

No. 20-1530 (Consolidated Case  
Nos. 20-1531, 20-1780, 20-1778)

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**In The  
Supreme Court of the United States**

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STATE OF NORTH DAKOTA

*Petitioner,*

v.

UNITED STATES ENVIRONMENTAL  
PROTECTION AGENCY, ET AL.,

*Respondents.*

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

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**REPLY BRIEF OF THE  
STATE OF NORTH DAKOTA**

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**QUESTION PRESENTED**

Section 111(d) of the Clean Air Act (“CAA”), 42 U.S. Code § 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?

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**SUMMARY OF REPLY ARGUMENT**

This Court is presented with a justiciable question of statutory interpretation: Whether the D.C. Circuit erroneously interpreted the limits of U.S. Environmental Protection Agency’s (“EPA”) authority under Section 111 of the Clean Air Act, 42 U.S.C. § 7411, and thus improperly vacated the *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 “Affordable Clean Energy Rule” or “ACE Rule”), JA.1729-2030.

The D.C. Circuit wrongly vacated the ACE Rule, which North Dakota supports and seeks to reinstate in this action. North Dakota was harmed by the wrongful vacatur of the ACE Rule, which established a lawful framework for the State and EPA to cooperatively and jointly regulate greenhouse gas emissions from existing power plants. Just as North Dakota had standing to intervene and support affirmation of the ACE Rule in the D.C. Circuit, North Dakota continues to have that standing now as it seeks to reinstate the ACE Rule that was wrongly vacated. The D.C. Circuit’s decision deprived North Dakota of the regulatory framework in the ACE Rule by which North Dakota could regulate greenhouse gas emissions from existing power plants.

This is a justiciable matter in which North Dakota seeks specific relief: the reinstatement of the duly

promulgated ACE Rule. North Dakota is not seeking an advisory opinion to guide some potential future EPA rulemaking.

The Court should reject Respondents' theory that the D.C. Circuit's wrongful vacatur is of no legal consequence and cannot be challenged because EPA now prefers that the ACE Rule was never promulgated in the first place. Challenging the wrongful vacatur of lawfully promulgated rules is not the sole privilege of the promulgating agency. EPA cannot effectuate a "pocket repeal" of the ACE Rule by attempting to prohibit other parties with an interest in the Rule from challenging the D.C. Circuit's wrongful vacatur. Should EPA wish to repeal the ACE Rule it may avail itself of the public notice and comment procedures under the Administrative Procedure Act ("APA") and CAA to do so; but it should not be allowed to rely solely on a wrongly granted vacatur that it then claims no one else can challenge.

Turning to the merits, North Dakota reiterates its position, not seriously contested by any of the Respondents, that a plain reading of the CAA gives the States the lead authority to establish performance standards for controlling air emissions from existing sources, based on guidance established by EPA. The ACE Rule established a regulatory framework that respected the cooperative federalism framework mandated by Congress.

North Dakota respectfully requests that this Court confirm the delicate balance of cooperative

federalism established by Congress in Section 111 of the CAA that gives the States the primary role establishing standards of performance for existing sources of air emissions, vacate the D.C. Circuit’s opinion below, and reinstate the ACE Rule.



### **REPLY ARGUMENT**

The relief North Dakota seeks in this case is (1) the reversal of the Court of Appeals’ decision below, and (2) the reinstatement of the ACE rule wrongly vacated by the decision below.

North Dakota has standing to seek a reinstatement of the ACE Rule, just as the non-federal Respondents had standing to seek the D.C. Circuit’s vacatur of that same rule. North Dakota did not lose its standing by dint of the D.C. Circuit’s erroneous vacatur of the ACE Rule—instead it was that erroneous vacatur that solidified North Dakota’s standing.

