFIB v. OSHA*, 142 S. Ct. 661, 665 (2022), then there can be no doubt that a forced transformation of a central sector of the economy likewise asserts a “power[] of vast economic and political significance.” *Id.* (quotation marks omitted).

The Government attempts to avoid that conclusion by drawing the arbitrary distinction that setting the BSER “involves no direct regulation of private conduct.” U.S.Br.46. No case suggests that the presence (or absence) of “direct regulation” figures into the major questions inquiry, and the Government offers no explanation why it would as a logical matter.

Additionally, as presented here, the argument is pure misdirection: although sources are not necessarily required to implement the precise BSER identified by EPA, they are subject to performance standards that “reflect” the BSER’s emission performance. 42 U.S.C. § 7411(a)(1). And that’s how the CPP sought to bring about the “replacement of higher emitting generation with lower- or zero-emitting generation.” 80 Fed. Reg. at 64,728. Given that even brand-new power plants could not achieve the CPP’s rates, reduced utilization and “shifting” provided the only pathway to compliance for existing sources. *See Westmoreland.Br.13*; 80 Fed. Reg. at 64,753–54.⁵ An

⁵ Indeed, EPA’s “model” State plans and proposed federal implementation plan implemented shifting through marketable emission credits. 80 Fed. Reg. at 64,833; 80 Fed. Reg. 64,966 (Oct. 23, 2015).

agency’s assertion of vast transformational power is not rendered insignificant just because the regulatory process involves more than one step.

The Government’s other arguments actually confirm the vastness of EPA’s claim to power here. It attempts to downplay the significance of reduced-utilization measures on the basis that nothing “*compel[s]* [EPA] to utilize such measures at all, let alone utilize the most impactful versions of them,” U.S.Br.47 (emphasis in original), or to set emissions limits of heightened “stringency,” U.S.Br.46. But this only underscores that, if reduced utilization is in play, EPA gets to decide for every sector whether to employ it and how far down to drive emissions limits. That the agency claims the discretion to transform entire industries—or leave them untouched—makes this asserted power “major.”

3. Any possible doubt is overcome by EPA’s application of that power here to “intrude[] into an area that is the particular domain of state law,” *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489: the regulation of the mix of electricity sources necessary to ensure public safety and welfare. See *Westmoreland*.Br.18–19. Respondents wave away the point, arguing that any emission-control measure may lead to some amount of “generation-shifting.” *ConEd*.Br.37; *NGO*.Br.45; *States*.Br.47. This, again, conflates the incidental impacts of emissions regulation with direct regulation of electricity production and output so as to reconfigure the mix of generation sources. It would be a stunning anomaly for the Clean Air Act to give

EPA the precise power over electricity generation that Congress specifically denied to the federal electricity-market regulator in favor of preserving exclusive State authority. *See, e.g., Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 348, 388 (2015); *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205–06 (1983). Only “exceedingly clear language” enacted by Congress could possibly support that unlikely result. *Ala. Ass’n of Realtors*, 141 S. Ct. at 2489 (quoting *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1850 (2020)).

C. No Respondent Identifies Clear Congressional Authorization for EPA To Restructure Industries

EPA was correct to conclude in the ACE Rule that Section 111(d) does not confer this awesome industry-restructuring power on EPA. 84 Fed. Reg. at 32,529. Nothing in that ancillary, all-but-forgotten provision “plainly authorizes,” *NFIB*, 142 S. Ct. at 665, EPA to force the reduced utilization of disfavored facilities or appoints EPA czar over the Nation’s electric system. These things are “simply not part of what the agency was built for.” *Id.* (quotation marks omitted). As with OSHA’s imposition of a vaccine mandate, EPA’s attempt in the CPP to reconfigure the electricity sector “is strikingly unlike” the emissions regulations that the agency has traditionally imposed and “falls outside of [its] sphere of expertise.” *Id.* Respondents identify no “clear congressional authorization,” *id.*, for EPA to exert this vast power.

1. To its credit, the Government does not attempt to argue that Section 111 unambiguously empowers EPA to restructure industries by setting unachievable-in-operation emission guidelines based on turning off sources. Instead, it argues at length that the statute “does not unambiguously preclude” such measures. U.S.Br.21; *see also* ConEd.Br.27. This essentially concedes the absence of the “clear congressional authorization” required for EPA to lay claim to a major power. *NFIB*, 142 S. Ct. at 665; *see also U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 425 (D.C. Cir. 2017) (Kavanaugh, J., dissenting) (ambiguity “is the end of the game” for an agency claiming a major power).

