No. 20-1530

In the Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,
PETITIONERS,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY AND
MICHAEL REGAN, ADMINISTRATOR OF THE U.S.
ENVIRONMENTAL PROTECTION AGENCY,
RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT NATIONAL MINING ASSOCIATION IN SUPPORT OF THE PETITION

CARROLL WADE MCGUFFEY III
TROUTMAN PEPPER HAMILTON SANDERS LLP
600 Peachtree St. N.E.
Suite 3000
Atlanta, GA 30308
(404) 885-3698
mack.mcguffey@troutman.com

MISHA TSEYTLIN
Counsel of Record
SEAN T.H. DUTTON
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe St.
Suite 3900
Chicago, IL 60606
(608) 999-1240
misha.tseytlin@troutman.com

Counsel for National Mining Association

QUESTION PRESENTED

In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules—including those capable of reshaping the nation's electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements?

CORPORATE DISCLOSURE STATEMENT

National Mining Association is a non-profit corporation that has no parent corporation; no publicly held company owns 10% or more of National Mining Association's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes And Rules

Regulations

Other Authorities

INTRODUCTION

Pursuant to Rule 12.6, Respondent National Mining Association ("NMA") submits this brief in support of the Petition filed by the State of West Virginia and other States ("Petitioner States"). NMA is the only national trade organization that represents the interests of mining before Congress, federal agencies, the judiciary, and the media. NMA's membership includes more than 250 corporations and organizations involved in aspects of mining, including producers, transporters, and consumers of coal. NMA and its members are thus deeply interested in the regulations of the energy sector that the EPA adopts under Section 111(d), 42 U.S.C. § 7411(d), including the fate of the Affordable Clean Energy Rule, Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations, 84 Fed. Reg. 32,520 (July 8, 2019).

NMA agrees entirely with the Petitioner States' arguments as to why this Court should grant the Petition. *See* Pet. 13–34. NMA files this brief to emphasize two additional points as to why this Court should answer the Question Presented now.

First, a years' long delay in answering the Question Presented will impose unnecessary harms upon a sector of the economy that the panel below properly recognized is as virtually "indispensable to

modern life as air itself." App.27a. The operation of the energy economy, in general, and coal-fired energy, in particular, requires long-ranging planning and large capital investments. Uncertainty as to whether the EPA has authority to mandate generation-shifting from coal-fired generation to natural gas and renewable sources, and whether it will actually do so, is a critically important input that will drive significant economic decisions *now* that will be costly, if not impossible, to reverse. All stakeholders would thus benefit greatly from this Court's definitive word as to whether the EPA has the authority to impose regulatory burdens based on generation shifting, or whether—as Petitioner States correctly explain—the statutory text and the Major Questions Doctrine foreclose the EPA from claiming such an awesome power to remake the energy economy.

Second, this Court should not wait for the EPA to complete a new rulemaking in response to the D.C. Circuit's mandate for the additional reason that the legality of the D.C. Circuit's mandate is precisely what is in dispute in the Question Presented. Absent this Court's decision on the Question Presented, the EPA will replace the Affordable Clean Energy Rule in accordance with the D.C. Circuit's erroneous opinion, which requires the agency to consider mandating emission reductions based upon electricity-grid-wide generation shifting. This Court should decide now the bedrock issue as to whether Section 111(d) authorizes the EPA to require reductions based upon transforming the electricity grid, and thus avoid

sending the agency on another misguided, multi-year Section 111(d) rulemaking.

This Court should grant the Petition.

ADDITIONAL REASONS FOR GRANTING THE PETITION

I. Declining To Answer The Question Presented Now Will Harm The Energy Economy, In General, And Coal-Fired Energy, In Particular, By Forcing The EPA to Consider Generation Shifting, Creating Unnecessary Uncertainty For Years

Declining to answer the Question Presented now will leave the energy economy, especially the coal-fired energy sector, in a state of significant uncertainty for years, while all must wait for the EPA to act on the D.C. Circuit's mandate for a new rulemaking that considers generation shifting. If that mandate is wrong, the years lost will cause needless harms that cannot later be undone.

