NOT YET SCHEDULED FOR ORAL ARGUMENT
No. 19-1140 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

AMERICAN LUNG ASSOCIATION, *et al.*,
Petitioners,

v.

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

On Petition for Review of Final Agency Action of the United States Environmental Protection Agency 84 Fed. Reg. 32,520 (July 8, 2019)

PROOF BRIEF OF STATE AND INDUSTRY INTERVENORS FOR RESPONDENT REGARDING CLEAN POWER PLAN REPEAL

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and *Amici*

The parties and intervenors are listed in the brief for the State and Municipal Petitioners ("State Pets."). The *amici* are listed in the brief for the U.S. Environmental Protection Agency ("EPA").

B. Ruling Under Review

The ruling under review is the final action by EPA entitled: "Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations," published at 84 Fed. Reg. 32,520 (July 8, 2019).

C. Related Cases

There are no related cases within the meaning of Circuit Rule 28(a)(1)(C).

CORPORATE DISCLOSURE STATEMENTS

Statements pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and Circuit Rule 26.1 for the non-governmental undersigned entities are contained in the Brief of State and Industry Intervenors for Respondent Regarding Affordable Clean Energy Rule.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

Statutes

TABLE OF AUTHORITIES
(continued)

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

GLOSSARY OF TERMS

ACE Rule	Affordable Clean Energy Rule
Act	Clean Air Act
Admin. Law Profs. Br.	Brief of Administrative Law Professors as *Amici Curiae* in support of State and Municipal, Public Health and Environmental, Power Company, and Clean Energy Trade Association Petitioners
BACT	Best Available Control Technology
BSER	Best System of Emission Reduction
CO_2	Carbon Dioxide
CPP	Clean Power Plan
EPA	Environmental Protection Agency
EPA Br.	Brief for the U.S. Environmental Protection Agency, And EPA Administrator Andrew Wheeler
Env. Br.	Initial Opening Brief of Public Health and Environmental Petitioners
FERC	Federal Energy Regulatory Commission
GHG	Greenhouse Gas
Grid Experts Br.	Brief of *Amici Curiae* Grid Experts Benjamin F. Hobbs, Brendan Kirby, Kenneth J. Lutz, and James D. McCalley In Support of Petitioners
JA	Joint Appendix

NYU Br.	Brief of the Institute For Policy Integrity at New York University School of Law as *Amicus Curiae* In Support of State and Municipal, Public Health and Environmental, Power Company, and Clean Energy Trade Association Petitioners
State Pets. Br.	State and Municipal Petitioners' Opening Brief
Renewable Pets. Br.	Opening Brief of Petitioners American Wind Energy Association, Advanced Energy Economy, and Solar Energy Industries Association

INTRODUCTION

The text and statutory context of 42 U.S.C. §7411 resoundingly confirm EPA's repeal of the Clean Power Plan ("CPP"). Under a scarcely used, narrowly tailored provision of the Clean Air Act ("Act"), the CPP purported to discover breathtaking agency power. It claimed authority to dictate massive changes in the Nation's mix of energy sources through "generation shifting"—an approach that would force some energy producers to shut down and others to drastically increase production to meet the corresponding increase in need. And it would have granted this sweeping authority in an area of deep political importance and usurped States' traditional powers over energy, all without a clear statement that Congress intended anything of the sort. EPA was right to repeal it.

This brief focuses on the CPP repeal, leaving for State and Industry Respondent-Intervenors' second joint brief responses to Petitioners' challenges to the Affordable Clean Energy Rule ("ACE Rule"). Part I of this brief highlights the key plain-text and statutory context violations that required repealing the CPP, without repeating EPA's detailed analysis on this score. Part II then analyzes three canons of statutory

construction that limit EPA's power under §7411(d). Each supports the CPP repeal and forecloses Petitioners' contrary reading:

First, this is a classic case for applying the major questions doctrine. This doctrine would require a clear statutory statement—conspicuously absent here—before Congress could delegate to EPA the massive suite of regulatory powers Petitioners seek. The CPP "found" this authorization in an ancillary statutory provision, §7411(d), previously used sparingly and in limited fashion for almost 40 years. It would have granted EPA power to restructure the Nation's energy grid, an issue of vast economic and political significance, even though (as this Court has recognized) EPA has no expertise in energy generation or electric grid reliability.

And Petitioners' approach would give EPA *even more* authority than this. For example, their reading of the statutory term "system"—which, properly understood, speaks to emission-reduction measures achievable at individual sources—would allow essentially any regulation of emissions from entire industries. Untethering "system" from its text would thus mean EPA could use (at best) implicit grants of statutory authority to commandeer manufacturers of fungible commodities, as well

as other greenhouse-gas ("GHG") emitting facilities, through almost any regulatory mechanism. If Congress intends to assign such economy-transforming authority to EPA, it must do so in the clearest statutory language. Section 7411(d) is far from that.

Second, Petitioners' and the CPP's approach to §7411(d) would trample the States' traditional powers to regulate electric utilities and energy generation within their borders. Congress must provide a clear statement to alter the federal-state balance of power in this way. Yet far from expressly granting EPA power over energy generation, §7411(d) secures *state* authority in this area. Congress provided that States, not EPA, would determine what levels of emission reduction are achievable for individual existing sources, against the backdrop of the best system of emission reduction ("BSER") EPA sets. The CPP's nationwide mandate is the antithesis of cooperative federalism.

Third, the CPP repeal must be upheld to avoid significant non-delegation and federalism concerns. Petitioners would read §7411(d) to grant EPA open-ended power over the American economy and to displace traditional state authority over energy generation. The statute must be

read to avoid the serious constitutional question of whether Congress can delegate those fundamental policy decisions to EPA.

STATEMENT OF THE ISSUES

State and Industry Respondent-Intervenors adopt EPA's Statement of the Issues.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are contained in the addenda to Petitioners' and EPA's briefs.

STATEMENT

State and Industry Respondent-Intervenors adopt EPA's Statement of the Case. They also emphasize that §7411 plays a specific and limited role within the Act's air quality programs. Subsection (d) forges a deliberate partnership between the States and EPA: EPA identifies the BSER that is available and achievable for designated categories of existing sources, then promulgates a framework for States to establish standards of performance for the individual existing sources within their borders. 42 U.S.C. §7411(d)(1). States also retain flexibility in this process to account for source-specific factors, such as remaining useful life. *Id.*

Section 7411(d) thus stands in contrast to more expansive provisions like §7409 (which establishes a program focused on mobile and stationary sources to address national ambient air quality), and more aggressive provisions like §7412 (which directs "major sources" of "hazardous air pollutants" to reduce emissions to the "maximum degree . . . achievable," 42 U.S.C. §7412(d)(1)-(2)). It also confers more limited authority to EPA than what the statute provides for *new* sources under §7411(b), through which EPA establishes performance standards directly. *Id.* §7411(b)(1)(A)-(B). And text and historical practice make clear that §7411(d) is an ancillary and relatively modest provision for regulating certain existing sources. EPA Br. 24. Even though Congress has repeatedly considered (but never passed) comprehensive legislation to reduce GHG emissions, EPA did not use §7411(d) before the CPP as a tool for imposing system-wide changes to limit these emissions in any industry, much less for the electricity-generation sector.

