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.

THE NORTH AMERICAN COAL CORPORATION,
Petitioner,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

WESTMORELAND MINING HOLDINGS LLC, *Petitioner*,
v.
U.S. ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

STATE OF NORTH DAKOTA, *Petitioner*,
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

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, foundations, law firms, and individuals who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property.

NELF believes that these consolidated cases present an issue of singular national importance. The decision below sanctions an improper, greatly enlarged exercise of the power by the Environmental Protection Agency (EPA). The decision, drawing deeply from a well of statutory silence while slighting the plain language of the statutes, goes beyond the Clean Power Plan of 2015, which itself amounted to agency overreach writ large. NELF urges this Court to correct the circuit court's reasoning, so that this important agency's powers may be placed on a sound legal footing that respects statutory law and the principles of both federalism and the delegation of powers.

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and no person or entity other than NELF made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2(a), NELF has obtained the consent of all parties. On December 9, 2021, the Power Company Respondents gave consent via email sent by counsel of record. All other parties have filed blanket consents to the filing of amicus briefs in these consolidated cases, as shown on the docket of the lead case, No. 20-1530.

SUMMARY OF THE ARGUMENT

I. The plain language of both 42 U.S.C. §7401, setting out congressional findings, and §7411 clearly shows that Congress intends emissions to be regulated primarily by the States and to be reduced by control measures applied to the individual sources of the emissions.

II. EPA and the circuit court define "system" by first de-contexualizing the term and then hunting through a dictionary for the broadest definition. Read in context, the word denotes technological means, including related technical operations and equipment, etc., located at the site of the individual sources of emissions.

III. EPA has a long history of construing §7411(d) as dealing solely with at-the-source technological control of emissions. The Court should not allow the agency to rewrite its own history.

IV. Congress has nowhere clearly delegated to EPA the enormously consequential power the agency claimed for itself in the Clean Power Plan. The power therefore lacks sufficient legal authority. Indeed, EPA made the claim only after Congress had refused to grant it the power.

ARGUMENT

I. Congress Has Clearly Expressed its Intent that "Any Measures" States Take to Control Pollution Be Applied "At [the] Source" of the Pollution.

The circuit court was mistaken when it concluded that "Congress consistently avoided imposing any such technological, at-the-source limitation on the measures that EPA might include in the 'best

system' for reducing emissions from existing-source categories" under 42 U.S.C. §7411. *American Lung Ass'n v. E.P.A.*, 985 F.3d 914, 954 (D.C. Cir. 2021). As we did in our brief in support of grant of certiorari, we turn to the statutes in order to discover the intent of Congress.

Section 7401 of 42 U.S.C. sets forth the "Congressional findings and declaration of purpose" for Subchapter I, Part A (Air Quality and Emissions Limitations), under which §7411 is codified in Chapter 85 of Title 42. The expression of congressional intent found in §7401 is therefore central to a correct understanding of all of §7411 and in particular to the phrase "best system of emission reduction" found in §7411(a)(1).

Among other findings, in §7401 Congress made specific findings about where and by whom it believed that emissions should best be controlled as a matter of general policy. As to where, it stated that both air pollution prevention and air pollution control should take place specifically "at its source":

> The Congress finds—
>
> ....
>
> (3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is [*sic*] the primary responsibility of States and local governments;

§7401(a)(3). *See also* 42 U.S.C. §7407(a) (States have primary responsibility).

Especially noteworthy is that, whatever "measures," i.e., whatever "system" and performance

standards, may be adopted under Subchapter I, Congress expects that they will control pollution locally, "at its source." §7401(a)(3). By the circuit court's own concession, words like "at" and "to" are "site-specific" when measures are spoken of as applied to something or taken at some place. *American Lung*, 985 F.3d at 950.

