No. _____

In The Supreme Court of the United States

STATE OF NORTH DAKOTA

Petitioner,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 111(d) of the Clean Air Act ("CAA"), 42 U.S.C. § 7411(d), governs air emissions from stationary sources of air pollutants. Section 111(d) explicitly requires the U.S. Environmental Protection Agency ("EPA") to develop guidelines for the States to create their own Section 111(d) plans to establish "standards of performance" for controlling air emissions from any individual "existing source." Section 111(d)(1) further provides that EPA guidelines "shall permit" States, in developing their plans, to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies."

The question presented is: Can EPA promulgate regulations for existing stationary sources that require States to apply binding nationwide "performance standards" at a generation-sector-wide level, instead of at the individual source level, and can those regulations deprive States of all implementation and decision making power in creating their Section 111(d) plans?

PARTIES TO THE PROCEEDING

Petitioner is the State of North Dakota. North Dakota was a respondent-intervenor below.

Respondents who were respondents below are the United States Environmental Protection Agency and Michael Regan, in his official capacity as Administrator of the United States Environmental Protection Agency.

Respondents who were petitioners below are, by court of appeals case number, as follows:

In Case No. 19-1140: American Lung Association and the American Public Health Association.

In Case No. 19-1165: State of New York, State of California, State of Colorado, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, People of the State of Michigan, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, State of Wisconsin, District of Columbia, City of Boulder (CO), City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, and the City of South Miami (FL).

In Case No. 19-1166: Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club.

PARTIES TO THE PROCEEDING—Continued

In Case No. 19-1173: Chesapeake Bay Foundation; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO; International Brotherhood of Electrical Workers, AFL-CIO; United Mine Workers of America, AFL-CIO.

In Case No. 19-1175: Robinson Enterprises, Inc., Nuckles Oil Co., Inc., dba Merit Oil Co., Construction Industry Air Quality Coalition, Liberty Packing Co. LLC, Dalton Trucking, Inc., Norman R. "Skip" Brown, Joanne Brown, The Competitive Enterprise Institute, and the Texas Public Policy Foundation.

In Case No. 19-1176: Westmoreland Mining Holdings, LLC.

In Case No. 19-1177: City and County of Denver (CO).

In Case No. 19-1179: The North American Coal Corp.

In Case No. 19-1185: Biogenic CO2 Coalition.

In Case No. 19-1186: Advanced Energy Economy.

In Case No. 19-1187: American Wind Energy Association and Solar Energy Industries Association.

In Case No. 19-1188: Consolidated Edison, Inc., Exelon Corp., National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Inc., and Sacramento Municipal Utility District.

PARTIES TO THE PROCEEDING—Continued

Respondents who were petitioner-intervenors below are, by court of appeals case number, as follows:

In Case No. 19-1140: State of Nevada.

Respondents who were respondent-intervenors below are, by court of appeals case number, as follows:

In Case No. 19-1140: States of West Virginia, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming; Mississippi Governor Tate Reeves; Commonwealth of Kentucky by and through Governor Andy Beshear; Mississippi Public Service Commission; Indiana Michigan Power Co., Kentucky Power Co., Public Service Co. of Oklahoma, Southwestern Electric Power Co., AEP Generating Co., AEP Generation Resources, Inc., Wheeling Power Co.; America's Power; Basin Electric Power Cooperative; Chamber of Commerce of the United States of America; Indiana Energy Association and Indiana Utility Group; Murray Energy Corp.; National Rural Electric Cooperative Association; Nevada Gold Mines and Newmont Nevada Energy Investment; PowerSouth Energy Cooperative; Westmoreland Mining Holdings, LLC.

In Case Nos. 19-1175, 19-1176, and 19-1179: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources

PARTIES TO THE PROCEEDING—Continued

Defense Council, Sierra Club; State of New York, State of California, State of Colorado, State of Delaware, State of Hawaii, State of Illinois, State of Maine, State of Maryland, Commonwealth of Massachusetts, People of the State of Michigan, State of Minnesota, State of New Jersey, State of New Mexico, State of North Carolina, State of Oregon, Commonwealth of Pennsylvania, State of Rhode Island, State of Vermont, Commonwealth of Virginia, State of Washington, State of Wisconsin, District of Columbia, City of Boulder (CO), City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, and the City of South Miami (FL).

Petitioners in current related Petitions for Certiorari to this Court of the below decision:

*In Case No. 20-1530**: States of West Virginia, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming; and Mississippi Governor Tate Reeves.

*In Case No. 20-1531**: The North American Coal Corporation.

There are no other directly related proceedings.

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* While the State of North Dakota generally supports the Petitions in Case Nos. 20-1530 and 20-1531, North Dakota submits is own petition for writ of certiorari to raise the distinct important issues of the clear statutory limitations on EPA's authority under Section 111(d), including principles of cooperative federalism protecting state sovereignty enshrined by Congress in the text of the CAA and Section 111(d).

STATEMENT OF RELATED CASES

The related case below is *American Lung Association and American Public Health Association v. EPA, et al.*, No. 19-1140, consolidated with Nos. 19-1165, 19-1166, 19-1173, 19-1175, 19-1176, 19-1177, 19-1179, 19-1185, 19-1186, 19-1187, 19-1188 (D.C. Cir. 2021), with judgment entered January 19, 2021.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

PETITION FOR A WRIT OF CERTIORARI

Petitioner State of North Dakota respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINION BELOW

The opinion of the D.C. Circuit (App. 1-215) is reported at 985 F.3d 914 and reproduced in the appendix hereto ("App.").

JURISDICTION

The D.C. Circuit entered judgment on January 19, 2021. This petition is timely filed consistent with the Court's March 19, 2020 Order. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 111 of the Clean Air Act ("CAA"), 42 U.S.C. § 7411 provides in pertinent part:

(a)

> (1) The term "standard of performance" means a standard for emissions of air pollutants which reflects the degree of emission limitation achievable

> through the application of the best system of emission reduction which (taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements) the Administrator determines has been adequately demonstrated.

. . .

(d) Standards of performance for existing sources; remaining useful life of source

> (1) The Administrator shall prescribe regulations which shall establish a procedure similar to that provided by section 7410 of this title under which each State shall submit to the Administrator a plan which (A) establishes standards of performance for any existing source for any air pollutant (i) for which air quality criteria have not been issued or which is not included on a list published under section 7408(a) of this title or emitted from a source category which is regulated under section 7412 of this title but (ii) to which a standard of performance under this section would apply if such existing source were a new source, and (B) provides for the implementation and enforcement of such standards of performance. Regulations of the Administrator under this paragraph shall

> permit the State in applying a standard of performance to any particular source under a plan submitted under this paragraph to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies.