North Dakota has significant and legally cognizable interests that were affected by the ACE Rule and injured by the vacatur of the ACE Rule. North Dakota is a major energy producing state. North Dakota’s energy production comes from several different types of “fossil fuels” (lignite coal, oil, and natural gas) as well as several types of “renewable energy” (wind, solar, hydropower, and biofuels). A significant portion of North Dakota’s electricity is generated by power plants that emit greenhouse gas emissions, the specific target of both the CPP and ACE Rules. North Dakota has

fundamental sovereign interests in regulating its natural resources and their development and use, and the control of emissions from existing power plants, exercised by North Dakota through the authority and discretion established by Congress in Section 111(d) of the CAA. 42 U.S.C. § 7411(d). North Dakota has sought to protect its statutorily mandated role in CAA Section 111(d) to regulate greenhouse gas emissions from existing power plants throughout the ACE Rule rule-making process, including seeking and obtaining a nationwide stay of the precursor rule to the ACE Rule, the *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”) from this Court and supporting the ACE Rule.

North Dakota supported the ACE Rule, which both rescinded the CPP and established the new ACE Rule recognizing the States’ statutorily mandated role under CAA Section 111(d), including the responsibility to establish and enforce standards of performance for existing sources of air pollution, applying the States’ expertise in source-specific considerations and factors to control such emissions. The ACE Rule would have allowed North Dakota to move forward with the regulation of greenhouse gas emissions from existing power plants in a manner consistent with the cooperative federalism mandate established by Congress. The wrongful vacatur of the ACE Rule harmed these sovereign North Dakota interests.

This is also a justiciable case and controversy in which North Dakota seeks specific relief: reinstatement of the ACE Rule. North Dakota does not seek an advisory opinion. Respondents' attempt to deprive North Dakota of its right to judicial review simply because the Respondents agree with the decision below should be rejected. If Respondents' arguments were accepted, the federal agency that promulgated a later vacated rule would be the sole and privileged gatekeeper to decide whether such a vacated rule could be reviewed by this Court. The D.C. Circuit's erroneous vacatur of the ACE Rule is a justiciable case and controversy in which North Dakota seeks, and this Court may provide, specific, not advisory, relief.

Deciding this case now is wholly within the permissible authority of this Court "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). Recognizing the "unremarkable proposition that an agency may adopt policies to prioritize its expenditures *within the bounds established by Congress*," the Court should vacate the decision below and reinstate the ACE Rule, and not stand by while EPA "embarks on this multi-year voyage of discovery" in promulgating new rules based on the D.C. Circuit's erroneous decision vacating the ACE Rule and granting EPA massive new authority "without regard for the thresholds prescribed by Congress" in Section 111(d). *Utility Air Regulatory Group v. EPA*, 573 U.S. 302, 327-328 (2014) (emphasis in original).

**I. NORTH DAKOTA IS INJURED BY THE D.C. CIRCUIT’S VACATUR OF THE ACE RULE AND THAT DECISION PRESENTS A CASE AND CONTROVERSY FOR THIS COURT’S REVIEW**

Federal courts only adjudicate “cases” or “controversies” in which parties demonstrate a “personal stake” in the suit. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The party invoking the Court’s jurisdiction must satisfy three conditions: that he has “suffered an injury in fact” that was caused by “the conduct complained of” and that “will be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561 (1992).

In *Massachusetts v. EPA*, this Court expanded *Lujan* and recognized that a State’s “stake in protecting its quasi-sovereign interest . . . is entitled to special solicitude in our standing analysis.” 549 U.S. 497, 520 (2007). Just as in *Massachusetts v. EPA*, North Dakota has a vested interest in the sovereign authority that “Congress has ordered EPA to protect” in the CAA by giving North Dakota responsibility to establish performance standards, including the autonomy to apply source specific considerations to 111(d) determinations. *Id.* at 519. North Dakota also has a specific interest in the regulation of greenhouse gas emissions from existing power plants in the State.

The Federal Respondent’s argument that North Dakota would “derive no practical benefit from the [ACE] Rule’s reinstatement” and that North Dakota

has “no concrete interest” in reinstating the ACE Rule misses the mark. Br. for the Fed. Respondent’s, at 17.