With the CPP, however, EPA changed course. 80 Fed. Reg. 64,662 (Oct. 23, 2015). Designed to overhaul national electricity generation, the CPP used §7411(d) to set emission standards for existing power plants that were, by EPA's own admission, unachievable through controls at any

individual source. *Id.* at 64,754. This meant owners and operators of regulated sources would be required to reduce operations or offset emissions by investing in lower- or zero-emitting generators—or (more often) subsidizing those investments elsewhere. EPA Br. 33-35. States, too, would be stripped of their statutory flexibility to adjust performance standards based on existing sources' individual characteristics, and forced instead to facilitate reordering their own fleets of electricity generation. EPA Br. 35-37.

In early 2016 the Supreme Court checked this unprecedented action by granting a stay pending the litigation in this Court that had been brought by a broad coalition of States, trade and labor associations, and regulated entities. *See* Order, *West Virginia v. EPA*, No. 15A773 (Feb. 9, 2016). The CPP has thus never gone into effect. And, following an administration change and before this Court's final decision in the CPP challenges, EPA repealed the CPP for its statutory excesses. 84 Fed. Reg. 32,520 (July 8, 2019). At the same time and as a "separate action," EPA also adopted new §7411(d) guidelines for existing coal-fired power plants in the ACE Rule. *Id.* at 32,532.

In repealing the CPP, EPA recognized that §7411(d) is limited by its terms to systems of controls that can be applied at individual existing sources, and that the CPP was an unjustified departure from those unambiguous constraints. 84 Fed. Reg. at 32,521, 32,526-27. It also recognized that clear-statement canons bolster its view. *Id.* at 32,529. Because Congress does not implicitly delegate authority over areas of vast "economic and political significance," EPA "may issue a major rule only if Congress has clearly authorized the agency to do so"—and it did not in §7411(d). *Id.* (citation omitted); *see also Bond v. United States*, 572 U.S. 844, 866 (2014). Similarly, the CPP would have run afoul of the Act's cooperative federalism framework and significantly infringed on an area of traditional state authority. *Id.* at 32,521. EPA accordingly repealed the CPP as exceeding its statutory authority and replaced it with a rule—the ACE Rule—consistent with the limits Congress set.

SUMMARY OF ARGUMENT

I.A. Section 7411(d) is clear: It tasks EPA with creating a process for States to establish standards of performance for emission reductions that can be applied at individual, existing sources. Numerous statutory terms confirm this reading, including §7411(d)'s reference to performance

standards "for" an "existing source" and §7411(a)'s discussion of standards of "performance" that are "achievable" through "application" of BSER. Read in context within §7411 and the Act as a whole, these terms must refer to continuous, source-specific measures, rather than standards applied to source owners or operators, or across an entire industry. And in no event do the statute's language and structure permit mandatory reduced utilization through generation shifting.

I.B. Petitioners' preferred approaches are at odds with well-established principles of statutory construction. Petitioners avoid the plain meaning of §7411(d) by stripping its terms from their context to concoct ambiguity, and championing a framework driven by the broad policy outcomes Petitioners claim Congress meant the Act to enshrine. Yet the Supreme Court and this Court are clear that agencies must be faithful to the precise words Congress chose within their immediate and broader statutory context. Only EPA's reading here gets the task right.

II. Three separate canons of statutory construction similarly establish that the Act's plain text does not authorize the CPP. These canons limit agency power by requiring Congress to speak *clearly* if it

wants to delegate major questions, alter the traditional federal-state authority balance, or push the boundaries of the non-delegation doctrine.

II.A. The major questions doctrine forecloses Petitioners' and the CPP's reading of §7411(d) because "it would bring about an enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Util. Air Regulatory Grp. v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*") (citation omitted). Congress would need to speak in clear, express language to assign EPA power to dictate the Nation's mix of energy generation resources. All three factors courts use to identify "major" questions apply here: The CPP reflected a novel view of §7411(d), implicated questions of deep economic and political significance, and far exceeded EPA's zone of expertise.

II.B. The rule that Congress must clearly state its intent to alter the "usual constitutional balance of federal and state powers" compels the same result. *Bond*, 572 U.S. at 858 (citation omitted). Public utility and energy regulation are among "the most important of the functions traditionally associated with the police power of the States." *Ark. Elec. Coop. Corp. v. Ark. Pub. Serv. Comm'n*, 461 U.S. 375, 377 (1983) (citation omitted). Section 7411(d) accordingly cannot be read to grant EPA broad

power to reinvent the Nation's energy grid without an express statement in the statute itself. Far from containing such a statement, the Act generally and §7411(d) specifically are built on principles of cooperative federalism that reaffirm States' roles in these important areas.

II.C. Finally, the constitutional avoidance canon also rebuts Petitioners' and the CPP's view of §7411(d). As EPA historically understood, §7411(d) is a modest tool. Through it, Congress did not make the fundamental policy decision to restructure the Nation's energy grid—rendering the CPP much more than merely filling in the details of Congress's chosen policy. Any reading of §7411(d) that grants EPA such sweeping power might make the statute "unconstitutional under [the non-delegation doctrine]" and principles of federalism, and accordingly must be avoided. *Indus. Union Dep't, AFL-CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 646 (1980) (Stevens, J., controlling op.).

STANDARD OF REVIEW

State and Industry Respondent-Intervenors adopt EPA's Standard of Review. Further, the recent decision in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891 (2020), confirms that agencies are free to reconsider prior rules without

triggering a heightened standard of review. There, the Court recognized that the agency did not analyze key legal questions separately or consider appropriate reliance interests. *Id.* at 1911-14. Neither concern is present here: EPA grappled with the dispositive legal issue—§7411(d)'s scope—in a thorough notice-and-comment process, and there are no reliance interests in play because the CPP never went into effect.

ARGUMENT

I. Section 7411(d)'s Unambiguous Focus On Source-Specific, Achievable Standards Forecloses The CPP.

Section 7411(d) instructs EPA to establish guidelines identifying the BSER—"best system of emission reduction"—for categories of existing sources. It then requires States to establish performance standards achievable by each existing source based on those guidelines and source-specific factors like remaining useful life. 42 U.S.C. §7411(d)(1). The statute's plain terms thus direct that BSER must reflect measures that can be accomplished by and at specific, individual sources, not those aimed at source owners or operators or the entire energy grid.

This straightforward textual analysis of what §7411(d) *requires* also makes clear what it *forbids*: EPA cannot remake the Nation's entire energy sector under the guise of setting guidelines for existing sources—

especially in a manner that Congress has repeatedly declined to authorize. Because the CPP was premised on just such a novel generation-shifting approach, EPA was right to repeal it.