The full relevant provisions of the Clean Air Act are set forth at App. 216-231.

INTRODUCTION

This case raises important and recurring issues concerning the ability of the States to exercise their statutory authority under the CAA—one of the Nation's most significant and far-reaching environmental statutes. Described as an "experiment in federalism," *Michigan v. EPA*, 268 F.3d 1075, 1078 (D.C. Cir. 2001) (quotation omitted), the CAA assigns to the States such as North Dakota the primary role in air pollution prevention and control. One of the States' principal responsibilities under the Act is to implement and enforce standards of performance for *existing* sources of air pollution under Section 111(d), using the States' expertise in applying source-specific considerations and factors to controlling air emissions from those sources.

To that end, Section 111(d) directs EPA's Administrator to "prescribe regulations which shall establish a procedure . . . under which each State shall submit to the Administrator a plan which (A) establishes

standards of performance for any existing source for any air pollutant . . . and (B) provides for the implementation and enforcement of such standards of performance." 42 U.S.C. § 7411(d)(1). In establishing these regulations, Congress specifically directed the Administrator to "permit the State" in creating its Section 111(d) plan to "apply[] a standard of performance to any particular source" and "to take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." *Id.* The primary "regulatory authority" and decisionmaker in setting standards of performance for individual specific sources under Section 111(d) is therefore the States. Within that primary authority the CAA also grants to States considerable discretion, including requiring that States are afforded the ability to "take into consideration" source specific factors such as, *inter alia*, the remaining useful life of the source when creating their Section 111(d) plans.

Ignoring these statutory directives, EPA promulgated the regulation entitled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Clean Power Plan" or "CPP"), which usurped the States' primary role in regulating existing sources under Section 111(d). Having "discover[ed] in a long-extant statute an unheralded power to regulate a significant portion of the American economy," *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 324 (2014) ("*UARG*"), EPA sought to wield that power through the CPP to force the States to shift the production of

energy away from existing coal-fired power plants in favor of natural gas, wind, and solar facilities.

EPA claimed in the CPP the authority to set fixed sector-wide and state-wide emissions standards of performance (measured by pounds of carbon dioxide per megawatt hour, or CO2 lb/MWh) applied to the electricity generating *sector* in a State *as a whole* that were impossible for certain individual existing sources (such as coal and natural gas power plants) to meet under any reasonable operating scenario. The CPP ignored the States' statutorily-mandated primary role under Section 111(d) for creating Section 111(d) plans that set standards of performance for individual existing sources while applying source-specific considerations. The CPP thus did not provide "guidelines" for the States to use to set facility-specific emissions standards, but rather imposed sector-wide emission requirements aimed at forcing States to shift away from coal-fired electricity generation. Reaching past the States, EPA was effectively requiring these existing sources to shut down, or to subsidize investment in alternate energy sources that EPA preferred in order to offset their noncompliant emissions—a regulatory scheme known as generation shifting. *See* 80 Fed. Reg. at 64,769 (explaining that coal and gas plants can reduce their emissions by buying electricity from EPA preferred generators, thus shifting generation elsewhere). The EPA's stated "authority for this rule" was § 7411(d)—the very section in which Congress had designated States as the primary regulator to "establish

standards of performance for any existing source." *Id.* at 64,710.

Before the CPP could ever take effect, this Court stayed implementation of the rule. EPA subsequently conceded that the CPP exceeded EPA's statutory authority, repealed the CPP and promulgated a replacement rule governing greenhouse gas ("GHG") emissions from EGUs that returned to the States their rights and authorities provided for under the CAA. *Repeal of the Clean Power Plan; Emissions Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019) (the "ACE Rule").

The D.C. Circuit vacated the ACE Rule and the rule's repeal of the CPP, holding (without reference to this Court's stay of the CPP) that the EPA erred in concluding that it did not have the authority to reach past the States and directly promulgate standards of performance applicable to individual existing sources. In effect, the D.C. Circuit's opinion granted EPA authority to force generation shifting for States under Section 111(d).

The D.C. Circuit's decision resurrects the jurisdictional overreach EPA attempted in the CPP that was stayed by this Court, and usurps the States' statutory authority under Section 111(d) of the CAA to create State Section 111(d) plans that establish and implement standards of performance for *individual existing sources*, while taking into account source specific

factors that the States are best equipped to evaluate. The question presented is a recurring one of national importance, arising not only under the CAA but in many other federal statutes with similar principles of cooperative federalism that allocate authority between the States and federal government. This Court should grant certiorari to correct the grave error in the D.C. Circuit's decision granting EPA significant regulatory powers Congress never authorized under Section 111(d), and to preserve the delicate balance of cooperative federalism that Congress established under the CAA and similar statutes.

STATEMENT OF THE CASE

A. Statutory and Regulatory Background.

The CAA establishes "a comprehensive national program that ma[kes] the States and the Federal Government partners in the struggle against air pollution." *General Motors Corp. v. United States*, 496 U.S. 530, 532 (1990). In this "experiment in cooperative federalism," *Michigan v. EPA*, 268 F.3d at 1083, the CAA establishes that improvement of the nation's air quality will be pursued "through state and federal regulation," where controlling the sources of air pollution is the primary responsibility of the States. *BCCA Appeal Group v. EPA*, 355 F.3d 817, 821-822 (5th Cir. 2003); *see also* 42 U.S.C. § 7401(a)(3) ("air pollution prevention . . . and air pollution control at its source *is the primary responsibility of States and local governments*")

(emphasis added); and 42 U.S.C. § 7407(a) ("Each State shall have the primary responsibility for assuring air quality within the entire geographic area comprising such State. . . .").

Section 111 of the CAA, 42 U.S.C. § 7411, established the process for setting "standards of performance" for new and existing stationary sources.

Section 111(b) then governs how EPA shall set standards of performance for new stationary sources, and under Section 111(b) it is relatively undisputed that EPA wields that power alone. However, mixed into Section 111 are the procedures governing the creation of standards for *already existing* sources, which can be found in Section 111(d), 42 U.S.C. § 7411(d).

Section 111(d) implements the CAA's cooperative federalism approach as to existing sources by requiring EPA to "establish a procedure" for States to submit Section 111(d) plans that "establish[] standards of performance for [certain] existing source[s] for any air pollutant[s]." *Id*. at (d)(1). Under Section 111(d), EPA may not set emission reduction requirements for States or existing sources. EPA instead is only authorized to "establish a procedure" (42 U.S.C. § 7411(d)(1)) for States to submit plans containing State performance standards applying EPA's BSER guidelines. EPA then reviews State plans to determine if the States' performance standards are "satisfactory" (42 U.S.C. § 7411(d)(2)(A)), based on the BSER guidelines (not mandates) established by EPA.