A robust, well-functioning energy sector—aided and driven in large part by coal-generated power—is essential to our Nation's wellbeing. As the panel majority recognized, "[e]lectrical power has become virtually as indispensable to modern life as air itself." App.27a. Further, the energy sector is a major contributor to employment and economic growth. At the close of 2019, more than 8.27 million Americans,

representing roughly 5.4% of the total workforce, worked in the energy sector. Nat'l Ass'n of State Energy Officials, et al., *Wages, Benefits, & Change: A Supplemental Report to the Annual U.S. Energy & Employment Report* 1 (2020) (fact sheet).[1] The coal industry directly employs over 185,000 individuals, Nat'l Ass'n of State Energy Officials, et al., *Wages, Benefits, & Change: A Supplemental Report to the Annual U.S. Energy & Employment Report* 47 tbl.6 (2020),[2] and "every job in coal mining" "creat[es] [ ] 3.3 jobs" elsewhere, NMA, *Coal: Reliable & Affordable Power* 1 (Feb. 2021).[3] The energy economy is also part of our Nation's "uniquely critical" infrastructure, "provid[ing] an 'enabling function' across all critical infrastructure sectors," as it "fuels the economy of the 21st century." U.S. Gov't, Cybersecurity & Infrastructure Sec. Agency, *Energy Sector*.[4]

Regulatory predictability is crucial for the robust functioning of America's energy economy. "[T]oo much uncertainty is the natural enemy of long-term investment," and so "frequent changes

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[1] Available at https://www.usenergyjobs.org/s/Fact-Sheet-The-Wage-Report.pdf (all websites last accessed on May 27, 2021).

[2] Available at https://www.usenergyjobs.org/s/Wage-Report.pdf.

[3] Available at https://nma.org/wp-content/uploads/2018/02/coal_reliable_power_2021.pdf.

[4] Available at https://www.cisa.gov/energy-sector.

in . . . regulatory structures . . . and other forms of government interaction with industry can be quite damaging." Nat'l Academy of Eng'g, *Time Horizons & Technology Investments* 60–61 (1992).[5] Unpredictable changes in government policy "are important at the micro level," affecting "a firm's decision to invest." Kevin L. Kliesen, *Uncertainty & the Economy*, The Regional Economist (Apr. 2013).[6] Regulatory stability is vital "for long-lived investment projects that are economically costly to reverse." *See id.* Investors facing regulatory uncertainty are less likely to invest, especially in projects that involve long-term, rather than short-term, time horizons. *See id.* And investments in the energy sector, more generally, require "considerable advance planning" given the capital investments necessary to build out new sources of electricity generation, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 201–02 (1983), and "significant lead time[s]" are common even to "maintain production" in "existing mining operations," *see* Seth Schwartz, *Evaluation of the Immediate Impact of the Clean Power Plan Rule on the Coal Industry* 48–50 (Energy Ventures Analysis, Inc. Oct. 2015).

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[5] Available at https://www.nap.edu/download/1943.

[6] Available at https://www.stlouisfed.org/~/media/files/pdfs/publications/pub_assets/pdf/re/2013/b/uncertainty.pdf.

Within this economic context, a refusal by this Court to resolve the Question Presented now—thus leaving unknowable to industry actors and potential investors whether the EPA can and will use Section 111(d) to, in effect, require generation shifting—will have dramatically negative impacts on the entire energy economy, especially as to coal. Uncertainty about whether the EPA will require a generation-shifting best system of emission reduction ("BSER") makes investment and planning in the energy sector extremely difficult. The D.C. Circuit's mandate directly requires the EPA to consider generation shifting as a legal alternative, *see* Per Curiam Order, No. 19-1140, Doc.1886386 (D.C. Cir. Feb. 22, 2021) (hereinafter "Doc.1886386"); App.101a, 161a–63a, and the EPA chose that alternative in the Clean Power Plan when it believed the law allowed it, *see* Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662, 64,745–46 (Oct. 23, 2015). Without this Court's review, the energy industry and its investors will be forced to lean into that possibility in making significant long-term investment decisions.

As Judge Walker explained below, when the Clean Power Plan used the generation-shifting methodology for setting the BSER, the price of compliance was "almost unfathomable," with cost estimates in the many tens of billions of dollars in both "electricity[ ] costs" and "shuttered capacity." App.174a; *see also* U.S. Energy Info. Admin., *Analysis of the Impacts of the Clean Power Plan* 63–64 (May

2015).[7] NMA's own evaluation of the potential impact of the generation shifting needed to comply with the Clean Power Plan, confirms the dramatic impact that this theory could have on the coal industry and the country. *See* Schwartz, *supra*, at 1–2. Facing uncertainty as to whether the EPA has that level of authority and will use it to impose that level of costs would be problematic for any industry, and will be particularly harmful to the energy sector, given its long-term planning time horizon. *See Pac. Gas & Elec.*, 461 U.S. at 201–02.