The definition given in §7411 to the key term "source" corroborates that the emission control described in §7401(a)(3) is targeted on the individual, physical sources and not on what the circuit court called the "exceptionally complex, interconnected" electrical grid, *id.* at 932. Both new and existing stationary "sources" of emissions are defined as "any building, structure, facility, or installation which emits or may emit any air pollutant." *See* §7411(a)(2), (3), and (6).

These conclusions are reinforced by §7411(d)(1). That subsection deals with State standards that are based on EPA's "best system" guidelines. First, it requires each State to submit to EPA a plan which "establishes standards of performance *for any existing source*" of air pollutants that are not regulated elsewhere. §7411(d)(1) (emphasis added). Second, it "permit[s] the State in applying a standard of performance *to any particular source* . . . to take into consideration, among other factors, the remaining useful life of each existing *source to which* such standard applies." *Id.* (emphasis added). Note the entirely harmonious use of the prepositions "for" and "to," which the circuit court viewed as being fundamentally antagonistic. *Cf.* §7412(d)(1) ("emission standards *for* each category" of sources), §7412(d)(2) ("sources *to* which such standard applies") (emphasis added).

As the language of §7411(d)(1) indicates, Congress means what it says in §7401(a)(3) about controlling pollution locally, "at its source." Subsection (d)(1), like (a)(3), is phrased in terms of single, individual physical sources of emissions, *for* which the best system of pollution control and the resulting standards of performance are first established and *to* which they are then applied.

Among the lexical improvisations underlying the Clean Power Plan (CPP) is EPA's redefinition of "source" to include "owners or operators of the sources." 80 Fed. Reg. 64,662, 64,720, 64,762 (Oct. 23, 2015). Similarly, to make the CPP work, measures that should be taken "at" the source or should be applied "to" the source are redefined by EPA as taken "by" the source, i.e., by the owners or operators. *Id.* The result is to move emissions control far outside the fence line of the individual sources and to "the overall electricity grid." *Id.* at 64,667.

Historically, however, we find that EPA itself understood §7411 in exactly the way we have interpreted it here. In 40 Fed. Reg. 53,339, 53,346 (Nov. 17, 1975), in text to be codified at 40 C.F.R. 60.22(b), EPA listed the kinds of guidance it would provide the States for their §7411(d)(1) implementation plans. EPA declared that it would issue an "emission guideline" based specifically on the "best system of emission reduction . . . *for* designated facilities," and in another item in the same list EPA referred to "applying each [such] system *to* designated facilities." *Id.* at 53346 (40 C.F.R. 60.22(b)(3), (5)) (emphasis added). Within the span of a couple dozen words, the agency used both "to" and "for" to describe the relationship between the "best system of emission reduction" and the

individual sources of pollution, and used them harmoniously.

The agency's own pre-CPP usage throws into stark relief how stilted and labored is the legal distinction which the circuit court sought to draw from these two prepositions when it was deciding what "best system of emission reduction" means. *See American Lung*, 985 F.3d at 950-51 ("application" of best system does not mean either system or resulting standards of performance are to be applied "to" sources, rather than being established merely "for" them). However, use of the two prepositions reflects nothing more than idiomatic English. Just as EPA once understood, the system of emission reduction that is chosen as best *for* the given category of sources, as well as the performance standards thereafter set *for* those sources, are then applied *to* the sources. *Cf.* 42 U.S.C. §7412(d)(1) (EPA promulgates "emission standards *for* each category of . . . sources" of hazardous emissions, but may not delay compliance date of "any standard applicable *to* any source") (emphasis added). The circuit court's rigid either/or approach is not consistent with either the text of the statutes or common sense.

Thus, an understanding of the meaning of "best system of emissions reduction" as site-specific is solidly grounded in governing statutes. In ruling otherwise the decision below failed to give effect to Congress's clear intent.