A "standard of performance" is "a standard for emissions of air pollutants which reflects the degree of emission limitation *achievable*" by applying the "best system of emission reduction" ("BSER") to the source, "taking into account the cost of achieving such reduction and any nonair quality health and environmental impact and energy requirements [EPA] determines has been *adequately demonstrated*." *Id.* at (a)(1) (emphasis added). Following the requirements that standards of performance be "achievable" and "adequately demonstrated," Section 111(d) requires that "[r]egulations of the Administrator under this paragraph *shall permit* the State in applying a standard of performance *to any particular source* under a plan submitted under this paragraph to *take into consideration*, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d)(1) (emphasis added). Thus, States are given the primary authority to create their own 111(d) plans for *existing* sources, subject to EPA review and approval based on EPA's BSER guidelines, and Congress specifically requires that States be able to consider source-specific factors when creating those plans and applying the BSER.

Under Section 111(d), EPA may not set emission reduction requirements for States or existing sources. EPA instead is only authorized to "establish a procedure" (42 U.S.C. § 7411(d)(1)) for States to submit plans containing State performance standards applying EPA's BSER. EPA then reviews State plans to

determine if the performance standards are "satisfactory" (42 U.S.C. § 7411(d)(2)(A)).

These express statutory limitations on EPA's authority are reinforced by part 2 of Section 111(d), which establishes when EPA may step into the shoes of a State who failed to submit a satisfactory plan for regulating emissions from existing sources. If a State fails to submit an adequate plan, EPA, in creating an adequate replacement "plan prescribed under" Section 111(d), "*shall* take into consideration, among other factors, remaining useful lives of the sources in the category of sources." 42 U.S.C. § 7411(d)(2). Thus, plans for regulating existing sources within States must always provide for source-specific considerations, and may not apply categorically to the entire generating sector.

B. The Clean Power Plan.

After the CPP was promulgated in 2015, it was immediately challenged in the U.S. Court of Appeals for the District of Columbia Circuit, by 159 different petitioners, including more than half of the States. *State of West Virginia, et al. v. EPA*, No. 15-1363 (and consolidated cases) (D.C. Cir. Oct. 23, 2015). A stay was sought with the D.C. Circuit, which the Circuit denied. *Id.*, Doc. No. 1594951.

Subsequently, five separate applications were filed with this Court seeking to stay the CPP, including an application from the State of North Dakota. *See* Application by the State of North Dakota for Immediate Stay of Final Agency Action Pending Appellate Review,

State of North Dakota v. EPA, No. 15A793 (Jan. 29, 2016), App. 232-267. On February 9, 2016 the full Court granted the five stay applications without qualification, halting the implementation or enforcement of the CPP pending disposition of the D.C. Circuit petitions. Order in Pending Case, *North Dakota, et al. v. EPA, et al.*, Nos. 15A793, 15A773, 15A776, 15A778, 15A787 (February 9, 2016). This marked the first time this Court had stayed a federal regulation before initial review by a federal appeals court. *See* https://www.americanbar.org/groups/litigation/committees/environmental-energy/practice/2016/021716-energy-supreme-court-stays-epas-clean-power-plan/.

While this Court did not issue an opinion in granting the stay of the CPP, the Court's jurisprudence indicates that in order to issue the stay, the Court found there was: "(1) 'a reasonable probability' that the Court w[ould] grant certiorari, (2) 'a fair prospect' that the Court w[ould] then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.'" *Maryland v. King*, 567 U.S. 1301, 1302 (2012).

C. The Affordable Clean Energy Rule.

After this Court stayed implementation of the CPP, EPA repealed the CPP, conceded that the CPP exceeded EPA's statutory authority, and promulgated the ACE Rule on July 8, 2019. 84 Fed. Reg. 32,520 ("the Agency has determined that the CPP exceeded the EPA's statutory authority under the [CAA]"). Upon

promulgation of the ACE Rule, the petitions challenging the CPP Rule in the D.C. Circuit were dismissed, although they had been heard by that court on argument *en banc*. App. 1-215.

In promulgating the ACE Rule, EPA sought to correct its clear prior jurisdictional overreach by establishing a BSER that the States could apply to establish performance standards to specific categories of existing generation sources, rather than upending the entire generation sector by mandating generation shifting with rigidly set CO2 lb/MWh mandates that did not allow States to apply the BSER to an individual generation source to determine a standard of performance. The ACE Rule correctly rejected the notion that EPA has the authority to regulate energy generation and returned to State authority "matters traditionally reserved for States: 'administration of integrated resource planning and . . . utility generation and resource portfolios.'" ACE Rule, 84 Fed. Reg. at 32,529 (quoting *New York v. FERC*, 535 U.S. 1, 24 (2002)).

In repealing the CPP, EPA admitted that it had "read the statutory term 'best system of emission reduction' so broadly as to encompass measures the EPA had never before envisioned in promulgating performance standards under [§ 7411]." ACE Rule, 84 Fed. Reg. at 32,523. "This was the first time the EPA interpreted the [best system of emission reduction] to authorize measures wholly outside a particular source." *Id.* at 32,526. To correct this error, the ACE Rule went on to restore the Federal-State relationship established by the statute, with EPA setting guidelines in

BSER tied to specific categories of sources of emissions, which the States use to "set rate-based standards of performance . . . generally be in the form of the mass of carbon dioxide emitted per unit of energy (for example pounds of CO2 per megawatt-hour or lb/MWh)." *Id.* at 32,554/3.

D. Procedural History.

Like the Clean Power Plan, the ACE Rule was met with multiple challenges that were consolidated in the D.C. Circuit. Most petitioners objected to the repeal of the Clean Power Plan, and argued that Section 111(d) provided EPA authority to mandate hard limits in standards of performance applied across the entire generation sector (e.g. pounds of carbon dioxide per megawatt-hour or CO2lb/MWh) that would require generation shifting. Under these theories, EPA's repeal was unlawful because it was based on a narrower view of EPA's authority than intended by Congress. North Dakota intervened in the D.C. Circuit litigation below as a respondent-intervenor in support of the ACE Rule.