Unpredictability about whether generation-shifting is a permissible tool for the EPA to set emission reductions, and whether the EPA will actually use that powerful tool, as it has before, *see* 80 Fed. Reg. 64,662, is a core concern affecting the coal industry. The generation-shifting methodology—as the EPA articulated it in the Clean Power Plan—makes coal-fired generation less desirable, and natural gas and renewable-energy generation more desirable, from the point of view of regulatory costs. *See* EPA, *Overview of the Clean Power Plan* 4 (Aug. 2015).[8] That is why the question of whether the EPA can mandate this thumb on the scales against coal-fired generation is a critically important factor that a reasonable investor or utility would need to know

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[7] Available at https://www.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerplant.pdf.

[8] Available at https://archive.epa.gov/epa/sites/production/files/2015-08/documents/fs-cpp-overview.pdf.

now, not years in the future. Specifically, if investors and utilities believe, as the D.C. Circuit has said, that the EPA has the power to impose emission reductions based upon generation shifting, they will naturally favor renewable and natural gas facilities, which will inevitably result in reduced utilization and, eventually, retirement of coal-fired generation.

These harms to the coal industry will harm our Nation's energy prosperity and security. Unlike many forms of energy production, coal is not a "resource limited" product in the near- or long-term, with stable reserves available in the United States for decades to come. Nat'l Research Council, *Coal: Energy for the Future* 3–4 (Nat'l Acads. Press 1995); *see* America's Power, *Coal Abundance* (Jan. 7, 2017) ("There's no question that coal is America's most abundant, domestically produced energy resource.").[9] This abundance makes coal essential to our energy grid, due to its resilience as a fuel-secure, dispatchable resource with the possibility of keeping months of fuel on site, which has played a critical role in maintaining reliability during bitter cold, *see* Jeff St. John, *PJM: Fuel Security Issues Won't Disrupt the Grid, Unless Coal & Nuclear Closures Skyrocket*, GreenTechMedia.com (Nov. 1, 2018),[10] and other

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[9] Available at https://www.americaspower.org/coal-abundance/.

[10] Available at https://www.greentechmedia.com/articles/read/pjm-fuel-security-wont-disrupt-grid-unless-coal-nuclear-closures.

threats to reliability, including a growing number of cyber-attacks, Robert Walton, *NERC Identifies 4 Regions Facing Potential Summer Energy Shortages*, UtilityDive.com (May 18, 2021).[11] Thus, by further depressing coal-fired resources, the uncertainty over whether the EPA can and will force generation shifting has the potential to exacerbate these threats to the Nation's energy security.

In all, unless this Court takes this opportunity to address the legality of the EPA adopting a generation-shifting approach, the specter of future EPA-mandated generation shifting that the D.C. Circuit's opinion created will hang over the energy sector. In turn, "requir[ing] the [energy] industry to proceed without knowing" the ultimate resolution of this question by this Court "would impose a palpable and considerable hardship on the utilities, and may ultimately work harm on the citizens" of this country. *Pac. Gas & Elec. Co.*, 461 U.S. at 201–02.

II. This Court Should Not Await The EPA's Response To The D.C. Circuit's Mandate Because The Legality Of That Mandate Is Exactly What Is In Dispute In The Question Presented

Even aside from the economic harms that the D.C. Circuit's decision will cause absent this Court's

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[11] Available at https://www.utilitydive.com/news/nerc-cybersecurity-concerns-summer-energy-shortages-texas-california/600324/.

review, a definitive answer from this Court is needed to ensure the EPA's next rule is legally correct. As such, the EPA's new efforts to begin writing that next rule under the D.C. Circuit's mandate is a powerful reason for immediate review, not against such review.

The Question Presented involves two conflicting visions of the EPA's authority under Section 111(d). On the one hand, in the Affordable Clean Energy Rule, the EPA correctly concluded that Section 111(d) requires the agency to determine the BSER by looking only to measures that can be applied at individual existing sources. *See* 84 Fed. Reg. at 32,526–27, 32,534. The statutory text and context do not permit the agency to base its BSER on generation shifting because the BSER must be applied at a "building, structure, facility, or installation," *id.* at 32,523–24, and cannot require power plant owners to operate their plants less, *id.* at 32,531–32, or subsidize competitor sources of energy, *see id.* at 32,527. And because such generation shifting would transform the energy economy, Congress would have to speak unambiguously if it sought to give the EPA such broad powers, which Congress did not do in Section 111(d). *Id.* at 32,529. On the other hand, the panel majority below wrongly rejected this reading of Section 111(d), holding that the EPA is *required* to consider generation shifting, *see* App.56a, 91a n.9, 99a, 100a–01a, and that the Major Questions Doctrine did not apply, App.83a–103a. That decision "go[es] beyond" even the Clean Power Plan itself. Pet. 10, 28.