II. Read in Context, "System" Means a Technological System and Related Processes, Practices, Equipment, etc.

The circuit court's decision concerning the powers claimed by EPA in the Clean Power Plan cannot be reconciled with what §7401(a)(3) says about "measures" to be taken against pollution emissions, nor with §7411(d)(1). Yet the circuit court essentially confirmed those powers by making selective use of a dictionary to construe the word "system" expansively in the phrase "best system of emission reduction." *See American Lung*, 985 F.3d at 946-47. As a result, using the same word "measures" found in §7401(a)(3), the circuit court declared that EPA possesses a "degree of leeway in choice of control measures" to include in the "best system" to reduce pollution emissions. *Id.* at 942. In the circuit court's view the "leeway" extends to "control measures" that do not "control [pollution] at its source," §7401(a)(3), but control it at the level of the "extremely complex and interconnected" electrical grid, *American Lung*, 985 F.3d at 932, 944-45. *See also* 80 Fed. Reg. at 64,728 ("measures available . . . thanks to the integrated . . . electricity system"), 64,733 ("source-category-wide multi-unit compliance").

That error arose from the circuit court's failure to examine the statutory context of §7411 as a whole. On countless occasions this Court has instructed lower courts that the meaning of statutory terms is to be determined contextually. "Text may not be divorced from context," *University of Texas Southwestern Medical Center v. Nassar*, 570 U.S. 338, 356 (2013), because "construction of statutory language often turns on context," *FCC v. AT&T, Inc.*, 562 U.S. 397, 404 (2011). Hence, "[i]t is necessary

and required that an interpretation of a phrase of uncertain reach is not confined to a single sentence when the text of the whole statute gives instruction as to its meaning." *Maracich v. Spears*, 570 U.S. 48, 65 (2013). As Judge Learned Hand expressed it, "words are chameleons, which reflect the color of their environment." *Yates v. United States*, 574 U.S. 528, 539 (2015) (quoting *Commissioner v. National Carbide Corp.,* 167 F.2d 304, 306 (2d Cir. 1948)). As this Court put it more succinctly if less colorfully, the first rule of statutory interpretation is "Read on." *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 36 (2012).

Reading on in §7411, we find that "the text of the whole statute gives instruction as to [§7411(a)(1)'s] meaning," *Maracich*, 570 U.S. at 65, and thus also to that of §7411(d).

We turn first to definitional subsection (a), which defines "standard of performance" as a standard of "emissions limitation achievable through application of the best system of emission reduction which . . . the Administrator determines has been adequately demonstrated." §7411(a)(1). We note that emissions limitation is understood to mean limits achieved "on a continuous basis," including "continuous emission reduction." 42 U.S.C. §7602(k).[2]

It is significant, therefore, that the *sole* other mention of "system" in the key definitional portion of §7411 also refers to exactly that kind of system, i.e., a system of continuous emission reduction. We do not believe that to be a coincidence. Subsection

[2] §7602 gives definitions for terms used in Chapter 85 of Title 42, within which §7411 is codified.

7411(a)(7) defines "technological system of continuous emission reduction" as either a "technological process for production or operation . . . which is inherently low-polluting or nonpolluting" or a "technological system for continuous reduction" of emissions after generation but before release into the ambient air. No other kind of system of continuous emission reduction is mentioned, let alone defined, anywhere in §7411.

Additional, corroborating context is given elsewhere. As we just noted, in §7411(a)(1) a "standard of performance" means a "standard for emissions" that provides the level of "emission limitation" achievable from the "best system of emission reduction." Both "emission limitation" and "emission standard" are in turn defined to mean a "requirement" which limits the emission of air pollutants on a continuous basis. §7602(k). Significantly, in order "to assure continuous emission reduction" like that, such a requirement is stated to include requirements concerning "the operation or maintenance of a source," as well as those for "any design, equipment, work practice or operational standard promulgated under this chapter" for a source. *Id.* Such "means of emission limitation" are defined as "a system of continuous emission reduction," and they are further stated to include "the use of specific technology or fuels with specified pollution characteristics." §7602(m).