In the opinion below, a divided three-judge panel of the D.C. Circuit vacated the ACE Rule, with the *per curiam* majority holding that EPA erred in concluding that it did not have the authority to promulgate the nation-wide generation sector mandates under the CPP. The *per curiam* opinion concluded that EPA's reading of 111(d) as requiring at-the-source controls was not "the only permissible interpretation of the scope of EPA's authority" under Section 111(d),

holding that EPA's repeal of the CPP could not be upheld as it had not considered the "exercise of discretion" that the D.C. Circuit read into section 111(d). Absent from the D.C. Circuit's opinion was any mention of this Court's unprecedented nation-wide stay of the CPP.

Further, despite admitting that "the statutory role of the best system of emission reduction under Section [111(d)] textually preserves and enforces the States' independent role in choosing from among the broadest range of options to set standards of performance appropriate to sources within their jurisdiction," the D.C. Circuit insisted that the mandated generation shifting requirements of the CPP somehow fit within Section 111(d)'s regulatory structure. App. 103. The D.C. Circuit opinion then dismissed cooperative federalism concerns implicated in the major questions doctrine, noting that the CPP "in fact, afforded States considerable flexibility in choosing how to calculate and meet their emissions targets." App. 98. According to the D.C. Circuit, a mandated generation shifting scheme that applied hard CO2lb/MWh standards of performance across the entire generation sector gave the states "considerable flexibility" in regulating individual existing sources. Inexplicably, the decision emphasized that "Congress imposed no limits" in Section 111(d) other than directives to consider costs, nonair health and environmental impacts, and energy requirements. App. 59.

Judge Walker dissented on the grounds that Section 111(d) did *not* authorize what EPA had attempted

in the CPP. Judge Walker would have held that EPA both "was required to repeal [the CPP] and wrong to replace it" under Section 111(d). App. 176 (Walker, J., concurring in part, concurring in the judgment in part, and dissenting in part). He explained that Congress disabled EPA from regulating pollutants "emitted from a *source category* which is regulated under [Section 112]"—and coal-fired power plants are one of those already-regulated sources. *Id.* at 192 (quoting 42 U.S.C. § 7411(d) (emphasis in original)).

Addressing the plain text of Section 111(d), Judge Walker wrote that "[h]ardly any party in this case makes a serious and sustained argument that § 111[d] includes a clear statement unambiguously authorizing the EPA to consider offsite solutions like generation shifting." *Id.* at 175. Judge Walker stated that the CPP was a "groundbreaking" rule for attempting to reshape the power sector, it aimed to reduce carbon emissions "equal to the annual emissions from more than 166 million cars," and it would have exacted "almost unfathomable costs" to do so. *Id.* at 184-185 (citation omitted). Thus, "because the [CPP] implicates 'decisions of vast economic and political significance,' Congress's failure to clearly authorize the [CPP] means the EPA lacked the authority to promulgate it." *Id.* at 175.

Finally, Judge Walker explained that even if Section 111(d) fairly showed that Congress "*allowed* generation shifting" (which he concluded it did not) that would result in an unconstitutional delegation because Congress did not "clearly *require* it." *Id.* at 189 (emphasis in original). Congress must decide "what major

rules make good sense," and cannot shirk that duty by passing off critical questions to "the impenetrable halls of an administrative agency." *Id.* at 190.

After the decision, the EPA sought and secured a stay of the mandate. Order, *Am. Lung Ass'n v. EPA*, No. 19-1140 (Feb. 22, 2021). EPA is now considering a new federal regulation consistent with the D.C. Circuit's decision.

E. North Dakota's Interests Under Section 111(d).

As a major energy producing state (from significant lignite coal, oil, natural gas, and wind resources), North Dakota has fundamental sovereign interests in regulating its natural resources and their uses. The North Dakota legislature has declared it to be an essential government function and public purpose to foster and encourage the wise use and development of North Dakota's vast lignite coal resources to maintain and enhance the economic and general welfare of North Dakota. N.D. CENT. CODE § 54-17.5-01. North Dakota's statutory scheme is consistent with the scheme recognized by Congress and this Court, namely that "the regulation of utilities is one of the most important of the functions traditionally associated with the police power of the States." *Arkansas Electric Cooperative Corporation v. Arkansas Public Service Commission*, 461 U.S. 375, 377 (1983).

The real-world effect of the D.C. Circuit's decision reviving and sanctioning EPA's jurisdictional overreach in the CPP is that North Dakota's authority to

create its own Section 111(d) plan that establishes emission "standards of performance" for existing power plants in the State is effectively extinguished. EPA is now free to promulgate new Section 111(d) regulations depriving North Dakota of its statutory right to apply source-specific factors in individual sources in its Section 111(d) plan in setting those standards of performance, including regulations such as the inflexible, generation-shifting requirements of the CPP.

For example, the CPP's draconian mandate setting the BSER as hard CO2 lb/MWh limits would have precluded North Dakota from considering the source-specific factors Section 111(d) mandates that States be allowed to consider such as the remaining useful life of the coal-fired facilities. The CPP, as applied to North Dakota, would have required a dramatic and immediate shift away from lignite coal-powered electric generating facilities in favor of gas-powered plants or renewable sources.

North Dakota, using the EPA's Integrated Planning Model ("IPM") and related IPM model documentation files created to analyze the impacts of the CPP, calculated that the CPP would have required North Dakota to reduce its carbon dioxide (CO2) emission rate by 44.9%, more than all but two other states. App. 246. The 427 MW Coyote Station, two miles south of Beulah, North Dakota, would have been forced to close in 2016 in the rate-based application of the CPP. *Id.* at 249. This scenario would also have included the shutdown of Unit 1 and Unit 2 at the R.M. Heskett Station near Mandan, North Dakota, in 2016 and 2018

respectively, where those units respectively consumed 120,991 and 396,712 tons of lignite from the Beulah Mine in North Dakota in 2014; the 250 MW Milton R. Young Station Unit 1, four miles southeast of Center, North Dakota, which used 1,545,190 tons of lignite coal in 2014; the Spiritwood Station which combusted 891,017 tons of lignite in 2014; and the 558 MW Coal Creek Station Unit 1, located between Underwood and Washburn, North Dakota, would close in 2018. *Id.* at 249-252. Further, the closure of these coal-fired electric generating facilities would have required multiple lignite coal mines in the State to also close and at least one mine to severely curtail production.

Thus, the D.C. Circuit's erroneous conclusion in the opinion below—that EPA has the novel and unprecedented power it previously attempted to wield in the CPP to set BSER guidelines that essentially mandate "standards of performance" be applied at the generation sector level, rather than to individual coal-fueled electric generating facilities—deprives North Dakota of the ability to make source-specific decisions for implementing standards of performance as required by the CAA. The reach of the D.C. Circuit's decision is potentially enormous. Section 111(d) applies to all existing stationary sources—including the oil and gas industry. As the second largest oil producing State, North Dakota could face further infringement upon its sovereign rights to regulate those existing sources if EPA uses the D.C. Circuit's decision as a

license to mandate standards of performance for *all* existing sources in future rulemakings.