North Dakota has a concrete interest in the reinstatement of the ACE Rule that created a lawful framework for the regulation of greenhouse gas emissions in the State, and in the repeal of the CPP rule that would have injured North Dakota and its citizens. Vacating the ACE Rule injured North Dakota by removing the regulatory framework by which North Dakota could regulate existing sources. This is not some future injury or one based on speculative actions EPA may take in the future. The injury is present now, as the D.C. Circuit’s vacatur of the ACE Rule harms North Dakota, which has a sovereign interest in a lawful regulatory framework for regulating greenhouse gas emissions.<sup>1</sup>

North Dakota regulates air emissions from existing fossil-fueled electric power generation, a central method of electric power generation in North Dakota. The vacated ACE Rule created a lawful framework to allow North Dakota and EPA to cooperatively regulate the greenhouse gas emissions from North Dakota’s power plants. The ACE Rule benefited North Dakota by rescinding the unlawful CPP and replacing it with a rule in line with the authority granted to EPA and

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<sup>1</sup> For the same reasons, the Non-Governmental and Trade Association Respondents’ (“NGO Respondents”) argument that North Dakota is only seeking standing based on injury North Dakota would experience under the CPP is misplaced, as North Dakota’s injury is based on the D.C. Circuit’s improper vacatur of the ACE Rule. NGO Respondents Br., at 27-29.

the States by Congress. The decision to vacate the ACE Rule harmed North Dakota by removing the benefits of the ACE Rule, including the lawful framework for regulating greenhouse gas emissions now.

Respondents mischaracterize North Dakota's interests in this matter and the federal-state cooperative framework of the CAA by suggesting that the absence of, or at least a delay in, Federal regulation does not injure North Dakota. North Dakota is not a "regulated entity" that suffers no injury or benefits if the ACE Rule no longer "applies." Rather, North Dakota is a sovereign State with rights and duties under its own Constitution, statutes and regulations, and as EPA's *partner* in the cooperative federalism framework established by Congress under the CAA, to control air emissions to protect public health and the environment. It also has an interest in doing so lawfully. The improper vacatur of the ACE Rule, which eliminated the lawful cooperative federal-state framework for regulating greenhouse gas emissions from power plants, created a regulatory void in the cooperative federalism framework that harmed North Dakota's ability to and interests in the lawful regulation of greenhouse gases from existing power plants. North Dakota supported the ACE Rule because the ACE Rule benefited North Dakota in its role as a sovereign regulator, and the vacatur of the ACE Rule harmed those interests.

It was to protect these sovereign interests that North Dakota supported the ACE Rule during the rulemaking process. Until now, no court or party has ever suggested that North Dakota, as a major fossil-

fuel energy producing and generating State with the authority and duty to regulate air emissions, did not have standing to support the repeal of the CPP and the promulgation of the replacement ACE Rule. North Dakota indisputably had standing at the D.C. Circuit: it had a “personal stake” in the matter that would be injured if there was an adverse decision, and North Dakota’s concerns would be redressed by a favorable decision. Now that decision has come to pass, and it was not favorable: the “personal stake” that North Dakota sought to protect was instead injured. North Dakota is therefore “asking for typical appellate relief”—that this Court “reverse” the decision below and “undo what it has done.” *Chafin v. Chafin*, 568 U.S. 165, 173 (2013)

North Dakota did not lose its standing when the ACE Rule was vacated. Respondents are suggesting a one-way street: reinstating the ACE Rule would harm the opponents of the rule, but vacating the ACE Rule does not harm the proponents of the rule. Similarly, the Federal Respondents’ decision to no longer support the ACE Rule does not adversely affect North Dakota’s standing. North Dakota’s rights to protect its interests in Federal courts are not dependent on the shifting of the political winds. North Dakota’s “personal stake” in the protection of its CAA implementation authorities and the regulation of greenhouse gas emissions from power plants remain unchanged regardless of the views of EPA. Respondents position that North Dakota no longer has standing because EPA no longer supports the ACE Rule should be rejected (if EPA was

challenging the D.C. Circuit’s vacatur of the ACE Rule, it is highly unlikely that they would be claiming that North Dakota has no standing).