What is notable about these dense, interlocking and overlapping definitions is that together they focus the meaning of "system of continuous emission reduction" on the individual sources of emissions, specifically on their actual physical, technical embodiment, to include their technology, equipment, design, operations, maintenance, work practices, etc.

This is entirely consistent with §7401(a)(3) and §7411(d)(1).[3] *See supra* pp. 3-5. (As we discuss below, EPA long shared the view that §7411, and specifically §7411(d), are technology-based. *See infra* pp. 12-17.)

In light of all of this, it would be exceedingly odd to believe that in §7411 Congress silently threw the doors of regulation wide open and intended the best "system" of continuous emission reduction to include the statutorily unregulated use of any "'complex unity formed of many often diverse parts subject to a common plan or serving a common purpose," which is what the circuit court concluded that "system" means here. *See American Lung*, 985 F.3d at 946-47 (quoting *Webster's Third New International Dictionary of the English Language Unabridged* 2322 (2d ed. 1968)).

We suggest that the circuit court went astray from its first step because it set out to find the meaning of "system" in isolation from statutory context, resorting instead to combing through a dictionary for a suitably "flexib[le]" definition. *See id*. In the 2015 CPP, EPA did the same thing but with a different dictionary. 80 Fed. Reg. at 64,720 & n.314 ("this definition is sufficiently broad," consulting Oxford English Dictionary).

This Court has cautioned against such uncritical use of a dictionary. When confronted with several dictionary meanings, it is a "fundamental principle

[3] The definition of "standard of performance" given in §7602(l) is less full than, but is consistent with, the definition found in §7411(a)(1), and it too refers to "any requirement relating to the operation or maintenance of a source to assure continuous emission reduction."

of statutory construction (and, indeed, of language itself) that the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used." *Deal v. United States*, 508 U.S. 129, 132 (1993). Echoing Learned Hand, the Court has written that "[t]he word 'under' is chameleon; it has many dictionary definitions and must draw its meaning from its context." *Kucana v. Holder*, 558 U.S. 233, 245 (2010) (quotation marks and citation omitted). *See also Taniguchi v. Kan Pacific Saipan Ltd.*, 566 U.S. 560, 569-70 (2012) (rejecting broader dictionary definition in light of statutory context); *Ali v. Federal Bureau of Prisons*, 552 U.S. 214, 244 (2008) (Breyer, J., dissenting) ("it is context, not a dictionary, that sets the boundaries of time, place, and circumstance within which words such as 'any' will apply"); *CSX Transp., Inc. v. Alabama Dept. of Revenue*, 562 U.S. 277, 305 (2011) (Thomas, J., dissenting) ("It is more reasonable to discern the meaning of 'discriminates' . . . [by] using the preceding subsections than to pluck from the dictionary a definition for such a context-dependent term.").

As we have stated, contrary to the circuit court's focus on the isolated word "system," the relevant contextual term is actually "system of continuous emission reduction," as an attentive reading of all the terms used in §7411(a)(1) makes clear. *See supra* pp. 8-9. We have proposed a context-based reading that respects Congress's findings and conclusions set out in §7401(a)(3). The "flexib[le]," "sufficiently broad" definitions the lower court and EPA culled from dictionaries do not; they are limited only by EPA's imagination for non-technological, off-site "complex unit[ies] formed of many often diverse

parts subject to a common plan or serving a common purpose."

III. For Years Before the Clean Power Plan Was Issued, EPA Acknowledged that §7411(d) Deals Solely with At-the-Source Technological Systems of Emissions Reduction.

In bolstering its ruling the circuit court majority observed that "the regulators closest to the issue never before saw what the EPA now [i.e., in 2019, when defending its repeal of the CPP] insists is obvious on the face of Section 7411." *American Lung*, 985 F.3d at 954. In other words, according to the lower court, previous EPA regulators supposedly never even entertained, much less actually held, the "myopic[]" view of circumscribed regulatory powers asserted by EPA in its repeal of the CPP, i.e., that the "best system" must be technological and applied to the emission sources *in situ*. *See id*. at 953. The circuit court could only have been encouraged in its mistaken belief by EPA's own highly disingenuous statement that the CPP's expansive view of §7411 "fall[s] squarely within EPA's historical interpretation" of the statute. 80 Fed. Reg. at 64,761.

