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

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

In 2015 EPA announced a new interpretation of 42 U.S.C. § 7411(d) that was alarming enough to trigger this Court's unprecedented stay pending judicial review of the critical issues at stake. Six years later, the Court now has the opportunity to put these questions to rest—and the need is even greater under the decision below, which magnifies the first rule's legal errors and blesses regulatory powers more expansive than EPA originally claimed.

The Respondents that oppose review do not deny the importance of the questions presented, and the Federal Respondents decline to defend the merits of the majority's decision with respect to this Petition. Respondents instead raise largely timing and other prudential objections. Yet the new record Respondents urge the Court to wait for would be irrelevant to the Petitions' threshold legal questions. And it is not unusual to grant review where core legal issues will shape an agency's steps on remand, particularly where the alternative is leaving in place an unconstitutional power dynamic that affects market decisions now, and will disrupt the energy grid and national economy for years to come.[*]

[*] The Petitions raise various aspects of the central question of EPA's delegated powers under Section 111(d)—including whether EPA may issue *any* rules in this space where it already regulates under Section 112.

I. Review Is Timely To Stem The Real-World Effects Of The Decision Below.

This is the right case and the right time to resolve the unusually important questions presented.

First, Respondents do not meaningfully refute that if they are right review is improper now, it may be years before a "better" opportunity arises. They assert that when the next round of rulemaking and litigation wraps up, aggrieved parties "may seek judicial review at that time." Federal BIO.20; see also State BIO.10 ("judicial review will be fully available"); NGO BIO.2-3 (same). But optimism alone will not make it so. Most Respondents do not acknowledge that political realities and the time-consuming nature of rulemaking and litigation meant the D.C. Circuit never even entered a final order after the first round. Pet.20. And none explain how circumstances are likely to change by the time EPA finalizes a third rule and the lower court (potentially) weighs in. If the current posture makes the decision below unsuitable for review, history counsels that the important questions presented may well evade resolution then, too.

Second, the purported benefits of waiting are illusory. No one disputes that these issues have been thoroughly developed by dozens of parties over two rounds of rulemaking and D.C. Circuit litigation. Nor is this a case where a new factual record would aid review. See State BIO.11-12; NGO BIO.3. Respondents cannot dispute that the majority did not rely on the factual records underlying either CPP or ACE when analyzing the scope of EPA's powers. Pet.24-25. Indeed, the decision below references

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See No. 20-1780 Pet.27-32. The Court should grant review on that important question, too.

the record just once when deciding this question—and there only to discount the relevance of an agency finding. App.96a.

There is no reason to think round three will be different. The Petitions raise threshold questions of law—matters of statutory and constitutional interpretation, not whether EPA adequately grounded its decision in the record. This Court has reviewed other decisions to resolve legal questions central to a new agency decision on remand. See, *e.g.*, *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208, 217 (2009) (certiorari granted to clarify scope of cost-benefit calculation remanded to agency); *Nat'l Ass'n of Greeting Card Publishers* v. *U.S. Postal Serv.*, 462 U.S. 810, 819-20 (1983) (certiorari granted to clarify permissible approaches to postal ratesetting calculation remanded to agency). Here too, resolving critical legal issues now will significantly aid EPA's rulemaking process by making clear which facts are relevant—or not—in the first place.

Similarly, it is implausible that the questions presented will become irrelevant. Respondents argue the decision below resolved a "relatively discrete" issue, and there is no guarantee its holding will be material to the next rulemaking. Federal BIO.22; see also State BIO.12; NGO BIO.6. Yet the questions presented were not side dishes in a Thanksgiving spread. They have been *the* issues—the main course—over two cycles of notice-and-comment and judicial challenges, and they are exceedingly unlikely to fall out of the analysis now. Even Federal Respondents recognize that EPA's efforts on remand will "take into account . . . the court of appeals' decision." Federal BIO.18. Either EPA will revert to its position that

methods like those the majority condoned are consistent with its delegated powers, see 80 Fed. Reg. 64,662, 64,760-61 (Oct. 23, 2015), or it will decline to do so and face litigation from parties like its fellow Respondents, see NGO Op. Br.38-40, *Am. Lung Ass'n* v. *EPA*, 985 F.3d 914 (No. 19-1140) (D.C. Cir. Aug. 13, 2020).