A. EPA's Reading Of Section 7411(d) Here Is Correct.

As EPA explains, reading §7411(d)'s precise terms in context makes its meaning plain: EPA must establish a process through which States set "standards of performance *for* any [covered] *existing source*." 42 U.S.C. §7411(d)(1) (emphases added). And a "standard of *performance*" is "a standard for emissions of air pollutants which reflects the degree of emission limitation *achievable* through the *application* of the [BSER]." *Id.* §7411(a)(1) (emphases added).

Taking these terms in turn builds the structure of §7411(d):

- ***Existing source.*** Section 7411 defines "stationary source" in physical terms and at the individual level—"any building, structure, facility, or installation which emits or may emit any air pollutant." 42 U.S.C. §7411(a)(3). This definition does not include source owners or operators or broad segments of the energy industry. Its singular tense contrasts with plural terms elsewhere, including "categories" of "sources," *e.g.*, *id.* §7411(b), and the term "owners or operators" (which Petitioners would graft onto "stationary source") is defined separately, *id.* §7411(a)(5). Moreover, owners "operate" a source in accordance with "any standard of performance applicable to such source," but are not *themselves* subject to that standard. *Id.* §7411(e). EPA Br. 63-64, 70-71.

- ***For.*** Section 7411 repeatedly describes standards of performance as "for," "applied to," and "applicable to" these sources. A standard that would require subsidizing construction or generation at another facility—perhaps even in a different State—cannot be "for" the regulated building or facility. EPA Br. 60-62.

- ***Performance.*** While "standard of performance" is a defined term, each of its component words retains its operative effect. *See Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172 (2001) ("*SWANCC*"). And a standard of *performance* presumes action, not inaction. Curtailing or shuttering operations—the essence of generation shifting—requires non-performance. EPA Br. 152-53.

- ***Achievable.*** Congress's insistence on achievability means that standards of performance must be more than "purely theoretical or experimental"; rather, individual sources must be able to meet them. *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 434 (D.C. Cir. 1973); *see also id.* at 433 (explaining related requirement that BSER be "adequately demonstrated"); *Nat'l Lime Ass'n v. EPA*, 627 F.2d 416, 433-34 (D.C. Cir. 1980); EPA Br. 60-61.[1]

- ***Application.*** Finally, all of these requirements must be met through "application" of BSER to the individual source. Section 7411(d)'s linguistic and logical structure requires that BSER be applied to an existing stationary source, not as "a general principle or process," State Pets. Br. 43-44. Application requires an object, and the only possible option that makes sense of the

[1] Debate surrounding the Act's 1970 amendments confirms this commonsense reading: Congress rejected language that would have "ensure[d]" results in favor of the term "achievable" to avoid delegating authority to set emissions standards "down to zero." Clean Air Act Amendments of 1970, Pub. L. No. 91-604, §4(a), 84 Stat. 1676, 1683 (Dec. 31, 1970); Legislative History of the Clean Air Act Amendments of 1970, at 217.

statute as a whole is the individual source. EPA Br. 66-67, 121-23.

Reading these terms in context with the rest of the Act underscores that §7411(d) is not an avenue for regulating owners across their facility holdings or restructuring entire industries. The Act contains many requirements for individual sources, for example, that make sense only if "source" means individual, physical entities. *E.g.*, 42 U.S.C. §7410(j) (requiring state plans to condition air permits for new and modified sources upon demonstration that "the technological system of continuous emission reduction . . . used *at such source* will enable it to comply with the standards of performance which are to apply to *such source*" (emphases added)); *id.* §7602(k)-(l), (o), (x), (z). Similarly, the fact that standards of performance can vary among individual sources, *id.* §7411(b)(1)(2), (d)(1), would make no sense if "source" meant the entire industry.

Petitioners' reading also conflicts with the Act's "Best Available Control Technology" ("BACT") requirement. EPA Br. 84-87. BACT, a separate emission limitation program, is indisputably confined to source-level systems of emission reductions. 42 U.S.C. §7479(3). BACT limitations may not "result in emissions of any pollutants which will

exceed the emissions allowed by any applicable standard established pursuant to section [7411 or 7412]." *Id.* Yet if owner-, operator-, or industry-level "systems" can be the §7411(d) BSER where EPA determines they reduce emissions more than any source-level system, it would be impossible to set BACT requirements more stringent than the §7411(d) standard.

Nor do prior EPA rules counsel a different outcome. EPA Br. 108. The 1979 Sulfur Dioxide new source rule *recognized* the interconnection between "electric utility generating units in the United States," State Pets. Br. 54, but grounded the *justifications* for its performance standard in a unit-specific analysis that required installing scrubbers on individual units. 44 Fed. Reg. 33,580, 33,592 (June 11, 1979). And the Clean Air Mercury Rule was vacated by this Court, *New Jersey v. EPA*, 517 F.3d 574 (D.C. Cir. 2008), and not analogous in any event because it based emission standards on available technology that could be applied at individual sources—trading was a "voluntary" option for States at the compliance stage. *Id.* at 580; 70 Fed. Reg. 28,606, 28,620 n.5 (May 18, 2005); EPA Br. 72 n.20.

The upshot is that EPA may not "change the basic unit"—an individual, physical source—to which §7411(d) applies. *ASARCO, Inc. v. EPA*, 578 F.2d 319, 327 (D.C. Cir. 1978). And proper understanding of what the statute requires likewise reveals that it does not allow industry restructuring based on mandated reduced utilization and subsidized alternate generation. Because §7411(d) requires promulgating the best standards that existing sources can meet while continuing to operate, it defies logic that this statutory framework could support a rule that forces stopping or curtailing production at some facilities while subsidizing others EPA favors in their place. Regulation premised on source *replacement* rather than source *performance* is beyond EPA's authority.

B. Petitioners' Interpretive Approaches Do Not Account For The Words Congress Chose And Their Surrounding Context.

Petitioners' contrary reading is based on flawed interpretive metrics. When construing §7411(d), Petitioners focus on individual terms in isolation, on the one hand, and policy outcomes that they assume Congress must have meant to address, on the other. That is not how statutory construction works. The correct approach—EPA's, and this and the Supreme Courts'—takes the words Congress used seriously, as understood in their immediate and broader statutory contexts.

Grounds for agency "action or inaction" must come from "the statute" itself. *UARG*, 573 U.S. at 318. And when determining whether Congress "has spoken to the precise question at issue," courts employ all of the "traditional tools of statutory construction." *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 399 (D.C. Cir. 2004). Construing a statute thus requires accounting not only for a term's plain meaning, but also for "the specific context" where it "is used and the broader context of the statute as a whole." *UARG*, 573 U.S. at 321 (citation omitted). Indeed, even a term arguably susceptible to multiple readings is not ambiguous if "clarified by the remainder of the statutory scheme"—often only one "of the permissible meanings produces a substantive effect that is compatible with the rest of the law." *Id.*

Petitioners depart from this well-settled path. For their part, State Petitioners focus on statutory terms in isolation to champion an extraordinarily expansive view of EPA's authority. Their discussion of "system," for example, emphasizes that term's alternative definitions. State Pets. Br. 33-35. Yet explaining that "system" may have different meanings in some contexts is not sufficient to resolve how it is used in *this* statute. A term's meaning must hold up against the "specific context

in which language is used." *UARG*, 573 U.S. at 321 (citation omitted). As EPA explains, Petitioners fail to account for other statutory definitions, like "source" and "owner or operator," and the overall statutory framework providing that any "system" must be a method capable of being applied to particular existing sources. *E.g.*, EPA Br. 145-49.