The Government’s apparent belief that a finding of statutory ambiguity is sufficient grounds to reject the ACE Rule misapprehends that rule’s reasoning. In addition to parsing the statutory language, the ACE Rule also concluded that “basing BSER on generation shifting is precluded by the statute” under “the major question doctrine.” 84 Fed. Reg. at 32,529. That conclusion was correct, it fully justified repeal of the CPP, and it therefore provides a sound basis to reverse the contrary decision below.

2. NGO Respondents contend (at 39) that the requisite “clear congressional authorization” is to be found in the statute’s delegation to EPA to identify the “best system of emission reduction.” But that provision says nothing about EPA’s authority to reorder entire sectors of the economy by setting emission lim-

its based on turning off sources. As Westmoreland observed in its opening brief (at 37–38), it’s not as if Congress was unaware that turning off emitting facilities would reduce their emissions. But there is no hint in the statutory language that Congress intended to empower EPA to control industrial production across the economy. And no Respondent claims that its text unambiguously confers *that* power.

3. Several Respondents, albeit not the Government, contend that *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011) (“*AEP*”), recognized Section 111 to authorize measures like the CPP. NGO.Br.43; States.Br.39. Their reliance on a court decision only underscores the absence of clear authorization in the statute itself. And any reliance on *AEP* is misplaced. *AEP* recognized that Section 111 authorizes regulation of power plants’ carbon emissions, 564 U.S. at 424, but it did not suggest that EPA has *carte blanche* to set the terms of such regulation. Indeed, *AEP* says nothing about the substance of Section 111(d) emissions guidelines, only that EPA generally must issue them after promulgating new-source standards. *Id.* That is what EPA did in the ACE Rule, and that rule’s emissions guidelines, being premised on traditional emission-reduction measures, do not implicate the question of EPA’s authority to restructure sectors of the economy.

4. Finally, the Government professes to find support for its interpretative position in a surprising place: the Clean Air Act’s Acid Rain Program. U.S.Br.49; *see also* States.Br.26–27. That program’s

“trading system,” it argues, provides “historical precedent” for the CPP’s generation-shifting approach. But that gets it backwards. The Acid Rain Program is precedent for Congress legislating expressly when it comes to emission-trading, not for EPA’s claim here that it has the power to fashion trading programs out of statutory interstices. Congress not only prescribed that program’s cap-and-trade approach, but it also dictated the initial allocation of emission allowances and other key terms. *See Westmoreland.Br.39*. That demonstrates the great political significance of measures that regulate industrial production and their impact on specific facilities in specific States and congressional districts. The Acid Rain Program shows that, when Congress intends to authorize the use of trading-type approaches, with all the sensitive economic and political choices they entail, it speaks with the “requisite clarity to place [its] intent beyond dispute.” *Cowpasture*, 140 S. Ct. at 1849. The claim that a similar but far greater authority—one not limited to specified pollutants or subject to congressional allocation of emission allowances—can be read into Section 111 is “especially questionable,” *id.* at 1850, to say the least.

II. Respondents’ Interpretation of Section 111 Brooks No Intelligible Principle Cabining EPA Discretion

If Section 111 authorizes EPA to base emission limits on turning off sources, then the agency has the power and discretion to set limits at any level and re-

structure or condemn any emitting sector of the economy at will. That result is the consequence of a statutory design that assumes limits will be based on traditional emission-reduction measures like control technologies and work practices and constrains EPA's discretion only with respect to such measures. As shown in Westmoreland's opening brief (at 42–43) and above (*supra* § I.A.1), every single one of the statutory criteria that would ordinarily circumscribe EPA's discretion—that systems be “adequately demonstrated,” standards “achievable,” and the agency consider “cost,” “energy requirements,” and “nonair health and environmental impact”—drops out of the analysis when EPA goes with reduced utilization. All that's left is for EPA to decide how much reduced utilization of a given source category it thinks “best.” No Respondent explains how providing EPA with the power and discretion to set limits at any level and restructure or condemn any emitting sector of the economy at will based on what it believes “best” “lay[s] down...an intelligible principle” to which EPA must “conform” its actions. *J.W. Hampton, Jr., & Co. v. United States*, 276 U.S. 394, 409 (1928). It does not.