This is why it is no answer to characterize CPP as a relic from "two Administrations ago." Federal BIO.17. Whether CPP's premise about the scope of agency powers was correct shaped the entirety of EPA's approach in ACE, even without the benefit of a court order. The majority's decision rejecting EPA's revised stance will almost certainly mold the next rule, too. And the validity of those core legal issues can be definitively resolved now, regardless what specific rules ultimately emerge. These factors distinguish *Trump* v. *New York*, where additional development would have helped litigation "take a more concrete shape." 141 S. Ct. 530, 535 (2020). Here, either EPA can regulate in the expansive, transformative ways the majority believes it can, or it cannot. Far from raising "abstract" questions, ConEd BIO.4, the Petitions seek review of threshold issues central to the majority's remand.

Third, there are weighty, real-world harms to deferring review.

It is telling that Respondents stop short of labeling the case moot. Federal Respondents, for instance, argue that "if" EPA adopts a new rule similar to ACE then "petitioners' concerns will be moot." Federal BIO.20. Even if that were a likely eventual outcome, it is extremely improbable EPA will adopt *any* rule before the Court

issues a decision. See Pet.20-21. Similarly, Federal Respondents do not argue EPA's motion to stay the vacatur of CPP renders the case moot—for good reason, because they would "bear[] the formidable burden of showing that it is absolutely clear" similar circumstances "could not reasonably be expected to recur." *Friends of the Earth, Inc.* v. *Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 190 (2000). Over-emphasizing the lower court's order would also be in tension with the practice of issuing stays to *prevent* circumstances where "the normal course of appellate review might otherwise cause the case to become moot." *Garrison* v. *Hudson*, 468 U.S. 1301, 1302 (1984) (Burger, C.J., in chambers) (citation omitted). And of course, EPA's "voluntary cessation of" CPP should not "deprive a federal court of its power to determine [its] legality." *Friends of the Earth*, 528 U.S. at 189 (citation omitted).

In reality, withholding review carries material and substantial consequences. Respondents argue there is no imminent harm if CPP is not in effect, *e.g.*, Federal BIO.17, but the Court has resolved underlying legal issues even where (unlike here) agencies had already proposed a replacement rule. *Nat'l Ass'n of Mfrs.* v. *Dep't of Def.*, 138 S. Ct. 617, 627 n.5 (2018). Indeed, there is nothing speculative about concerns surrounding the framework that will govern the next rule—and the consequences it will have for the economy in the meantime. Respondents do not acknowledge that when the Court struck down a different rule EPA emphasized that the unlawful regime had already successfully forced significant and likely irreversible changes to the market. Pet.23. That concern is just as serious here, if not greater, where now-operative

precedent invites regulation more expansive than CPP, *e.g.*, App.91a n.9—which itself was troubling enough for the Court to grant its stay. True, part of the stay briefing turned on the imminent harms had CPP gone into effect, Federal BIO.24; ConEd BIO.8, but the requirements for a stay also include reasonable likelihood that the Court will grant review and side with the movants on the merits. Pet.8-9.

Here, the decision below is already affecting "necessary planning decisions" and making financing "more expensive and scarce due to the reluctance of private financial institutions to invest in fossil-fuel-fired assets." No. 20-1780 South Tex. Electrical Coop. Amicus.12-13. The specter of expanded regulatory power will likely shape many other market decisions as well, with consequences for energy stability and key sectors of the economy. The costs from yet another round of rulemaking and the extended uncertainty it entails are thus different from those inherent to all rulemakings as Respondents claim, *e.g.*, Federal BIO.23-24. The possibility of review years in the future is not an adequate remedy where immediate-term investment and planning decisions must operate under incorrect and dangerously expansive precedent.

II. The D.C. Circuit's "No Limits" Interpretation Is Worthy Of Review.

The questions presented are not only timely, but important enough to warrant review. Respondents do not dispute that they matter—numerous parties have argued vigorously on all sides for six years. The crux, then, is

whether the issues remain compelling in *this* case, based on the actual decision below. They do.