The facts say otherwise. At least as long ago as 1975 the EPA put on record its understanding that §7411(d) deals with at-the-source technological measures. In 40 Fed. Reg. 53,339 (November 17, 1975), which deals with "State Plans for the Control of Certain Pollutants From Existing Facilities," EPA discussed the grounds on which it might approve or disapprove a state plan under §7411(d). 40 Fed. Reg. at 53,342. In the course of its explanation, it laid out at length its understanding of the approach

Congress wanted to be taken in implementing §7411(d).

First EPA reviewed the legislative history of §7411(d), which began as section 114 of a Senate bill intended to address pollutants which are neither criteria pollutants nor hazardous pollutants, i.e., they belonged to the same category of pollutants as §7411 already then dealt with. *Id*. at 53,342. So a conference committee rewrote section 114 in order to incorporate it into §7411, a statute "which," EPA observed, "in effect requires maximum feasible control of pollutants from new stationary sources through *technology-based standards*." *Id*. (emphasis added). In this way, section 114 of the Senate bill, dealing with existing stationary sources, became §7411(d). *Id*. *See* Pub. L. 91-604, §4(a), 84 Stat. 1676, 1684 (1970).

From these facts EPA drew four conclusions, the fourth of which is pertinent here.

> (4) Under the circumstances, EPA believes, the conferees decided (a) that control of such pollutants on some basis was necessary; (b) that, given the relative lack of information on their health and welfare effects, a technology-based approach (similar to that for new sources) would be more feasible than one involving an attempt to set standards tied specifically to protection of health; and (c) that the technology-based approach (making allowances for the costs of controlling existing sources) was a reasonable means of attacking the problem until more definitive information became known, particularly because the States would be

> free under section 116 of the Act to adopt more stringent standardse [*sic*] if they believed additional control was desirable. In short, EPA believes the conferees chose to rewrite section 114 [of the Senate bill] as part of section 111 [of the Clean Air Act (CAA), i.e., §7411] largely because *they intended the technology-based approach* of that section to extend (making allowances for the costs of controlling existing sources) *to action under section 111(d)* [§7411(d)]. In this view, it was unnecessary (although it might have been desirable) to specify explicit substantive criteria in section 111(d) [§7411(d)] because *the intent to require a technology-based approach could be inferred from placement of the provision* [of the Senate bill] *in section 111* [i.e., §7411].

Id. (emphasis added).

EPA was correct; as we have shown earlier, the text and context of §7411(d) amply justify taking a solely "technology-based approach" to emission reduction at the site of the existing emission sources. *See supra* pp. 2-12.

EPA concluded with the following observations:

> Requiring a technology based approach . . . would not only shift the criteria for decision-making to more solid ground (the availability and costs of control technology) but would also take advantage of the information and expertise available to EPA from its assessment of techniques for the control of the same pollutants from the same types of sources under [§7411(b)], as

> well as its power to compel submission of information about such techniques under section 114 of the Act (42 U.S.C. 1857c-9).

40 Fed. Reg. at 53,343.

Not surprisingly, therefore, in the 1975 amended regulations promulgated in 40 Fed. Reg. at 53,346-9, EPA expressly described best systems of emission reduction as being systems applied *to* the existing sources of emissions, as we have seen. *Supra* pp. 5-6. More specifically, in language strongly echoing §7411(a)(1)'s description of "the best system," EPA stated that it would issue to the states "[g]uideline documents" that would provide:

> (2) A description of systems of emission reduction which, in the judgment of the Administrator, have been adequately demonstrated.
>
> (3) Information on the degree of emission reduction which is achievable with each system, together with information on the costs and environmental effects of *applying each system to designated* [i.e., existing] *facilities*.