Rather than meet this point head-on, Respondents gesture to the statutory factors (like “cost” and “energy requirements”) that *have no bearing* when EPA decides to go with reduced utilization because they pertain only to whether a system or emission reduction is “adequately demonstrated,” *see Essex Chemical*, 486 F.2d at 433, which reduced utilization always is. EPA.Br.50; ConEd.Br.48–49; NGO.Br.48;

States.Br.48. Westmoreland described in its opening brief (at 42–43) how that result is compelled by the language and structure of Section 111’s “standard of performance” definition. Respondents attempt no argument to the contrary. Their inability to show how these factors have any bite confirms that they do not.

Respondents also attempt to draw a parallel with the Clean Air Act provision upheld against a nondelegation challenge in *Whitman v. American Trucking Associations*, 531 U.S. 457 (2001). U.S.Br.50; NGO.Br.47–48; States.Br.48. But the contrast is overwhelming. That provision required EPA to set ambient air quality standards that, “allowing an adequate margin of safety, are requisite to protect the public health.” *Id.* at 472 (quoting 42 U.S.C. § 7409(b)(1)). Through that language, the statute provided the “intelligible principle” that the agency set standards at “the level that is ‘requisite’—that is, not lower or higher than is necessary—to protect the public health with an adequate margin of safety.” *Id.* at 475–46.

By contrast, Section 111 provides no standard to guide agency discretion when reduced utilization is in the mix. EPA may adopt any level of reduced utilization that it thinks “best,” 42 U.S.C. § 7411(a)(1), and thereby set emission guidelines at any level. Directing EPA to choose the level that is “best” is a Rorschach test for EPA officials, not an intelligible principle. It comes nowhere close to satisfying Congress’s obligation to “provide substantial guidance on setting air standards that affect the entire national economy.” *Whitman*, 531 U.S. at 475.

By applying the major questions doctrine to rule out reduced utilization and shifting as Section 111 “systems of emission reduction,” 84 Fed. Reg. at 32,529, the ACE Rule properly avoided what would otherwise be an unconstitutional delegation of legislative power. The Court should do the same. *See Indus. Union Dep’t, AFL-CIO v. Am. Petrol. Inst.*, 448 U.S. 607, 646 (1980) (plurality opinion) (“A construction of the statute that avoids this kind of open-ended grant should certainly be favored.”); *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

III. Respondents’ Various Justiciability Arguments Are Meritless

Respondents repeat the same standing and mootness arguments that the Court found unconvincing at the petition stage. Nothing has changed since then. Petitioners’ injury remains obvious, ongoing, and redressable. The CPP imposed sovereign and economic injuries on Petitioners, the ACE Rule relieved those injuries by rescinding the CPP, and the decision below vacated that relief. Neither the court of appeals’ stay order nor the Government’s hand-waving about what EPA might do in the future deprives the Court of jurisdiction or weighs against its finally answering the vital question of EPA’s authority presented here. To the contrary, EPA’s rulemaking designs confirm the necessity of bringing this “multiyear voyage of discovery,” *UARG*, 573 U.S. at 328, to an end now.

A. Petitioners possess the “direct stake in the outcome” requisite for standing to appeal. *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (quotation marks

omitted). Westmoreland owns and operates a captive mine serving Montana’s Colstrip power plant, Decl. of Jeremy Cottrell ¶ 5, *Am. Lung Assoc. v. EPA*, (No. 19-1140) (D.C. Cir. Aug. 13, 2020), which does not satisfy the “Emission Performance Rates” set by the CPP, *compare* 80 Fed. Reg. at 64,962 (setting rate at 1,534 pounds of CO₂ per megawatt-hour) *with* EPA, Emissions & Generation Resource Integrated Database (reporting Colstrip’s emission rate as 2971.95 lb/MWh).⁶ By default, the CPP required Colstrip to achieve the specified rate, 80 Fed. Reg. at 64,962 (promulgating 40 C.F.R. § 60.6855(a)),⁷ disadvantaging Colstrip’s and Westmoreland’s business, *see* Cottrell Decl. ¶ 5. The ACE Rule relieved that injury through its repeal of the CPP, until the court below vacated it. Westmoreland has a personal stake in obtaining review of that judgment.