Just as in *Massachusetts v. EPA*, North Dakota has a “well-founded desire to preserve its sovereign” authority to regulate existing sources within its borders through reinstatement of the ACE Rule. 549 U.S. at 519. The D.C. Circuit’s decision to vacate the ACE Rule undid that Rule’s recognition of Congress’ carefully crafted balance in Section 111, causing a harm that is both “actual” and “imminent” to North Dakota by vacating the regulatory framework under which North Dakota could have exercised its sovereignty to regulate existing sources. *Id.* at 521 (citing to *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

To conclude otherwise would be antithetical to the longstanding judicial review provisions of the APA and the CAA, and the Court’s own past practice of reviewing decisions deciding the bounds of agency rulemaking authority. *See, e.g., EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 506 (2014) (The Court granting certiorari to “decide whether the D.C. Circuit had accurately construed the limits the CAA places on EPA’s authority” where the D.C. Circuit vacated EPA’s “Transport Rule.”); *Michigan v. EPA*, 576 U.S. 743 (2015) (The Court granting certiorari to determine whether the D.C. Circuit’s upholding of EPA’s decision to refuse to consider costs in deciding that regulation of coal- and oil-fired power plants was appropriate and necessary under the CAA.).

Indeed, in *EPA v. EME Homer City Generation, L.P.*, individual States comprised both petitioner and respondent groups in support of, and opposed to, the vacated Transport Rule, and the Court did not question the standing of any of the parties. The same was true in *Michigan v. EPA*, where individual States were aligned both in support of, and opposition to, the D.C. Circuit's decision. The same principles apply here, and North Dakota has standing to challenge the D.C. Circuit's vacatur of the ACE Rule, which North Dakota desires be reinstated.

Federal Respondent's motion to "withhold issuance of the mandate with respect to the vacatur of the Clean Power Plan Repeal Rule until the EPA responds to the court's remand in a new rulemaking action" does not change this conclusion. JA.270-271. The fact that the repeal of the CPP will not become effective if and until EPA promulgates a new rule is irrelevant to North Dakota's challenge to the D.C. Circuit's *vacatur* of the ACE Rule. North Dakota's request for relief is to reinstate the vacated ACE Rule, a portion of the D.C. Circuit's mandate that has not been stayed.

North Dakota has been injured by the improper vacatur of the ACE Rule. The Court can redress that injury by vacating the D.C. Circuit's opinion, and reinstating the ACE Rule.

## II. THE D.C. CIRCUIT'S DECISION PRESENTS A JUSTICIABLE ISSUE ON THE VACATUR OF THE ACE RULE.

The D.C. Circuit's vacatur of the ACE Rule presents a justiciable case and controversy for the Court to properly review, and North Dakota is not seeking an advisory opinion.

The D.C. Circuit vacated the ACE Rule by expressly expanding the bounds of EPA's authority under Section 111(d) beyond what was authorized by Congress at the expense of the States' statutorily proscribed authority and discretion. The D.C. Circuit misread the plain text of Section 111(d) and its decision is contrary to the Court's prior decisions enforcing the bounds of the cooperative federalism established by the CAA. *See* North Dakota Merits Br., at 29-56 Relying on those grievous errors in statutory interpretation and departure from this Court's jurisprudence, the D.C. Circuit improperly vacated the ACE Rule. It is precisely these holdings and outcomes that North Dakota contends were in error and were the basis for North Dakota's petition for certiorari to this Court, not for speculative advisory purposes but to expressly reverse the decision below and reinstate the ACE Rule. *See* North Dakota's Petition, at 39.

Section 111(d) embodies the fundamental cooperative federalism structure of the CAA by requiring that regulations promulgated by the EPA targeting existing generation sources 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 “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). The D.C. Circuit’s decision vacating the ACE Rule extinguished North Dakota’s statutorily mandated State role in Section 111(d) to establish standards of performance in its State plan to regulate existing sources in a cooperative federalism framework alongside EPA.

None of the Respondents claimed in the D.C. Circuit that EPA’s interpretation of its authority under Section 111(d) in the ACE Rule presented non-justiciable issues or that the Rule’s proponents were seeking an advisory opinion. Neither did Respondents claim that EPA’s actions in promulgating the ACE Rule were somehow immune from judicial review. *See Bowen v. Mich. Academy of Family Physicians*, 476 U.S. 667, 672 (1986) (holding that judicial review of an agency’s regulatory authority is presumed valid absent Congress specifically legislating to the contrary).