Other Petitioners invite the Court to follow an ends-driven approach and let the gravity of climate change dictate the meaning of the statute's key terms. *See*, *e.g.*, Env. Br. 7-13; NYU Br. 23; Renewable Pets. Br. 6. This approach is equally flawed because, even accepting the premise that Congress had climate change in mind when enacting §7411(d), it treats GHG-emission reductions as §7411(d)'s sole objective. Statutes often strike "a balance among multiple competing interests" rather than "permit[ting] anything and everything that might advance [one] goal." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 139 S. Ct. 1652, 1666 (2019).

This is especially true for the Act, where statutory terms "may take on distinct characters from association with distinct *statutory objects* calling for different implementation strategies." *UARG*, 573 U.S. at 320

(emphasis added). Its terms do not, however, have different meanings when applied in different *policy* contexts. For example, §7411 permits regulating GHGs, but not more broadly than in other §7411 contexts. *See Am Elec. Power Co., Inc. v. Connecticut*, 564 U.S. 410, 424-25 (2011). And "Congress's failure to enact general climate change legislation" cannot retroactively expand the scope of existing statutes—like the Act. *Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 460 (D.C. Cir. 2017). Instead, Courts must give a "statute the effect its language suggests, however modest that may be." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 270 (2010).

II. The Major Questions Doctrine, Federalism Clear-Statement Rule, And Constitutional Avoidance Canon Foreclose The CPP's And Petitioners' Expansive Approach To Section 7411(d).

As explained above, the statute unambiguously forecloses Petitioners' and the CPP's reading of §7411(d). Three separate canons of construction likewise support the CPP repeal and counsel against reading that provision to grant vast agency power: the major questions doctrine, the clear-statement requirement for altering the usual constitutional balance of federal and state powers, and the constitutional avoidance doctrine. Each one confirms that courts should not "presume

that the act of delegation, rather than clear congressional command, work[s]. . . vast expansion[s]" of agency power. *U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2020).

A. The Major Questions Doctrine Bars The CPP's And Petitioners' Assertion Of Agency Power.

The well-established major questions doctrine rejects statutory readings that "would bring about an enormous and transformative expansion in [an agency's] regulatory authority without clear congressional authorization." *UARG*, 573 U.S. at 324. In other words, Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); and citing *MCI Telecomms. Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 231 (1994); *Indus. Union*, 448 U.S. at 645-46 (Stevens, J., controlling op.)); *see also*, *e.g.*, *King v. Burwell*, 135 S. Ct. 2480, 2489 (2015); *Gonzales v. Oregon*, 546 U.S. 243, 267 (2006); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468-69 (2001); *Interstate Commerce Comm'n v. Cincinnati, N. O. & T. P. Ry. Co.*, 167 U.S. 479, 505 (1897).

This Court routinely applies this canon. *E.g.*, *Loving v. IRS*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) ("[C]ourts should not lightly presume

congressional intent to implicitly delegate decisions of major economic or political significance to agencies." (citation omitted)). So do others. *E.g.*, *City & Cty. of S.F. v. Trump*, 897 F.3d 1225, 1242 (9th Cir. 2018); *Texas v. United States*, 809 F.3d 134, 182-83, 188 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S. Ct. 2271, 2272 (2016) (per curiam); *Port Auth. Trans-Hudson Corp. v. Sec'y, U.S. Dep't of Labor*, 776 F.3d 157, 168 (3d Cir. 2015).

Petitioners' approach to §7411(d) would grant EPA extraordinary powers over the Nation's mix of electricity generation. That alone is a major question Congress would have needed to assign through clear statutory language. After all, it is "implausible that Congress would give to the EPA" this sweeping power through "modest words"—instead, "that textual commitment must be a clear one." *Whitman*, 531 U.S. at 468; *see also Cowpasture*, 140 S. Ct. at 1849 ("[W]hen Congress wishes to alter the fundamental details of a regulatory scheme," courts "expect it to speak with the requisite clarity to place that intent beyond dispute." (citation omitted)).

But make no mistake: Petitioners' and the CPP's reading of §7411(d)'s terms would give EPA power over far more than just the

energy-generation industry. To take just one example, if the term "system" were as broad as Petitioners assert, EPA would have pervasive power over manufacturers and any other entities emitting GHGs—even outside the electricity-generation sector. This is because if a permissible "system" under §7411(a)(1) is any set of steps or measures that owners and operators of regulated sources could take to reduce CO_2 emissions across an industry as a whole, then EPA would have authority to reorganize the operation of virtually any industry according to its view of the "best" way to achieve reduced emissions nationwide. And even though EPA attempted to limit the CPP's expansive approach to the electricity sector alone, 80 Fed. Reg. at 64,726 (describing the "unique, interconnected and interdependent manner in which affected EGUs and other generating sources operate"), nothing *in §7411 itself*—or Petitioners' construction of it—would prevent a similar approach for other industries.

Put another way, if this Court adopts Petitioners' approach to "system" as any series of steps that EPA determines owners and operators could employ to reduce emissions—including reducing utilization, producing fewer goods, or shifting production to other types

of sources—the logic of this statutory construction would not stop at the energy grid. Had Congress wanted to delegate so broadly to EPA, it would have needed to do so in clear, express terms. Congress provided nothing close to this in §7411(d).[2] *See* EPA Br. 97-109.

1. All three factors courts apply to identify "major" questions make clear that Petitioners' assertion of broad administrative power triggers the major questions doctrine.

a. The CPP arose from an "unheralded power" purportedly found in a secondary provision of a "long-extant statute." *UARG*, 573 U.S. at 324. EPA has seldom used §7411(d) in nearly 50 years. EPA Br. 24. And in these actions EPA's guidelines were limited to reducing specific pollutants through discrete control measures applied to individual plant operations:

- 61 Fed. Reg. 9,905, 9,914 (Mar. 12, 1996) (landfill guideline based on "[p]roperly operated gas collection and control systems").

[2] EPA expressly invoked the major questions doctrine in its CPP repeal because the doctrine "confirms the unambiguously expressed intent of [§7411]." 84 Fed. Reg. at 32,529. Regardless, the major questions doctrine—like all canons of statutory interpretation—implicates "legal principles" to which the *Chenery* doctrine does not apply. *See*, *e.g.*, *Sierra Club v. FERC*, 827 F.3d 36, 49 (D.C. Cir. 2016) ("*Chenery* applies only to determinations specifically entrusted to an agency's expertise, not legal principles of the sort that a court usually makes" (citation omitted)).