The D.C. Circuit not only endorsed this erroneous view, but now has directed the EPA to move forward with "a new rulemaking action," consistent with its opinion. Doc.1886386; *accord* App.162a. The EPA, in turn, has represented to the court that it will "respond[ ] to the Court's remand in a new rulemaking action." Resp'ts Mot. For Partial Stay Of Issuance Of The Mandate at 4, No. 19-1140, Doc.1885168 (D.C. Cir. Feb. 12, 2021). And it has since advised the D.C. Circuit that "administrative proceedings to respond to the Court's remand in a new rulemaking action are ongoing." Status Report at 3, No. 19-1140, Doc.1899829 (D.C. Cir. May 24, 2021).

The D.C. Circuit's mandate for a new rule, and the EPA's efforts to comply with that mandate, offer an additional, powerful reason why this Court should decide the Question Presented now, given that the legality of the mandate is precisely what is in dispute in the Question Presented. According to the D.C. Circuit, the EPA must consider generation shifting as an available option in the "new rulemaking action" that the D.C. Circuit ordered. Doc.1886386. But if the EPA was right in the Affordable Clean Energy Rule as to the scope of its authority—which, as Petitioner States correctly explained, it was, Pet. 25–34—that is not a legally permissible approach.

Deciding the Question Presented now is the only way to avoid forcing the agency to waste significant time considering options that are outside the scope of its authority, under a proper understanding of

Section 111(d). As this Court has opined in a closely related context, this Court should not "stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 326 (2014).

A comparison of this case to the circumstances in *National Association of Manufacturers v. Department of Defense*, 138 S. Ct. 617 (2018) ("*NAM*"), illustrates why this Court should not delay in answering the Question Presented while the EPA engages in a "new rulemaking action" to comply with the D.C. Circuit's mandate. *See* Doc.1886386. In *NAM*, this Court granted review on a legal issue regarding judicial review of a rule issued jointly by the EPA and the U.S. Army Corps of Engineers. *NAM*, 138 S. Ct. at 624. Even though the agencies had *already proposed* to repeal and replace the preexisting rule, this Court decided the legal issue, *NAM*, 138 S. Ct. at 628 n.5, contrary to the agencies' urging, *see* Resp'ts Notice Of Exec. Order & Related Agency Action & Motion To Hold The Briefing Schedule In Abeyance at 3, *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, No. 16-299 (U.S. Mar. 6, 2017); Order Denying Motion To Hold The Briefing Schedule In Abeyance, *id.* (U.S. Apr. 3, 2017).

There is far less reason for this Court to hesitate here, in the face of future agency action, than there was in *NAM*. In the present case, the EPA has not yet even proposed a rule to repeal and replace the Affordable Clean Energy Rule, and this entire process—just beginning—will take a long time. *See*

80 Fed. Reg. at 64,662, 64,665 (Clean Power Plan effective date more than 18 months after the proposal); 84 Fed. Reg. at 32,520, 32,532 (Affordable Clean Energy Rule effective date more than 21 months after proposal to repeal Clean Power Plan, and more than 12 months after proposed Affordable Clean Energy Rule). Therefore, this case is unlikely to become moot during the time it would take this Court to rule on the merits. *See NAM*, 138 S. Ct. at 628 n.5. Quite the opposite, this Court's definitive answer to the Question Presented now is critical so that the EPA does not write a rule under an erroneous mandate from the D.C. Circuit.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

CARROLL WADE MCGUFFEY III
TROUTMAN PEPPER HAMILTON SANDERS LLP
600 Peachtree St. N.E.
Suite 3000
Atlanta, GA 30308
(404) 885-3698
mack.mcguffey@troutman.com

MISHA TSEYTLIN
Counsel of Record
SEAN T.H. DUTTON
TROUTMAN PEPPER HAMILTON SANDERS LLP
227 W. Monroe St.
Suite 3900
Chicago, IL 60606
(608) 999-1240
misha.tseytlin@troutman.com

May 2021