The Respondents who challenged the ACE Rule under the judicial review provision of the CAA, 42 U.S.C. § 7607 now claim that such review is unavailable to Petitioners. *See, e.g., American Lung Assoc. et al. v. EPA et al.*, 19-1140 (D.C. Cir.), Petition for Review

(Document No. 1796317).<sup>2</sup> To now claim that the Court's review of a decision vacating the ACE Rule would be advisory, in the same proceedings where the Respondents exercised their right of judicial review to challenge the ACE Rule, is disingenuous.

That EPA has since indicated it may pursue a new rulemaking to replace both the ACE Rule and the CPP, and that no current Section 111 rule regulating greenhouse gas emissions from power plants is in effect after the D.C. Circuit's vacatur and stay order, does not render the decision below unreviewable. *See* Federal Respondents Br., at 16-18; State and Municipal Respondents Br., at 42-45; Power Company Respondents Br., at 21-24; NGO Respondents Br., at 23-42. The Executive Branch's announcements cannot deprive this Court of its jurisdiction or authority or deprive Petitioner of its rights of judicial review. "The judicial Power extends to cases arising under . . . the Laws of the United States, Art. III, § 2, cl. 1, and a court properly asked to construe a law has the constitutional power to determine whether the law exists." *United States National Bank v. Independent Insurance Agents of America, Inc.*, 508 U.S. 439, 446 (1993) (quoting *Cohens v. Virginia*, 19 U.S. 264, 406 (1821) (internal quotations omitted)).

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<sup>2</sup> With the exception of Federal Respondents, who defended EPA's authority to promulgate the ACE Rule in front of the D.C. Circuit (and never questioned standing or justiciability), but who now claim that North Dakota's standing and the justiciability of this case was extinguished by the D.C. Circuit's decision to vacate EPA's own ACE Rule.

North Dakota has challenged the D.C. Circuit's decision because it wrongly vacated the ACE Rule which established a lawful framework for regulating greenhouse gas emissions from power plants. That decision was based on an incorrect interpretation of the CAA that deprived States of their express authority and responsibility to establish performance standards through State plans, and bestowed authority on EPA not granted to it by Congress and "valuable legal rights . . . [will] be directly affected to a specific and substantial degree by a decision on whether" the ACE Rule "was proper and lawful." *Id.* (internal quotations omitted). For North Dakota, charged by its own laws and the Clean Air Act to regulate air emissions from existing sources, the D.C. Circuit's decision was anything but "hypothetical." *Id.* at 447. Instead, this case, as in *United States National Bank*, is a controversy which "depend[s] on the validity of [the ACE Rule], that would be a case arising under the constitution, to which the judicial power of the United States" extends. *Id.* at 446-447. Further, the fact that the ACE Rule does not for the moment apply is precisely the matter for which North Dakota seeks redress. There is nothing "hypothetical" about the decision below or the relief sought by North Dakota: the D.C. Circuit erroneously vacated the ACE Rule dealing with a subject matter that all parties agree is of great national significance and North Dakota is petitioning the Court to reinstate it.

That the opinion below vacated the ACE Rule does not change this conclusion. It is fully within the Court's

authority to reverse the D.C. Circuit’s decision and reinstate the ACE Rule. For example, in *FERC v. Elec. Power Supply Ass’n*, the D.C. Circuit vacated a FERC rule, holding that FERC “lacked authority” to issue the rule. 577 U.S. 260, 275 (2016). This Court granted certiorari to “decide whether [FERC] ha[d] statutory authority” to issue the rule, and ultimately held that FERC did have that authority and reversed the D.C. Circuit’s decision vacating the FERC Rule. *Id.* at 276; see also *National Cable Telecom. Assn. v. Brand X Internet Services*, 545 U.S. 967, 980 (2005) (This Court granting certiorari to review a Ninth Circuit decision vacating portions of an FCC rulemaking in order “to settle the important questions of federal law that these cases present,” and ultimately reversing the D.C. Circuit’s decision.).

The Supreme Court’s jurisdiction to review agency actions is not limited to cases in which the courts below affirmed the agency rule. Nor is the Court’s jurisdiction limited by changes in the promulgating agency’s position. The fact that EPA no longer supports the ACE Rule does not deprive North Dakota of standing, render the legal issues non-justiciable, or prevent this Court from reinstating the wrongly vacated ACE Rule.