- 45 Fed. Reg. 26,294, 26,294 (Apr. 17, 1980) (aluminum plant guideline based on "effective collection of emissions, followed by efficient fluoride removal by dry scrubbers or by wet scrubbers").

- 44 Fed. Reg. 29,828, 29,829 (May 22, 1979) (pulp mill guideline based on digester systems, multiple-effect evaporator systems, and straight kraft recovery furnace systems).

- 42 Fed. Reg. 55,796, 55,796 (Oct. 18, 1977) (proposed guideline for sulfuric acid production units based on "fiber mist eliminators").

- 42 Fed. Reg. 12,022, 12,022 (March 1, 1977) (guidelines for fertilizer plants based on "spray-cross-flow packed" scrubbers).

EPA's historical practice of using §7411(d) in limited, targeted ways confirms that it is an *ancillary* part of the overall statutory scheme. Section 7411(d) allows limited regulation of existing sources as a complement to §7411's primary focus on new sources. And "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman*, 531 U.S. at 468 (citations omitted); *see Cowpasture*, 140 S. Ct. at 1849-50 (same).

In contrast, the acid rain program in Title IV of the Act demonstrates that when Congress creates environmental cap-and-trade

programs like generation-shifting regimes, it uses clear statutory language. *See Cowpasture*, 140 S. Ct. at 1849-50 (reliance on delegated authority is "especially questionable" where "Congress has used express language in other statutes" to accomplish the same goal). That program provides exactly what §7411 lacks: an exhaustive statutory scheme that established an emission cap for the entire source category, imposed a detailed trading program, and then developed methods for distributing emission allowances to affected sources covered under the emission cap. *See* 42 U.S.C. §§7651-7651o. Similarly, in the Stratospheric Ozone Protection program in Title VI, Congress expressly directed EPA to administer a phase-out of ozone-depleting substances through an ever-tightening cap on their production and use. 42 U.S.C. §§7671-7671q.

So there was nothing "trend-following," State Pets. Br. 55, about the CPP's means of regulation. Rather, the CPP was an attempt to "discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy'"—which this Court must view with "skepticism." *UARG*, 573 U.S. at 324 (citation omitted); *see D.C. v. Dep't of Labor*, 819 F.3d 444, 446 (D.C. Cir. 2016) ("The novelty of the . . . interpretation strongly buttresses our conclusion that the Act

does not apply here." (citations omitted)); *Chamber of Commerce of U.S.A. v. U.S. Dep't of Labor*, 885 F.3d 360, 387 (5th Cir. 2018) (noting Supreme Court's skepticism "of federal regulations crafted from long-extant statutes that exert novel and extensive power over the American economy").

b. The major questions doctrine applies because electricity generation shifting is a question of "vast economic and political significance." *UARG*, 573 U.S. at 324 (citation omitted). Petitioners' interpretation would drastically expand EPA's authority over "entire[]" industries, *MCI*, 512 U.S. at 231—and thus "a significant portion of the American economy," *Brown & Williamson*, 529 U.S. at 159. How the Nation generates electricity, including the underlying technical and policy judgments made State-by-State, is a question of deep economic and political significance. *See infra* Part II.B; EPA Br. 99-103. And the power to essentially shut down *any* emitter—such as a manufacturer that does not even generate energy—is a question of deeper significance still. Express authorization is required for EPA to wield such "extravagant statutory power." *UARG*, 573 U.S. at 324.

Moreover, responses to climate change are subject to "earnest and profound debate across the country," making the "oblique form of the claimed delegation all the more suspect." *Gonzales*, 546 U.S. at 267 (citation omitted). Congress, of course, "has not yet enacted general climate change legislation." *Mexichem*, 866 F.3d at 460. It has repeatedly rejected a generation-shifting approach to climate change regulation, and continues to consider the best way to regulate GHG emissions. *See Brown & Williamson*, 529 U.S. at 143-51 (consulting Congress's consideration of proposals that would have granted an agency power the agency later asserted unilaterally). For example, before the CPP Congress rejected a carbon tax, S. Con. Res. 8, S. Amdt. 646, 113th Cong. (2013); fees on GHG emissions, Climate Prot. Act of 2013, S. 332, 113th Cong. (2013); and a GHG cap-and-trade program, Clean Energy Jobs & Am. Power Act, S. 1733, 111th Cong. (2009). Congress has debated the best policy approach to GHG emissions ever since, *e.g.*, Am. Energy Innovation Act of 2020, S. 2657, 116th Cong. (2020)—well aware of the backdrop of EPA's historic, and limited, approach to §7411(d) regulation.

Private industry and States have also responded by finding cost-effective measures that significantly reduce GHG emissions. *See infra* pp. 44-45. Since 2005, and without the CPP's dictates, carbon-dioxide emissions from the power sector have decreased almost 30%—on track to meeting the CPP's 2030 goal a decade ahead of schedule. *See* U.S. Energy Information Admin., *U.S. Energy-Related Carbon Dioxide Emissions* 12 (Nov. 14, 2019), https://www.eia.gov/environment/emissions/carbon/pdf/2018_co2analysis.pdf; EPA, Fact Sheet: Overview of the Clean Power Plan, https://archive.epa.gov/epa/cleanpowerplan/fact-sheet-overview-clean-power-plan.html (CPP designed to reduce power-sector carbon pollution 32% below 2005 levels).

By contrast, the CPP would have imposed a nationwide, one-size-fits-all, extremely cost-*ineffective* mandate to restructure the energy grid. *See* EPA Br. 103; 84 Fed. Reg. at 32,529. EPA's own analysis identified billions of dollars in increased compliance costs alone from the restructuring that would have been necessary for nationwide generation shifting. *See* Regulatory Impact Analysis for the Clean Power Plan Final Rule ES-9 (Aug. 2015). The Department of Energy likewise projected at the time that a federal mandate to restructure the Nation's energy grid

would have imposed hundreds of billions of dollars in cumulative GDP growth losses from 2015 to 2040. *See* Energy Information Administration, *Analysis of the Impacts of the Clean Power Plan* 63-64 (May 2015), https://www.eia.gov/analysis/requests/powerplants/cleanplan/pdf/powerplant.pdf (Fig. 39). Simply put, this was an agency action "involving billions of dollars" and "affecting the price of [energy] for millions of people."[3] *King*, 135 S. Ct. at 2489.

Similarly, it is immaterial that the CPP's mandated generation shifting could be cheaper than other, even more costly controls like carbon capture and storage. *Cf.* Admin. Law Profs. Br. 17-18; State Pets. Br. 53-54. The relevant issue is whether the CPP's imposition of generation shifting was a question of deep economic and political significance *in itself*, not its cost compared to hypothetical alternative regulation.