40 Fed. Reg. at 53,346 (42 C.F.R. §60.22) (emphasis added). *See also id.* (40 C.F.R. §60.21(d)) (defining "Designated facility").

The wording of 40 C.F.R. §60.22 quoted above has remained in effect to the present, despite the interpretative revolution attempted in the statutory law by EPA in the Clean Power Plan in 2015. *See* 42 C.F.R. §60.22 (Westlaw through 86 Fed. Reg. 68444). As such, it remains an abiding marker of EPA's longtime view that §7411(d) takes a "technology-based approach" to emission reduction systems, one

that is to be "appl[ied]. . . to" existing emissions sources, 40 Fed. Reg. at 53,346, i.e., applied locally, *in situ*, and not grid-wide or industry-wide.

We call attention to the significant fact that EPA took that view at a time when, just as now, §7411(a)(1) did not spell out "best technological system." *See* 42 U.S.C. §7411 (1970), as amended by Pub. L. 75-157, 88 Stat. 431, 464 (1971). *See also ASARCO, Inc. v. EPA*, 578 F.2d 319, 322 n.6 (D.C. Cir. 1978) (reading §7411(a)(1) to mean best technological system "still," whether "technological" is spelled out or not).

Thus the EPA's own detailed analysis, as far back as 1975, provides an "at the source," technology-based reading of §7411(d) which is inconsistent with the CPP and with the circuit court's expansive view of EPA's powers.

Contrast the foregoing EPA analysis with what the agency said in 2015, forty years later, when it was defending the newly discovered — or, rather, newly contrived — expansive powers it claimed for itself in the CPP.

> [O]ur interpretation *accommodates the very design of CAA section 111(d)(1)*, which covers a range of source categories and air pollutants; *our interpretation is supported by the legislative history* of CAA section 111(d)(1) and (a)(1), which indicates Congress's intent to give the EPA broad discretion in determining the basis for CAA section 111 control requirements, particularly for existing sources, and Congress's intent to authorize the EPA to consider *measures that could be carried out by parties other than the affected sources*[.]

80 Fed. Reg. at 64,761 (emphasis added).

In fact, as we have seen, the text of the statute, its "design," and its legislative history do not justify EPA's recent attempt to control emissions from "outside the fence line" of the actual, individual sources, and for decades EPA thought so too and said so.

IV. Nowhere in the Clean Air Act does Congress Delegate the Greatly Enlarged Powers Claimed by EPA in the Clean Power Plan.

As this brief seeks to persuade the Court, there exist compelling reasons to conclude that Congress did not give EPA the extensive powers that the agency claimed in the CPP and that the circuit court majority in effect ratified. The origin of those supposed powers lies elsewhere.

In 2015 the White House announced the imminent release of the Clean Power Plan, which it hailed as an "historic step in the Obama Administration's fight against climate change." Press Release, Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plans (August 3, 2015).[4] The announcement declared that, compared to earlier ways of setting "state targets" for pollution reduction, the CPP "better reflects the way the electricity grid operates." *Id*.

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[4] Available at https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards%20 (last accessed May 31, 2021).

The CPP, promulgated on Oct. 23, 2015, was the backup "Plan B" to a challenge President Obama had made to Congress two years earlier.

> [I]f Congress won't act soon to protect future generations [from climate change], I will. . . . I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.