If the Court reinstates the ACE Rule, EPA may choose to revise or replace that rule, in accordance with the substantive and procedural requirements of the CAA and the APA. Whatever EPA’s future plans may be, they do not deprive the Court of its jurisdiction today to review the decision below or its authority to reinstate the ACE Rule that was improvidently vacated.

Further, EPA's changed position or plans are not a legal basis for keeping the ACE Rule off the books. If, as North Dakota argues, the ACE Rule was incorrectly vacated by the D.C. Circuit, then the ACE Rule should be reinstated. EPA might later seek to revise a reinstated ACE Rule, so long as it adheres to the requirements of the CAA and complies with the public notice and comment procedures of the APA, including explaining and justifying any changes it might propose. What EPA cannot do is block any review of the D.C. Circuit decision and use the improperly granted vacatur as a "pocket repeal" of the ACE Rule accomplished without following the procedural requirements of the CAA and the APA.

Similarly, Respondents claims that North Dakota and other Petitioners are challenging the CPP miss the mark. North Dakota is not challenging the CPP. This Court stayed the CPP, it never went into effect, EPA repealed the CPP and, despite the D.C. Circuit's stay of the portion of its decision vacating the repeal the CPP, EPA has announced that it does not intend to re-promulgate the CPP. Respondents also ignore (as did the D.C. Circuit) the point that EPA's decision to repeal the CPP was a separate and distinct agency action from its decision to promulgate the ACE Rule. *See* ACE Rule, JA.1784-1785 ("the repeal of the CPP is a distinct final agency action that is not contingent upon the promulgation of ACE or the new implementing regulations."). So, the CPP is not at issue or being challenged in North Dakota's petition to seek reinstatement of the ACE Rule.

However, the D.C. Circuit relied extensively on the reasoning of the CPP, which had been stayed by this Court, to justify its vacatur of the ACE Rule. Further, the ACE Rule, which was promulgated separately but at the same time as the repeal of the CPP, corrected the errors of and replaced the CPP. Therefore, any discussion of the ACE Rule and the decision below cannot avoid discussion of the CPP. That unavoidable overlap does not transform North Dakota's petition to reinstate the ACE Rule into a challenge to the defunct CPP.

North Dakota is *not* bringing this Petition asking the Court to speculate or opine on or direct whatever future actions EPA might take. North Dakota is seeking the vacatur of the D.C. Circuit's decision and the reinstatement of the ACE Rule because the D.C. Circuit erroneously concluded that EPA had powers not granted to EPA by Congress in Section 111(d), and in doing so deprived North Dakota of its implementation and decision-making powers under Section 111(d) plans in violation of its sovereign authority established by Congress in the CAA. *See* North Dakota's Petition, at i (Question Presented).

Similarly, North Dakota is not bringing this case to argue about "measures that the [EPA] *might* adopt in its upcoming rulemaking" such as would constitute an advisory opinion. Federal Respondents Br., at 18-19; *see also* State and Municipal Respondent Br., at 46-47; Power Company Br., at 20; NGO Respondents Br., at 30-31. Instead, North Dakota is challenging the D.C. Circuit's decision to vacate the ACE Rule that

established a lawful federal-state framework for regulating greenhouse gas emissions from power plants.

### **III. THE NON-GOVERNMENTAL ORGANIZATION AND TRADE ASSOCIATION'S ARGUMENTS ARE MERITLESS.**

This case can be decided on the simple basis of statutory interpretation: the D.C. Circuit incorrectly vacated the ACE Rule because it erroneously interpreted the plain language of Section 111(d) of the CAA to effectively dismantle the federal-state cooperative framework established by Congress and eviscerate North Dakota's explicit authority to establish performance standards governing emissions of greenhouse gases from existing power plants.

The Non-Governmental Organization and Trade Association Respondents ("NGO Respondents") are the only Respondents to directly address North Dakota's merits arguments. The NGO Respondents do so only in the final closing pages of their merits brief, arguing first (and echoing the D.C. Circuit) that "EPA did not assert" as a ground for repealing the CPP the requirement that it is the States who set standards of performance for existing sources, and that the "court of appeals did not address" that grounds for the vacating ACE Rule. NGO Respondents Br., at 49-50.