REASONS FOR GRANTING THE PETITION

I. The D.C. Circuit's Decision Conflicts with the Decisions of this Court on the Allocation of Federal-State Authority.

The D.C. Circuit's decision in this case that Section 111(d) grants EPA sufficient discretion to mandate a generation shifting regulatory scheme misreads the text of the CAA and is contrary to this Court's prior decisions setting the bounds of the cooperative federalism required by the CAA. Section 111(d) embodies the fundamental cooperative federalism structure of the CAA by requiring that regulations promulgated by the EPA targeting existing generation sources "*shall permit* the State in applying a standard of performance *to any particular source* under a plan submitted under this paragraph to *take into consideration*, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d)(1) (emphasis added). Under the plain language of Section 111(d), EPA exceeds its authority if it promulgates a BSER which ties the States' hands in establishing Section 111(d) plans by removing their ability to (1) "establish[] standards of performance for any existing source" and (2) "take into consideration" source specific factors in applying the standards of performance "to any particular source."

The D.C. Circuit's opinion now grants a license to EPA to create new Section 111(d) regulations, as it did in the CPP, which *mandate* hard CO2lb/MWh BSER across the entire generation sector and require States to implement hard, qualitative emission limits in setting standards of performance for individual sources in their Section 111(d) plans. This would effectively prohibit States from taking into consideration source-specific factors in their Section 111(d) plans. The CAA, however, clearly mandates that EPA "shall prescribe regulations" which allow the States to then create Section 111(d) plans that apply the BSER to "establish[] standards of performance for any existing source," and which plans "*shall* permit the State in applying a standard of performance to *any particular* source . . . to take into consideration, among other factors, the remaining useful life of the existing source" in their Section 111(d) plans. 42 U.S.C. § 7411(d)(1) (emphasis added). Because the CAA and Section 111(d) implement this principle of cooperative federalism, by requiring that EPA establish a procedure by which States then submit a Section 111(d) plan to EPA which (1) "establishes standards of performance for any existing source for any air pollutant" and (2) "provides for the implementation and enforcement of such standards of performance," *id.*, EPA does not have the authority to remove the States' expressly stated statutory role in that process by creating a hard CO2lb/MWh BSER that deprives the States of their authority to set standards of performance for specific existing sources in their Section 111(d) plans, and the D.C. Circuit's decision below is therefore in error.

While Section 111(d) does allow the EPA to "prescribe regulations," *id.*, governing how States will submit plans for establishing standards of performance for existing sources, only if a State "fails to submit a satisfactory plan," may EPA then "prescribe a plan" for that State, including "enforcing provisions of such plan in cases where the State fails to enforce them." *Id.* at (d)(2)(A)-(B). However, in "promulgating a standard of performance" for a State that failed to submit a satisfactory plan, EPA continues to be required to "take into consideration, among other factors, remaining useful lives of the sources in the category of sources to which such standard applies."

Five decades ago, this Court recognized the CAA's "division of responsibilities" between the States and the federal government in *Train v. Natural Resources Defense Council, Inc*., 421 U.S. 60, 79 (1975). There, the Court looked at Section 110 of the CAA and acknowledged that EPA has the "responsibility for setting the national ambient air standards." But "[j]ust as plainly," the Court emphasized, the EPA "is relegated by the [CAA] to a *secondary role* in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met." *Id.* (emphasis added). As the Court explained, "[t]he Act gives the [EPA] *no authority* to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the [CAA's] standards." *Id.* (emphasis added). "[S]o long as the ultimate effect of a State's choice of emission limitations is compliance with the national

standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." *Id.*; *see also Union Elec. Co. v. EPA*, 427 U.S. 246, 269 (1976) ("Congress plainly left with the States, so long as the national standards were met, the power to determine which sources would be burdened by regulation and to what extent.").

Just like EPA is limited in enforcing the NAAQS under Section 110 of the CAA, EPA is limited to regulating existing sources under Section 111(d) by "establish[ing] a procedure *similar to that provided by* [Section 110] of this title under which each State shall submit to the Administrator a plan" for establishing standards of performance for existing sources. 42 U.S.C. § 7411(d)(1) (emphasis added). Congress, by this reference, intended that the States' processes for creating Section 111(d) plans would mirror those under Section 110.

This Court previously confirmed Section 111(d)'s cooperative federalism structure in *American Electric Power Co. v. Connecticut* ("*AEP*"), where the Court stated that EPA's duties under Section 111(d) included "regulation of existing sources" once a category of sources was established under Section 111(b). 564 U.S. 410, 424 (2011). The Court went on to acknowledge that "for existing sources, EPA issues emissions guidelines," and "in compliance with those guidelines and subject to federal oversight, the States then issue performance standards *for stationary sources within their jurisdiction*." *Id.* (emphasis added). The D.C. Circuit

decision relies on *AEP* for the proposition that Congress directed EPA to "regulate carbon-dioxide emissions from [new, modified, and existing] power plants using the regulatory tools laid out in Section 7411," App. 94, but entirely fails to recognize and adhere to this Court's emphasis in *AEP* that Section 111(d) restricts EPA to creating *guidelines* that apply to generation sources "within the same category," which guidelines States then use to "issue performance standards" that can be applied to individual "stationary sources" within the States' jurisdiction. 564 U.S. at 424. The Court recognized that the CAA "envisions extensive cooperation between federal and state authorities, generally permitting each State to take the first cut at determining how best to achieve EPA emissions standards within its domain[.]" 564 U.S. at 428 (internal citations omitted).