The State Petitioners’ stake is also plain. None of their existing plants satisfy the CPP’s source-specific rates. *Compare* 80 Fed. Reg. at 64,812, Table 11, *with* EPA, Clean Air Markets, Facility Level Comparisons, “Coal-fired Characteristics and Controls: 2020” (Feb. 3, 2021).⁸ The CPP directs States either to impose

⁶ Available at <https://www.epa.gov/egrid> (last visited Feb. 15, 2022).

⁷ *See also id.* at 64,944 (promulgating 40 C.F.R. § 60.5740(a)(3), which imposes the same requirement as a “backstop” when States depart from the default rates).

⁸ Available at <https://www.epa.gov/airmarkets/facility-level-comparisons> (last visited Feb. 15, 2022).

those emission limits on sources directly or to establish State-wide programs subject to the CPP's State-based targets. *See* 80 Fed. Reg. at 64,942 (promulgating 40 C.F.R. § 60.5710). That requirement applies to *all* States with fossil-fuel-fired plants irrespective of current emissions, *id.*, contradicting the NGO Respondents' claim (at 28) that the CPP is somehow "non-binding" on States. Also mistaken is their claim (at 28) that the CPP's emission-reduction goals have been satisfied, leaving nothing to enforce. Petitioners Indiana, Missouri, Ohio, and North Dakota all must achieve emissions reductions to meet the CPP's State-wide targets. *Compare* 80 Fed. Reg. 65,824 (Table 12) *with* U.S. Energy Info. Admin., State Electricity Profiles (Nov. 4, 2021).⁹ As the States are the "object of the action...at issue," there is "little question that [it] caused [them] injury." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992). They are equally injured by the judgment below vacating the repeal of the CPP.

B. Respondents present no authority or even logical basis to conclude that a stay of judgment somehow changes the standing calculus. A stay does nothing more than "suspend[] judicial alteration of the status quo." *City of Chicago v. Fulton*, 141 S. Ct. 585, 590 (2021) (quotation marks omitted). And that is, by the

⁹ Available at <https://www.eia.gov/electricity/state/> (last visited Feb. 16, 2022). Specifically, Indiana: 1,242 goal, 1,584 current emissions; Missouri: 1,272 goal, 1,641 current emissions; Ohio: 1,190 goal, 1,222 current emissions; North Dakota: 1,305 goal, 1,430 current emissions. All measurements are weighted-average pounds of CO₂ per megawatt hour, all goals are 2030 goals.

Government’s own telling, what it sought and obtained here: a “stay of the mandate with respect to the vacatur of the CPP Repeal Rule.” U.S.Br.16 (quotation marks omitted). The stay order did not alter or in any way displace the judgment, and it therefore had no impact on standing to appeal. After all, Petitioners might well have sought a stay themselves if the agency hadn’t, and no one could seriously argue *that* would relieve their injury from the judgment to the extent that there’s nothing to appeal.

C. Respondents’ claim of mootness fails for the same reasons, and then some. That claim does not turn on any action taken by EPA, as the agency has yet to publish a proposal for altering the status quo at the time of the judgment below, let alone a final rule doing so with legal force. Instead, Respondents’ mootness argument relies on speculation that EPA will do something other than revise the out-of-date deadlines and targets that the Government cited as the basis for stay below. U.S.Br.10. But the Government makes no attempt to carry its “formidable burden of showing that it is absolutely clear the allegedly wrongful behavior could not reasonably be expected” to continue or recur. *Friends of the Earth v. Laidlaw Env’tl Servs., Inc.*, 528 U.S. 167, 190 (2000). The prospect that EPA may update the CPP’s parameters does not moot this case, and the Government does not even suggest that EPA’s contemplated updates will relieve (rather than aggravate) Petitioners’ injuries. An agency cannot escape judicial review of its existing actions simply by asserting that it might change course in the future.

CONCLUSION

The Court should reverse.

Respectfully Submitted,

MARTIN T. BOOHER
JOSHUA T. WILSON
BAKER & HOSTETLER LLP
2000 Key Tower
127 Public Square
Cleveland, Ohio 44114
(216) 621-0200

MARK W. DELAQUIL
ANDREW M. GROSSMAN
Counsel of Record
JENNA M. LORENCE
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Washington, D.C. 20036
(202) 861-1697
agrossman@bakerlaw.com

Counsel for Petitioner

FEBRUARY 17, 2022