The decision below grants EPA near-boundless authority. Respondents argue the Petitions read the court's "no limits" holding out of context. Yet at the same time State Respondents levy this charge, they quote the majority's statement that there are "no limits on the *types of measures* that EPA may consider"—which is precisely the point. State BIO.12-13 (quoting App.56a; emphasis added); see also ConEd BIO.14. To be sure, EPA must justify any rule with respect to cost, nonair health and environmental factors, and energy needs. Pet.16. But under the majority's view Congress delegated to EPA a universe of options to start from, up to restructuring entire industries. EPA must explain why the three factors support its ultimate choice, but untethering the statute from controls for specific sources still gives the agency a newly unlimited slate of options.

EPA itself understands the stakes. In ACE, it explained that if CPP's approach to the statute were correct, then EPA would be empowered "to order the wholesale restructuring of any industrial sector" because the statute would have no "valid limiting principle." 84 Fed. Reg. 32,520, 32,529 (July 8, 2019). Below, EPA argued that undoing the repeal would allow it to "intervene in any industry to reconfigure the mix of sources operating therein" and "shut down the fossil fuel portion" by executive fiat. EPA Br.95, *Am. Lung Ass'n* v. *EPA*, 985 F.3d 914 (No. 19-1140) (D.C. Cir. Aug. 13, 2020). Even now, Federal Respondents do not disclaim that position. And they have nothing to say about the majority's take on CPP as *restrained* because EPA "tied its own hands" instead of considering all options the

statute—in the majority's view—actually permits. App.91a n.9.

Further, the decision below has serious consequences despite not compelling EPA to choose any specific rule. Respondents miss the forest for the trees, arguing that the decision has no "present or imminent legal effect" because it does not "*requir[e]* EPA to include generation shifting" when regulating the electricity utility sector. Federal BIO.18-20; see also State BIO.18; ConEd BIO.12-13. The majority's "core holding" is that reduced-operation commands like generation shifting are permissible statutory options. Federal BIO.19-20. Thus, what the decision below *does* require EPA to do is analyze such measures to avoid arbitrarily and capriciously refusing to consider important options. See, *e.g.*, Nat'l Mining Ass'n Br. in Support.9-12. Sending EPA on a rulemaking voyage with a grossly inflated view of its powers will accordingly waste unnecessary resources *even if* EPA ultimately adopts a rule similar to ACE—in both the rulemaking and the legal challenges that will follow. Worse still if (the more likely scenario) EPA lands on an option the majority decision permits, but the statute and Constitution do not.

Finally, the decision below reaches far beyond the (itself vitally important) electricity utility sector. Respondents do not claim the decision is limited by its own terms to the power sector. Five years ago EPA defended CPP by arguing that "system of emission reduction" has a special meaning when applied to "circumstances unique to the power industry," but it later repudiated that view. Mem. for Fed. Resp. Opp.36, *West Virginia* v. *EPA*, No. 15A773 (Feb. 4, 2016); 84 Fed. Reg. at 32,529. Because the majority did not adopt it below, there is no "power sector only" gloss limiting the decision's reach.

Nevertheless, Respondents argue it is mere speculation EPA will extend Section 111(d) further afield. *E.g.*, Federal BIO.21; State BIO.14. But States and regulated parties should not be forced to stomach an unlawful decision based on a promise the agency will not wield all of its newly blessed powers. In any event, EPA makes no promises; it argues it "has never" listed "residential homes" or "commercial facilit[ies] generally" for regulation under Section 111. Federal BIO.21 (citation omitted). Yet it has listed fossil fuel heating systems in residential homes, commercial buildings, and factories. 40 C.F.R. pt. 60 subpt. AAA; *id.* pt. 60 subpt. QQQQ; *id.* pt. 60 subpt. Dc. And there is no barrier to listing other sources, particularly given EPA's responsibilities once it finds a source category "causes, or contributes significantly to, air pollution which may reasonably be anticipated to endanger public health or welfare." 42 U.S.C. § 7411(b)(1)(A).