Instead, the D.C. Circuit reached the opposite conclusion, stating "[b]ecause we hold that EPA erred in concluding Section [111] unambiguously requires that the best system of emission reduction be source specific, we necessarily reject the ACE Rule's exclusion from Section [111(d)] of compliance measures it characterizes as non-source-specific." App. 85. The conflict with the Court's prior decision in *AEP* is stark, because if EPA is not limited to source-specific guidelines, then the States no longer retain the autonomy required under Section 111(d) to meet those guidelines.[1]

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[1] Thus, the D.C. Circuit's statement that States "retain the choice of how to meet those guidelines through standards of

This Court has also previously weighed in on "the division of responsibilities" set out in the CAA, has frequently held EPA to the limits of its congressionally-delegated authority, and has consistently protected the authority reserved to the States. In *Alaska Dept. of Environmental Conservation v. EPA*, the Court examined whether EPA had the authority to block a permitting decision that was clearly left to the State of Alaska's discretion under the cooperative federalism of the CAA. 540 U.S. 461 (2004) ("*Alaska v. EPA*"). At issue was the Prevention of Significant Deterioration ("PSD") program, which sets up a regulatory system by which States permit new air pollutant emitting facilities prior to construction by requiring in the permit that each individual facility is equipped with best available control technology ("BACT"). *Id.* at 468. BACT is defined in CAA § 7479(3) as "an emission limitation based on the maximum degree of [pollutant] reduction . . . which the permitting authority, on a case-by-case basis, taking into account energy, environmental, and economic impacts and other costs, determines is achievable for [the] facility. . . ." *Id.*

In analyzing the cooperative federalism required by the CAA, this Court noted that § 7479(3) "entrusted state permitting authorities with initial responsibility to make BACT determinations 'case-by-case.'" *Id.* at 488 (Citing to 42 U.S.C. § 7497(3)). "A state agency," this Court noted, "is best positioned to adjust for local differences in raw materials or plant configurations,

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performance tailored to their various sources," App. 97, under a mandated generation shifting scheme is patently untrue.

differences that might make a technology 'unavailable' in a particular area." *Id.* It is only once a State has made its BACT determination that EPA can participate by reviewing the reasonableness of that determination. *Id.* at 489 ("EPA claims no prerogative to designate the correct BACT; the Agency asserts only the authority to guard against unreasonable designations."). Ultimately, the Court concluded that "EPA has supervisory authority over the reasonableness of state permitting authorities' BACT Determinations," but noted that authority could only be used *after* the State had made its initial BACT determination, and could not be used to designate the correct BACT determination from the outset. *Id.* at 502.

Much like the BACT determination at issue in *Alaska v. EPA*, the "plan" that each "State shall submit to the" EPA under Section 111(d) requires that the States be afforded the opportunity, "in applying a standard of performance to *any particular source*" to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d)(1) (emphasis added). The plain language of Section 111(d) requires that States be allowed to use their expertise, just like in BACT determinations, to apply source specific factors in a case-by-case manner to these determinations. And, just as in *Alaska v. EPA*, EPA retains a secondary oversight over States' 111(d) plans whereby EPA can "prescribe a plan for a State in cases where the State fails to submit a satisfactory plan." *Id.* at (d)(2). The only requirement is that EPA first allow States the

flexibility to create their 111(d) plans—and to consider source specific factors when doing so.

The D.C. Circuit's opinion, basically ratifying the CPP, fails to meet these basic requirements. Unlike in *Alaska v. EPA*, where EPA openly acknowledged it did not have the authority to mandate any particular BACT outcome at the initial decision stage that was reserved to States, under the CPP, EPA *mandated* a hard CO2lb/MWh standard of performance across the entire generation sector, which entirely foreclosed the States from applying their own expertise to their Section 111(d) plans. The D.C. Circuit's decision upholding this jurisdictional overreach thus grants EPA the authority, through its "guidelines," to mandate exactly how a State's 111(d) plan will read before it is written—a result that is in conflict with the Court's decision in *Alaska v. EPA*.

This is not to say that States have unfettered authority or discretion. States must use EPA's guidelines (*i.e.*, the BSER) in setting their Section 111(d) plans, and EPA then retains the authority to review the States' plans. *Cf. Alaska*, 540 U.S. at 482. However, the BSER upon which the States rely must be one that EPA is statutorily authorized to promulgate under Section 111(d) (*i.e.*, guidance for control measures that can be applied at the source, not a binding mandate for the energy sector as a whole, divorced from sources of emissions). Further, EPA's BSER guidelines cannot be transformed into mandates that extinguish the States' authority to establish performance standards through their Section 111(d) plans.

The conflict between the decision below and both the CAA text and the prior decisions of this Court provide a sufficient and compelling justification for review.[2]

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[2] The conflict created by the D.C. Circuit's decision below is by no means limited to this Court's decisions but also conflicts with earlier decisions of that court as well. For example, in *American Corn Growers Ass'n v. EPA*, 291 F.3d 1 (D.C. Cir. 2002), EPA had promulgated a rule requiring the States to consider best available retrofit technology ("BART") factors on a group, rather than on an individual source-by-source, basis. *See* 291 F.3d at 6. The D.C. Circuit invalidated the rule, holding that it was "inconsistent with the CAA's provisions giving the states broad authority over BART determinations." *Id.* at 8. By dictating that the States make BART determinations in a particular manner, the EPA had impermissibly "constrain[ed] authority Congress conferred on the states." *Id*. at 9.

Similarly, in *Virginia v. EPA*, 108 F.3d 1397 (D.C. Cir.), *modified on other grounds*, 116 F.3d 499 (1997), the D.C. Circuit invalidated an EPA regulation requiring certain States to adopt particular motor vehicle emissions standards. Relying on this Court's decision in *Train*, the D.C. Circuit held that "Congress did not give EPA authority to choose the control measures or mix of measures states would put in their implementation plans." *Id.* at 1410.

The same is true here. The CAA gives the States the first crack at creating their Section 111(d) plans for existing sources, and mandates that States be able to consider source-specific factors. By mandating an outcome in the CPP instead of letting the States develop a Section 111(d) plan, EPA plainly "infringe[d] on [the State's] authority under the [CAA]." *American Corn Growers Ass'n*, 291 F.3d at 9. The D.C. Circuit's decision sanctioning that result cannot be reconciled with its prior decision in *American Corn Growers* and *Virginia*. Indeed, the D.C. Circuit decision below never mentions those opinions, let alone attempts to reconcile them.

II. The D.C. Circuit's Decision Conflicts with this Court's Major Question Doctrine and Clear Statement Rulings.

The D.C. Circuit held below that EPA's generation shifting approach in the CPP did not implicate the major-question doctrine because the CPP "was aimed not at regulating the grid, but squarely and solely at controlling air pollution." App. 104-105. This conclusion is wrong factually and is legally inconsistent with this Court's decision in *UARG*.

Factually, EPA admitted that its goal in the CPP was to take a grid level approach to shift generation from coal fired generation sources to gas and other renewable generation sources. CPP, 80 Fed. Reg. at 64,728/3 (noting EPA was targeting "generation shifting from higher-emitting to lower-emitting EGUs as a component of the BSER."). Judge Walker correctly characterized the CPP in his dissent as "one of the most consequential rules ever proposed by an administrative agency." App. 183. Judge Walker noted that the CPP would have "aspired to reduce that industry's carbon emissions by 32 percent—'equal to the annual emissions from more than 166 million cars.'" *Id.* at 184. He noted that industry experts predicted wholesale electricity's cost to rise by $214 billion, with the cost to replace shuttered plants at another $64 billion. *Id.* at 184-185.