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[3] Some now argue that CPP compliance costs would have been less than originally predicted, potentially decreasing to "*zero*" by 2030. Admin. Law Profs. Br. 28-29. But not only does this argument ignore costs *before* 2030, it also turns on a single outlier from a study describing nine different scenarios—most of which projected compliance costs *higher* than EPA's original estimate. *See* Denise A. Grab & Jack Lienke, Institute for Policy Integrity, *The Falling Cost of Clean Power Plan Compliance* 14 (2017), https://policyintegrity.org/files/publications/Falling_Cost_of_CPP_Compliance.pdf.

The profound and long-running debate on this issue also refutes *amici*'s assertion, *see* Admin Law Profs. Br. 18-19, that reorganizing the Nation's electricity generation is analogous to EPA's "bubble concept" at issue in *Chevron*. *See* EPA Br. 7-9, 77-80. *Chevron* concerned an EPA definition of "source" (from a different statutory provision) that *reduced* regulatory burdens on facilities by increasing flexibility—not a rule imposing rigid requirements forcing many sources to curtail or cease operations. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 840 (1984); *id.* at 860 ("[T]he definition in [§7411(a)(3)] is not literally applicable to the permit program" at issue in *Chevron*.). And that concept was certainly not subject to widespread public debate for many years like climate change has been.

c. Finally, Congress is "especially unlikely" to have delegated the expansive authority Petitioners urge because EPA has "no expertise" in electricity generation, transmission, and reliability. *King*, 135 S. Ct. at 2489.

This Court recognizes that energy "grid reliability is not a subject of the Clean Air Act and is not the province of EPA." *Del. Dep't of Nat. Res. & Envtl. Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015). And EPA

previously agreed in other rulemakings: "[M]anagement of energy markets and competition between various forms of electric generation are far afield from EPA's responsibilities" under the Act. JA __[Response_to_Comments_on_Amendments_to_standards_for_Stationary_Internal_Combustion_Engines_at_50_01-14-13_EPA-HQ-OAR-2008-0708-1491].

In fact, *amici* spend pages citing *Federal Energy Regulatory Commission* ("FERC") cases to explain various "technical matters" regarding "how and why the grids are designed and operated as they are." Grid Experts Br. 3. To operate "the world's most 'complex machine'—the U.S. power system"—each State makes individualized decisions regarding its own energy infrastructure, then coordinates with other States, companies, and grid operators "within one of three regional, interconnected electric grids." *Id.* at 6. This process requires constant planning and coordination among States and multiple industries to ensure reliable energy generation and distribution. *Id.* at 11 (describing techniques like "joint dispatch arrangements," "joint power-plant ownership agreements," "bilateral power purchase agreements," and

"short-term balancing transactions"). *Amici*'s discussion accordingly proves the point: EPA is not the expert in this complicated field.

2. State Petitioners and *amici* would dispense with this analysis on the basis that Congress's decision to delegate authority to regulate GHGs in *some* ways means the major questions doctrine has nothing to say about *which* means EPA can use. State Pets. Br. 53; *see also* Admin. Law Profs. Br. 22 (arguing major questions doctrine does not apply to "how any agency may regulate"). Petitioners and *amici* are wrong.

First, although the Supreme Court has held that GHGs qualify as an "air pollutant" under the Act, *Massachusetts v. EPA*, 549 U.S. 497, 528 (2007), that Court and this Circuit have rejected the argument that EPA may regulate GHGs by any means. *See UARG*, 573 U.S. at 318 (explaining EPA is not compelled to regulate in a manner "extreme, counterintuitive, or contrary to common sense" (citation omitted)); *Mexichem*, 866 F.3d at 460. Significantly, the Supreme Court did so while applying the major questions doctrine. *See UARG*, 573 U.S. at 333-34 (although EPA could regulate GHG emissions in some form, major questions doctrine barred requiring "PSD and Title V permitting for stationary sources"). This means that the major questions doctrine

applies to both whether EPA has authority to regulate specific pollutants or sources at all and the means of regulation it chooses. This analysis will *always* depend on "the particulars of the regulation." *Cf.* Admin. Law Profs. Br. 22. But that does not mean Congress delegated EPA power to regulate through any means it chooses.

Second, *amici* incorrectly suggest that the Court should dispense with the doctrine because the "*Chevron* framework is fully adequate to assess EPA's interpretation." Admin. Law Profs. Br. 3. *Amici*'s "self-serving invocation of *Chevron* leaves out a crucial threshold consideration, *i.e.*, whether the agency acted pursuant to delegated authority." *Am. Library Ass'n v. FCC*, 406 F.3d 689, 699 (D.C. Cir. 2005). Canons of statutory construction are part of the "ordinary tools of the judicial craft" that the Court must "exhaust[]" before it could "find ambiguity" that possibly constitutes an implicit delegation of authority under *Chevron v. Mozilla Corp. v. FCC*, 940 F.3d 1, 20 (D.C. Cir. 2019) (per curiam); *see* EPA Br. 53-54, 113. Canons therefore apply at *Chevron* Step 1.[4] *See Mozilla*, 940 F.3d at 19-20. So the Court must account for

[4] Regardless, as *amici* concede, courts have used the major questions doctrine to limit agency power at all steps of the *Chevron* inquiry. Admin. Law Profs. Br. 15.

each of the three canons raised in this brief even under *Chevron*'s framework.

And those three canons *limit* agency power; in statutes where they apply, there is no room to find implicit agency delegation or to defer to an agency's reading. *E.g.*, *UARG*, 573 U.S. at 324; *SWANCC*, 531 U.S. at 174 (reading statute "to avoid the significant constitutional and federalism questions" of proposed interpretation and rejecting "request for administrative deference"); *Nat'l Mining Ass'n v. Kempthorne*, 512 F.3d 702, 711 (D.C. Cir. 2008) (constitutional avoidance canon "trumps *Chevron* deference"); *see U.S. Telecom Ass'n v. FCC*, 855 F.3d 381, 419 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from denial of reh'g en banc) (major questions doctrine "*prevents* an agency from relying on statutory ambiguity").

In short, the major questions doctrine rejects the CPP's and Petitioners' expansive view of agency power.

B. Principles Of Federalism Do Not Allow Implicit Delegation Concerning States' Traditional Authority Over Energy Generation And Transmission.

It is a "well-established principle" that Congress must provide a "clear statement," *United States v. Bass*, 404 U.S. 336, 349 (1971), to

alter the "'usual constitutional balance of federal and state powers,'" *Bond*, 572 U.S. at 858 (quoting *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991)). A statute must therefore be read as *not* delegating authority to agencies in areas of traditional state power unless Congress made that intent "unmistakably clear in the language of the statute." *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 65 (1989) (citation omitted); *see also*, *e.g.*, *Bond*, 572 U.S. at 866 (courts presume that Congress does not intend to make "a dramatic departure from [the] constitutional structure" "[a]bsent a clear statement of that purpose").