There is also every reason to think EPA will flex at least some of its new muscle, and the consequences would be severe. A rule governing industrial and commercial natural gas boilers, for instance, would have enormous significance. See Energy and Environmental Analysis, Inc., *Characterization of the U.S. Industrial/Commercial Boiler Population*, ES-2 to ES-4 (May 2005), *available at* https://www.energy.gov/sites/default/files/2013/11/f4/characterization_industrial_commerical_boiler_population.pdf (identifying 15,950 industrial boilers and 24,890 commercial boilers with 10-100 MMBtu/h, primarily combusting natural gas). EPA could require replacing these boilers in factories, "hotels, restaurants," "medical centers, nursing homes, research centers, institutions of higher education, elementary and secondary schools, libraries, religious establishments, and governmental buildings." 40 C.F.R. § 63.11237. And recall that

President Biden promised the world the United States will cut its emissions *in half* by the end of *this decade*. Pet.15. The likely consequences of the decision below are thus more than academic. A decision that greenlights tremendous and all-but-unlimited power to decide whether, how, and when to decarbonize numerous industries presents "a uniquely compelling justification" for review. *McCulloch* v. *Sociedad Nacional*, 372 U.S. 10, 17 (1963).

III. The Decision Below Is Wrong.

Federal Respondents do not defend the merits of the decision below when it comes to the limits of EPA's powers under Section 111(d). EPA argued vigorously against the majority's interpretation below, and does not support it even in part now.

The Respondents that do defend the majority lean on a decision that concluded "Congress imposed no limits on the types of measures the EPA may consider," provided it accounts for economic, nonair health and environmental, and energy factors. App.56a. That holding is wrong as a matter of statutory interpretation—or else it is an unconstitutional delegation.

The granular, grammar-focused analysis some Respondents emphasize (State BIO.16-17; ConEd BIO.11-12) is wrong. The majority took key words in isolation, and its reading cannot be reconciled with the rest of the same statutory provisions, much less the Clean Air Act as a whole. See, *e.g.*, Pet.29-32; No. 20-1531 Pet.24-29. Just last Term when evaluating CERCLA—another complex environmental statute—the Court underscored the importance of "interlocking language and structure" and an interpretive approach that views statutory sections as "integral parts of a whole." *Guam* v.

United States, 141 S. Ct. 1608, 1613 (2021) (citation omitted). Here, other text and context cues confirm that Section 111 involves control technologies and best practices for specific sources, not deciding whether those sources should be shut down or replaced. Pet.29-32.

And if the majority is right that the statute's text does not forbid measures like those in CPP, that would only bring into sharper relief the flaws of its approach to the clear-statement canons. Respondents do not contest that proper application of the major-rules doctrine is an unsettled issue worthy of review—there is significant confusion surrounding the doctrine in at least the Fourth, Fifth, Ninth, and D.C. Circuits. Pet.17-19. Nor do Respondents point to text that could constitute a clear enough statement to assign "major lawmaking authority to the Executive Branch," *U.S. Telecom Ass'n* v. *FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of rehearing en banc), nor the "exceedingly clear language" required before "alter[ing] the balance between federal and state power," *U.S. Forest Serv.* v. *Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849-50 (2020).

Some Respondents posit that *American Electric Power Co.* v. *Connecticut*, 564 U.S. 410 (2011) ("*AEP*") forecloses the major-rules doctrine here. State BIO.23-24; NGO BIO.9-10. Yet *AEP*'s preemption analysis turned on "whether the field [of CO2 regulation] has been occupied, not whether it has been occupied in a particular manner," and the Court specifically emphasized that EPA does not have a "roving license" in *how* it regulates. 564 U.S. at 426, 427 (citations omitted). Power to regulate power plants' CO2 emissions in some fashion does not imply power to employ any means, regardless how disruptive or economically and politically weighty. Nor

does discussing power plants answer whether Congress clearly delegated sweeping powers over the host of other industries and private actors swept up in the mandate the majority handed to EPA.

AEP also did not consider whether the Constitution would allow Congress to delegate so expansively had it wanted to. If the statute fails to define EPA's targets, that utter lack of guidance would violate the separation of powers. Pet.32-34. The Court should grant review and hold that there are, in fact, textual and constitutional limits on EPA's authority in this critical area of the law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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