As noted earlier in this Petition, the effects of that change of policy would have been drastic for North Dakota, requiring it to reduce its CO2 emission rate by 44.9%, more than all but two other states. *See* App. at

246. EPA's own modelling confirmed that the CPP would have required North Dakota to close or curtail production at multiple coal fired electric generating facilities and coal mines in the state (*id.* at 249-252), the development of which resources have been deemed by North Dakota's legislature to be an essential government function, and public purpose, to maintain and enhance the economic and general welfare of North Dakota. N.D. CENT. CODE § 54-17.5-01. It is clear that the CPP's hard CO2 lb/MWh BSER equated to a mandated standard of performance, and left *no choice* to North Dakota (or other States) of how to meet the CPP's BSER requirements in their Section 111(d) plans. Instead, the "standard of performance" was already mandated by EPA in a hard CO2 lb/MWh requirement. Under the CPP States were deprived of the longstanding and statutorily-mandated discretion afforded by Section 111(d) of the CAA, and were not "permit[ted]" to apply the CPP's BSER to set standards of performance applicable "to any particular source" by "tak[ing] into consideration, among other factors, the remaining useful life of the source." 42 U.S.C. § 7411(d)(1).

This Court has long held that it is a "well-established principle that 'it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides' the 'usual constitutional balance of federal and state powers.'" *Bond v. United States*, 572 U.S. 844, 858 (2014). The Court requires a "clear statement" from Congress that it meant to

extend vague federal statutes into areas of "traditional state responsibility." *Id.*

This Court has checked EPA when it "discover[ed] in a long-extant statute an unheralded power to regulate" a significant portion of the economy. *UARG*, 573 U.S. at 324. In *UARG*, EPA reversed longstanding regulatory practice by announcing it was reworking its PSD program and Title V programs, which were designed to and historically regulated a relatively small number of large industrial sources, by requiring that the program include all sources of GHGs above a certain low threshold point. *Id.* at 312. The EPA argued that the "general, [CAA]-wide definition of 'air pollutant' includes greenhouse gases; the Act requires permits for major emitters of 'any air pollutant'; therefore, the Act requires permits for major emitters of greenhouse gases." *Id.* at 316.

This Court rejected EPA's attempt to drastically alter its prior readings of the CAA, noting that EPA's newfound interpretation threatened to "overthrow" the "structure and design" of the PSD and Title V programs as enacted by Congress. *Id.* at 321. The Court pointed to the extremely significant implications of EPA's new interpretation, noting that "the number of sources required to have [Title V] permits would jump from fewer than 15,000 to about 6.1 million; annual administrative costs would balloon from $62 million to $21 billion; and collectively the newly covered sources would face permitting costs of $147 billion." *Id.* at 322. Rejecting the EPA's bid for more regulatory power, the Court required that Congress must "speak clearly if it

wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* at 323-324.

The D.C. Circuit's opinion works the same result here by upending how States regulate existing sources under Section 111(d), and negates the States' codified right to apply the BSER to set "standards of performance" for existing sources. The D.C. Circuit stated that the CPP "serve[d] only as the basis for EPA to set the emission-reduction targets in its quantitative guidelines," and that "[t]he States retain the choice of how to meet those guidelines through standards of performance tailored to their various sources." App. 97. However, the D.C. Circuit did not expound upon how States had any flexibility to apply a hard CO2 lb/MWh "guideline" when setting a standard of performance, and logic would dictate that a hard emission limit is not a guideline but rather a mandate.

Even assuming the BSER set in the CPP allowed States some, if miniscule, flexibility in creating Section 111(d) plans, the D.C. Circuit's opinion failed to address how the never-before-applied "generation shifting" approach of the CPP was not an "overthrow" of the longstanding "structure and design" of Section 111(d). *UARG*, 573 U.S. at 321. Instead, the D.C. Circuit dismissed such concerns by noting that "EPA's consideration of already-in-use generation shifting as part of the 'best system of emission reduction' does nothing to enlarge the Agency's regulatory domain." App. 108-109. The D.C. Circuit suggested that generation shifting was already employed under Section 111(d) because "*[a]ny* regulation of power plants—even the most

conventional, at-the-source controls—may cause a relative increase in the cost of doing business for particular plants but not others, with some generation-shifting effect." App. 105 (emphasis in original).

The D.C. Circuit's erroneous logic cannot stand. While any regulation of air emissions, including "at-the-source controls," may cause regulated entities to "shift" generation elsewhere, "at-the-source controls" are not grid-wide generation shifting mechanisms. Instead, "at-the-source controls" are mechanisms consistent with Section 111(d)'s structure whereby the States are mandated the ability to apply EPA's BSER to set their own "standards of performance" that can be applied "to any particular source." 42 U.S.C. § 7411. The D.C. Circuit's opinion vested in EPA the inverse authority—the ability to mandate grid-level changes through hard qualitative BSER "guidelines" that equated to standards of performance. The D.C. Circuit's conclusion (and the CPP) thus implicated "decisions of vast 'economic and political significance'" requiring a clear statement from Congress. *UARG*, 573 U.S. at 323-324. No such statement can be found in Section 111(d).

III. The Issues Raised by this Petition are of National Importance and Significance—As Already Recognized by this Court.

This Court seldom grants petitions for national stays of Agency rulemakings, and never before had done so prior to an initial review by a federal circuit.

However, after five separate applications were filed with this Court seeking to stay the CPP, including an application by this Petitioner, State of North Dakota, this Court granted the five stay applications without qualification on February 9, 2016. Implicit in the Court's grant of the stay applications was a recognition of both the national importance of the issues surrounding EPA's novel expansion of its authority in the CPP, and a likelihood that EPA had overstepped the bounds of its authority. *See Maryland v. King*, 567 U.S. at 1302 (to grant a stay the Court found there was: "(1) 'a reasonable probability' that the Court w[ould] grant certiorari, (2) 'a fair prospect' that the Court w[ould] then reverse the decision below, and (3) 'a likelihood that irreparable harm [will] result from the denial of a stay.' ").

Now, over 5 years after the Court stayed the CPP, the same issues raised in those original stay applications still need full and final resolution—specifically, what are the limits of EPA's regulatory authority under Section 111(d)? Unless that question is addressed by the Court, EPA will seize upon the broad and expansive license given to it by the D.C. Circuit's opinion.[3] Then, EPA's new regulatory acts will be challenged yet again, and this process will begin anew.