Utilities regulation, including of energy generation, is "one of the most important of [these] functions traditionally associated with the police power of the States." *Ark. Elec.*, 461 U.S. at 377; *see Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 568-69 (1980). States retain and continuously exercise this "traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost and other related state concerns." *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205 (1983).

Critically, this power includes regulation of "the need for additional generating capacity" and "the type of generating facilities to be licensed." *Pac. Gas*, 461 U.S. at 212. States regulate the retail energy market, too, balancing energy production against other local concerns through antitrust requirements, consumer-protection laws, and other programs. *E.g.*, *Oneok, Inc. v. Learjet, Inc.*, 575 U.S. 373, 376 (2015). Local policies therefore set retail energy prices, protect state residents from price fluctuations, and affect national demand. *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760, 778-79 (2016). And when States seek to modify or explore development of new energy systems, they maintain wide discretion to use solutions like "tax incentives, land grants, direct subsidies, construction of state-owned facilities, or re-regulation of the energy sector." *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1299 (2016).

Congress may not intrude into core realms of state powers like these without an express, unmistakable statement. And the statement must truly be clear. Where a law concerns an area that States have regulated "throughout the history of the country," courts are required to find statutory language that "compels the intrusion" before determining

that Congress delegated power to the agency—not text that is "at most ambiguous." *Am. Bar Ass'n v. FTC*, 430 F.3d 457, 471-72 (D.C. Cir. 2005); *see also City of Abilene v. FCC*, 164 F.3d 49, 52 (D.C. Cir. 1999).

Far from providing that clear direction, the Act embeds principles of cooperative federalism throughout the statute—and especially into §7411(d). Yet by design and admission, the CPP would have "aggressive[ly] transform[ed] . . . the domestic energy industry." JA __[White_House_Fact_Sheet,_Joint_App._JA005711,_*West_Virginia_v._EPA*,_D.C._Cir_No._15-1363] (White House fact sheet describing the CPP). Reading §7411(d) to allow this power to reshape the national energy grid, despite States' contrary decisions about the mix of generation that advances the public interest, would give EPA unprecedented control over a complex area long understood to be within the States' traditional authority. Neither §7411(d) nor any other provision of the Act clearly delegates EPA this power. EPA Br. 99-103.

1. Nothing in §7411(d) discusses (or even suggests) displacement of state authority over energy generation. To the contrary, the Act disavows intent to abrogate state powers. The Act's findings section, for example, affirms that "air pollution prevention" and "air pollution control

at its source is the *primary responsibility* of States and local governments." 42 U.S.C. §7401(a)(3) (emphasis added).

Section 7411(d) doubles down on this view. It establishes a "program of cooperative federalism that allows the States, within limits established by federal minimum standards, to enact and administer their own regulatory programs, structured to meet their own particular needs." *Hodel v. Va. Surface Mining & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981). Under this intentional partnership, "each State" bears the responsibility to "establish[] standards of performance for any existing source" within its borders. 42 U.S.C. §7411(d)(1). EPA sets a "procedure" for this process, including determining BSER, but under the statute's express terms *States* decide how to implement it on a source-by-source basis. *Id.* States, not EPA, establish the standards of performance that actually bind each existing source, and States have express discretion under the statute to adopt less stringent standards based on factors like "the remaining useful life of the existing source to which such standard applies." *Id.* Only if States fail to submit "satisfactory" plans may EPA "prescribe a plan"—and EPA would have to use certain additional procedures to do so. *Id.* §7411(d)(2)(A).

Indeed, the contrast between §7411(d) and §7411(b) demonstrates that Congress expressly retained States' powers and role for existing sources. Section 7411(b)(1)(B)'s process for *new* sources allows EPA to create standards of performance directly. Section 7411(d)(1) takes a different path, expressly reserving States' authority to adopt and enforce standards of performance for *existing* sources with limited federal oversight. This is hardly a clear statement abrogating States' traditional powers.

2. Petitioners' and the CPP's reading of §7411(d) would significantly upset this federal-state balance of power. EPA Br. 109-13.

As explained above, *supra* pp. 23-24, for many years EPA limited its use of §7411(d) to regulations of individual sources. And even then, from the outset EPA's implementing regulations provided States with nothing more than a "guideline document"—including an "emission guideline"—that "reflects the application of the [BSER]." 40 C.F.R. §60.22(a), (b)(5). Enacted in 1975, these regulations affirmed States' discretion to submit standards *less* stringent than those reflected in the guidelines if a State makes certain policy or technical determinations, including that the guidelines were infeasible or would result in

unreasonable costs. *Id.* §60.24(f). And EPA explained that the guidelines were not intended to be "legally enforceable," which explained its choice in the first place to issue a "guideline" instead of a "limitation." 40 Fed. Reg. 53,340, 53,341 (Nov. 17, 1975).

The CPP's contrary approach of using §7411(d) to require generation shifting runs roughshod over federalism. Under the guise of a "cooperative framework," the CPP usurped the States' roles, requiring them to remake their energy grids—or else EPA would do it for them. 80 Fed. Reg. at 64,758. Whether implemented by federal or state plan, the CPP would not have worked unless States exercised their "responsibility to maintain a reliable electric system" in the face of the CPP's disruptions, taking the many steps needed to ensure that reductions in disfavored forms of energy generation were matched adequately by increases in others that the CPP preferred. 80 Fed. Reg. at 64,678; *see also*, *e.g.*, *Printz v. United States*, 521 U.S. 898, 928 (1997) (federal policy unconstitutionally commandeers the States that "dragoon[s]" state officials "into administering federal law" (citation omitted)). And many States would have been forced to require their utilities to buy credits from *out-of-state* utilities, in effect undermining the "status of the States as

independent sovereigns in our federal system." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 577 (Roberts, C.J.) (plurality op.).

The CPP also took away even the *express* means of state discretion in §7411(d): "[C]onsideration of facility-specific factors" would not have "justif[ied] a state making further adjustments to the performance rates" of its sources. 80 Fed. Reg. at 64,662; *see* EPA Br. 82-83. Rather, States would have been required to account for EPA's judgments touching on electric reliability, 40 C.F.R. §5745(a)(7) (2015), through such means as "[public utility commission] orders" and "state measures" making unregulated renewable energy generators "responsible for compliance and liable for violations" if they failed sufficiently to fill in the electricity-generation gaps the CPP would have created. 80 Fed. Reg. at 64,848; 40 C.F.R. §60.5780(a)(5)(iii) (2015).

The CPP therefore would have displaced the States' traditional and statutorily confirmed role of managing their utilities. This outcome further demonstrates that the CPP's (and Petitioners') view is worse than attempting to fill statutory silence without a clear statement—it would have required rewriting the statute itself.