Press Release, Remarks by the President in the State of the Union Address (February 12, 2013).[5]

When Congress failed to act soon enough and President Obama's legislative "Plan A" fell through, the Administration resorted to "Plan B." It made the discovery that Congress had long ago delegated to EPA the power the Executive Branch wanted, so that EPA could proceed to rule-making without any legislative ado. *See American Lung*, 985 F.3d at 996-998 (Walker, J., concurring in part, concurring in the judgment, and dissenting in part) (legislative process worked as constitutionally designed to work when president's proposed legislation did not pass; "So President Obama ordered the EPA to do what Congress wouldn't."). The resulting Clean Power Plan echoed President Obama's view that limits on emissions should be set in a manner that "better reflects the way the electricity grid operates." *See*, e.g., 80 Fed. Reg. at 64,665, 64,667, 64,728. The

[5] Available at https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/remarks-president-state-union-address (last accessed May 19, 2021).

difference is that while the power to set emission limits that way required new legislation in 2013, in 2015 it miraculously did not.[6]

Of such opportunistic discoveries of agency power this Court has written:

> We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.

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[6] *Cf.* Jennifer A. Dlouhy, Biden Climate Czar Vows Clean-Energy Edict If Congress Fails (July 13, 2021) (available at https://www.bloomberg.com/news/articles/2021-07-13/biden-climate-czar-vows-clean-energy-rules-with-congress-or-not) (last accessed Nov. 4, 2021).

The article quotes President Biden's National Climate Advisor Gina McCarthy as saying, "We have lots of regulatory authority that we intend to use regardless[.]" McCarthy was head of EPA when the CPP was promulgated in 2015. So when she now says, "We have lots of regulatory authority that we intend to use regardless," she should be believed.

One ominous sign is that a White House press release on President Biden's goal of achieving 100% carbon-free electricity generation mentions neither Congress nor the need for legislation. *See* Press Release, Fact Sheet: President Biden Sets 2030 Greenhouse Pollution Target (April 22, 2021) (available at https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/) (last accessed May 31, 2021).

As an American folk philosopher once said, "It's *déjà vu* all over again."

Utility Air Regulatory Group v. E.P.A., 573 U.S. 302, 328 (2014) (*UARG*).

It is for that reason that this case is not about "the way the electricity grid operates," as the 2015 White House Fact Sheet put it. It is about the way the United States Government operates. As this Court once observed, "Regardless of how serious the problem an administrative agency seeks to address, . . . it may not exercise its authority in a manner that is inconsistent with the administrative structure that Congress enacted into law." *Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 125–26 (2000) (quotation marks and citation omitted).

As shown in this brief, the statute in question (42 U.S.C. §7411) cannot serve EPA as a navigational chart to any point in the compass to which EPA now wishes to journey. The statute lacks entirely the clear language needed to delegate to the agency the expansive economic and policy-making powers at issue in these cases. When it intends to do so in the Clean Air Act, Congress knows how to authorize the use of non-technological means, including economic ones, and it does so in clear terms. *See*, e.g., 42 U.S.C. §7410(a)(2)(A), 42 U.S.C. §7651(d), and 42 U.S.C. §7671f(a). It has not done so here.

As this Court wrote on a similar occasion:

> EPA's interpretation is also unreasonable because it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization. When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American

> economy, we typically greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance.

UARG, 573 U.S. at 324 (cleaned up). *See also Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 172-73 (2001).

When a clear delegation of power is required, ambiguity must fall short. Hence, when EPA invokes *Chevron* deference, *see* 80 Fed. Reg. at 64,719 & n.301 and 64,768, it does so in vain. "Even if the text were ambiguous, the sheer scope of the [agency's] claimed authority . . . would counsel against the Government's interpretation." *Alabama Association of Realtors v. Department of Health and Human Services*, 141 S.Ct. 2485, 2489 (2021). Least of all, therefore, could the powers claimed in the CPP simply "evolve," *American Lung*, 985 F.3d at 953, into existence lawfully.

Hence, the decision of the circuit court majority must rely largely on reading the delegation of these powers into the statute's supposed silence, while ignoring key words and context that delimit and particularize the meaning of the law as Congress actually wrote it. The circuit court's two-judge majority appears comfortable with its understanding of the meaning of supposed legislative silence. This Court should not be.

CONCLUSION

For the reasons given above, this Court should reverse the decision below.

Respectfully submitted,
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