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[3] When this Court rejected EPA's justification for its Mercury Air Toxics Standards in *Michigan v. EPA*, 576 U.S. 743 (2015), EPA Administrator Gina McCarthy famously boasted that because of the time it took to litigate the rule "the majority of power plants are already in compliance or well on their way to compliance" and investments have been made before judicial review

Only this Court can resolve EPA's authority to regulate existing sources under Section 111(d). Further delay will result in additional litigation and stay applications before this Court, likely over several years. The Court should take this opportunity to resolve EPA's statutory authority under Section 111(d) now, and provide the nation a final resolution.

The conflicts between the D.C. Circuit's decision below, the text of Section 111(d), and this Court's rulings alone are sufficient to warrant certiorari. However, even without these conflicts, the CAA's repeated emphasis on cooperative federalism highlights the important and recurring nature of the question presented.

A State's authority to set its own Section 111(d) plan for regulating emissions from existing sources, as the CAA text requires, is key to the cooperative federalism enshrined in the CAA, and specifically Section 111(d). Congress' decision to reserve the authority for creating the initial Section 111(d) plan to the States makes sense, as it is the States—not the EPA—that are most sensitive to particular local needs and

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could occur. Janet McCabe, In Perspective: the Supreme Court's Mercury and Air Toxics Rule Decision, EPA CONNECT (June 30, 2015), https://blog.epa.gov/blog/2015/06/in-perspective-the-supreme-courtsmercury-and-air-toxics-rule-decision/. McCarthy reported, "we're still going to get at the toxic pollution from these facilities" regardless of this Court's ruling. Timothy Cama & Lydia Wheeler, Supreme Court overturns landmark EPA air pollution rule, THE HILL (June 29, 2015, 10:38 AM), http://thehill.com/policy/energy-environment/246423-supreme-courtoverturns-epa-air-pollution-rule.

concerns. The CAA's mandate that States be afforded the opportunity to consider source specific factors such as the remaining useful life of the source highlights the importance of local considerations. For instance, only North Dakota is adequately positioned to take into account the requisite BSER established by EPA in light of the significant lignite coal generation mix present in the State in creating a compliance plan. EPA is not adequately positioned to balance the jobs at risk (through the closure of both coal generators and coal mines), increased energy costs for North Dakota's citizens, and cleaner air potential on the ground in North Dakota. This is exactly why Congress required that EPA allow source-specific considerations in Section 111(d) plans, and left those considerations to the States.

In the CPP, EPA, far removed from the realities of the energy infrastructure in North Dakota, felt that it could brush aside the textual constraints of Section 111(d) and instead mandate that North Dakota, like other States, engage in a generation shifting approach whereby they were forced to close certain coal-fired electric generating facilities in favor of generation sources EPA preferred. The D.C. Circuit's decision below holding that this approach was not precluded by the text of Section 111(d) therefore grants EPA broad license to dictate a Section 111(d) plan to the States and "assume control" of the States' "developing policy choices as to the most practicable and desirable methods of restricting total emissions to a level consistent

with" the limitations set out in the Act. *Train*, 421 U.S. at 80.

Further, the reach of the D.C. Circuit's decision goes beyond just the generation sector, and could drastically affect all other existing sources. EPA has already shown its hand by identifying many other key categories of existing sources it is targeting for future Section 111(d) regulation including industrial oil operations; petroleum systems; oil and gas wells; iron, cement, and petrochemical production; and many residential existing sources. *Inventory of U.S. Greenhouse Gas Emissions & Sinks*: 1990-2019, at 1-17 to 1-20 (Apr. 2021) (available at https://www.epa.gov/ghgemissions/inventory-us-greenhouse-gas-emissions-and-sinks-1990-2019). With the D.C. Circuit's new license to EPA, North Dakota's sovereign right to create Section 111(d) plans for all of these sources is at risk.

The D.C. Circuit's decision also has larger and far-reaching implications for other CAA provisions, threatening the ability of the States to make numerous similar kinds of discretionary decisions. For example, the CAA authorizes the States to determine the BART for particular sources by weighing various statutory factors. *See* 42 U.S.C. § 7491(b)(2)(A); *id.* § 7491(g)(2). The CAA also authorizes the States, in consultation with the EPA, to exclude from the definition of "small business stationary sources" under the CAA's operating permit provisions any category of sources that "the State determines to have sufficient technical and financial capabilities to meet the requirements of [the CAA]." *Id.* § 7661f(c)(3)(B). In non-attainment areas,

the CAA authorizes the States to determine the lowest achievable emissions rate ("LAER") for new and modified major stationary sources. *See id.* §§ 7501(3), 7503(a)(2). Under the D.C. Circuit's flawed reasoning, EPA would be free to override these sorts of determinations simply by setting rigid guidelines that mandate outcomes and fail to allow for States to make source-specific considerations. When a federal statute is based on "a program of cooperative federalism," there is "nothing 'cooperative' about a federal program that compels State agencies to either function as bureaucratic puppets of the Federal Government or abandon regulation of an entire field traditionally reserved to state authority." *FERC v. Mississippi*, 456 U.S. 742, 768 n.30 (1982) (O'Connor, concurring in part and dissenting in part).

Further, the principles of cooperative federalism are not limited to the CAA, but are present in many other federal statutes. If the D.C. Circuit's decision is allowed to stand, those statutes are also at risk of being undermined. For example, in *New York v. United States*, this Court acknowledged the "numerous federal statutory schemes" implicating cooperative federalism. 505 U.S. 144, 167-168 (1992) (noting the Clean Water Act "anticipates a partnership between the States and the Federal Government, animated by a shared objective," 33 U.S.C. §§ 1251 *et seq*., the Occupational Safety and Health Act, 29 U.S.C. §§ 651 *et seq*., the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.*, and the Alaska National

Interest Lands Conservation Act, 16 U.S.C. §§ 3101 *et seq*.).

Those statutes all create cooperative federalism expectations, whereby the federal government sets standards and the States—if they opt to undertake the responsibility—are given the first go at implementing the standards by taking into account local considerations. Such programs "offer States the choice of regulating activity according to federal standards," consistent with cooperative federalism principles whereby "state governments remain responsive to the local electorate's preferences; state officials remain accountable to the people." *New York v. United States*, 505 U.S. at 167-168. The D.C. Circuit's decision instead strips the States' statutory authority to create Section 111(d) plans and wrongly gifts that authority to the EPA, and thus threatens to undermine the balance of federal-state power struck by Congress in the CAA. This Court should not allow a decision with such wide-reaching implications to stand unreviewed.

CONCLUSION

For the foregoing reasons, North Dakota's petition for a writ of certiorari should be granted, and the judgment below reversed.

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