3. The State Petitioners' attempts to cure this clear-statement failure fall flat. They concede that States "have exclusive authority over the mix of *electricity generation* within their borders," but argue that cannot mean "EPA is thereby restrained from regulating *pollution*." State Pets. Br. 55. Yet EPA's general authority to regulate pollution is not controversial. As explained above, clear-statement canons govern the *means* an agency employs no less than the *subject matters* it regulates. *Supra* pp. 32-33. Section 7411(d) accordingly does not allow EPA to pursue pollution-reducing goals through any mechanism it chooses—including prescriptive requirements like generation shifting that infringe significantly on an area of core state sovereignty—without clear congressional authorization.

State Petitioners' primary support, *FERC v. Electronic Power Supply Association*, 136 S. Ct. 760 (2016) ("*EPSA*") (cited at State Pets. Br. 55-56), only underscores this conclusion. There, the Supreme Court upheld a rule that regulated wholesale electricity markets—even though that regulation affected retail electricity rates, which is an area of traditional state authority. The Court emphasized, however, that every aspect of FERC's rule and justifications was limited to *wholesale*

regulations. *Id.* at 776-77 (explaining FERC addressed "transactions occurring on the wholesale market" and aimed only at "improving the wholesale market"). And FERC displayed "notable solicitude toward the States" precisely because of the rule's (indirect) effect on the federal-state power balance. *Id.* at 779. The rule granted States "veto power," for example, even where exercising that prerogative would have undermined FERC's overall goals. *Id.* at 779-800.

Further, in contrast to the lack of a clear statement for Petitioners' preferred approach here, the Court noted that Congress directly encouraged FERC's policy strategy in a congressional resolution. *EPSA*, 136 S. Ct. at 770 (citing 16 U.S.C. §2642). *EPSA* thus supports rulemaking in areas of traditional state sovereignty only where the agency acts with Congress's clear approval and safeguards States' prerogatives. It does not bless the CPP's deliberate effort to restructure nationwide energy generation, over States' objections, in order to further policy goals that Congress itself has repeatedly declined to address.

Similarly, assurances that States retain "discretion to pursue their own [source-specific] solutions so long as they accomplish the same emissions-reducing result that EPA's guidelines require," State Pets. Br.

38, do not resolve the federalism concerns inherent to an approach like the CPP's. Discretion to pursue *additional* policies is cold comfort if EPA has already directed a nationwide mandate—or in other words, eviscerated the States' authority over existing sources by setting an overarching framework that allows only one outcome. *See* EPA Br. 83, 150-52.

4. Finally, States take seriously their responsibility to protect air quality while regulating energy generation. Even if policy concerns could displace statutory intent—and they cannot—here they support the Act's plain-text cooperative federalism framework.

Many States are already well into the regulatory process to develop state plans under the ACE Rule while also experiencing larger-than-expected emission reductions due to market forces—all without the CPP's costly mandate to restructure the Nation's energy grid. As of October 2018, for example, CO_2 emissions in Kentucky had dropped 31% compared to 2005 levels. JA __[Kentucky_Energy_&_Environment_Cabinet_Comments_3_EPA-HQ-OAR-2017-0355-23593] (Comments of Kentucky Energy & Environmental Cabinet). Indiana emissions declined 43% compared to 2000 levels. JA __[Indiana_Energy_

Association_Comments_1_EPA-HQ-OAR-2017-0355-23742] (Comments of Indiana Energy Association). And Ohio emissions dropped 38% compared to 2005 levels. JA __[Ohio_Environmental_Protection_Agency_Comments_2-3_EPA-HQ-OAR-2017-0355-24630] (Comments of Ohio Environmental Protection Agency).

States are therefore exercising their traditional powers effectively within the Act's established cooperative federalism framework. Petitioners are wrong that §7411(d) supplants this federal-state balance of power without a clear statement from Congress.

C. The Constitutional Avoidance Canon Requires Rejecting Petitioners' And The CPP's Reading, Which Raises Serious Non-Delegation Concerns.

The constitutional avoidance canon similarly compels EPA's reading of §7411(d). Courts must construe statutes to avoid "serious constitutional problems." *SWANCC*, 531 U.S. at 173 (citation omitted). And there is serious concern that Petitioners' reading of §7411(d)—including their untethered view of terms like "system"—violates the non-delegation doctrine and implicates serious federalism concerns.

The Supreme Court has long held "[t]hat Congress cannot delegate legislative power"—"a principle universally recognized as vital to the

integrity and maintenance of the system of government ordained by the constitution." *Marshall Field & Co. v. Clark*, 143 U.S. 649, 692 (1892). After all, "fundamental policy decisions" are "the hard choices, and not the filling in of the blanks, which must be made by the elected representatives of the people." *Indus. Union*, 448 U.S. at 687 (Rehnquist, J., concurring in the judgment); *accord*, *id.* at 645-46 (Stevens, J., controlling op.). So while the "major questions doctrine" is "nominally a canon of statutory construction," it applies "in service of the constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency." *Gundy v. United States*, 139 S. Ct. 2116, 2142 (2019) (Gorsuch, J., dissenting).

To be sure, Congress does not divest itself of the legislative power by allowing an agency to "'fill up the details'" where Congress already made the fundamental policy decision on "'important subjects, which must be entirely regulated by the legislature itself.'" *Gundy*, 139 S. Ct. at 2136 (Gorsuch, J., dissenting) (quoting *Wayman v. Southard*, 23 U.S. 1, 31, 43 (1825)). And properly understood, §7411(d) does only that: It empowers EPA to implement Congress's policy determination that each existing stationary source (as determined in state plans) must mitigate

emissions to whatever degree is attainable by applying available technology and practices *to that source*.

The CPP, by contrast, was not just filling up the details after Congress "legislated on the subject as far as was reasonably practicable," *Buttfield v. Stranahan*, 192 U.S. 470, 496 (1904). The Nation's mix of electricity generation—and how the States achieve that mix—is the kind of fundamental decision that must be left to the States unless made through the "single, finely wrought and exhaustively considered" legislative process. *INS v. Chadha*, 462 U.S. 919, 951 (1983). But Petitioners' reading of §7411(d) would give that power to EPA—placing no practical constraints on what "systems" of emission reduction EPA may use to set BSER. If they are correct, the Act would thus "make such a 'sweeping delegation of legislative power' that it might be unconstitutional under [the non-delegation doctrine]." *Indus. Union*, 448 U.S. at 646 (Stevens, J., controlling op.). At the very least, "[a] construction of the statute that avoids this kind of open-ended grant should certainly be favored." *Id.* The Court should therefore give §7411(d) its plain-text, historically understood meaning instead—and uphold the CPP repeal.

CONCLUSION

The petitions should be denied.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit of the Court's order of January 31, 2020 because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) this brief contains 9,015 words. The combined total words in this brief and the Brief of State and Industry Intervenors for Respondents Regarding Affordable Clean Energy Rule is less than 17,900 words.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

Dated: July 16, 2020 /s/ Lindsay S. See
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CERTIFICATE OF SERVICE

I hereby certify that, on this 16th day of July, 2020, a copy of the foregoing brief was served electronically through the Court's CM/ECF system on all ECF-registered counsel.

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