This narrative is incorrect. The D.C. Circuit ignored large sections of EPA's explanation in the ACE Rule discussing that the CPP was inconsistent with the mandate of Section 111(d)(1) that the States have

the authority and right to make source-specific determinations in setting standards of performance. North Dakota Merits Br., at 32. Thus, the D.C. Circuit was plainly wrong when it concluded that EPA's sole ground for repealing the CPP and promulgating the ACE Rule was that "the text of Section 7411 is clear and unambiguous in constraining the EPA to use only improvements at and to existing sources in its best system of emission reduction." JA.103. This is clearly evidenced from the portion of the ACE Rule setting forth EPA's basis for the repeal, which NGO Respondents acknowledge is located at JA.1739-1786. There, EPA stated that "EPA's role under CAA section 111(d) is narrow. Indeed, CAA section 111(d) tasks states with 'establish[ing] standards of performance for any existing source' and 'provid[ing] for the implementation and enforcement of such standards of performance.'" JA.1743. EPA went on to state that Section 111(d) "requires further that the regulations the EPA is directed to adopt must permit the state 'to take into consideration, among other factors, the remaining useful life of the existing source to which such standard [of performance] applies.'" *Id.* That is because EPA's best system of emission reduction ("BSER") guidelines simply "provide states with information to assist them in developing state plans establishing standards of performance for existing designated facilities within their jurisdiction that are submitted to the EPA for review." *Id.* at 1744. Thus the D.C. Circuit's characterization of the basis for EPA's decision was materially incorrect.

The D.C. Circuit’s undue focus on EPA’s repeal of the CPP also contributed to its improper vacatur of the separately promulgated ACE Rule. The D.C. Circuit (and the NGO Respondents) improperly ignored EPA’s statement in the ACE Rule regarding the repeal of the CPP that “[a]lthough this action appears in the same document as the ACE Rule and the revisions to the emission guidelines implementing regulations, the repeal of the CPP is a distinct final agency action that is not contingent upon the promulgation of ACE or the new implementing regulations” (JA.1784-1785), and that the EPA repealed “the CPP as a separate action, distinct from its promulgation of the ACE Rule and revisions to its regulations implementing section 111(d)” (*Id.* at 1786). Thus the D.C. Circuit committed an additional material error by simply applying its already incorrect analysis of the repeal of the CPP to the separately promulgated ACE Rule.

Therefore, all of EPA’s justifications for promulgating the ACE Rule, including that it is the States who set standards of performance for existing sources, are relevant to the Court’s analysis of the D.C. Circuit’s basis for vacating the ACE Rule. *See, e.g.*, ACE Rule, at Section III (The Affordable Clean Energy Rule) JA.1786-2030. These include multiple references to Section 111(d)(1) and State plans, EPA’s obligation to allow States to take into account source-specific factors (including the useful life of facilities) when States set performance standards (JA.1798-99; 1812-13; 1822), and EPA’s conclusion that it was ultimately the State’s

responsibility to establish the performance standards (JA.1809, 1836, 1866, 1870).

The D.C. Circuit was wrong and EPA did not base its reasoning for promulgating the ACE Rule solely on the determination that Section 7411 constrains the EPA to consider only improvements at and to existing sources in establishing its BSER, but rather on much broader considerations, including that States are the authorized body under CAA Section 111(d) to set standards of performance for air emissions existing sources. EPA's reasons for promulgating the ACE Rule were not limited to the appropriate location of source controls, but also on the much broader premise that Section 111(d) directs EPA to establish BSER "guidelines" and that give the States flexibility in exercising the authority granted to them by Congress to establish performance standards that take site-specific factors into account. The D.C. Circuit's erroneous failure to consider EPA's express reliance on the State authority to support promulgation of the ACE Rule is properly before this Court.<sup>3</sup>

The Court should also reject the NGO Respondents' assertion that North Dakota's position would allow

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<sup>3</sup> Further, North Dakota argued in the D.C. Circuit that the ACE Rule corrected the CPP's overreach by returning to the States "matters traditionally reserved for States: 'administration of integrated resources planning and . . . utility generation and resource portfolios.'" Thus the issues and EPA reasoning that the D.C. Circuit ignored in its vacatur of the ACE Rule were also raised below by North Dakota. Final Core Legal Issues Brief of the State of North Dakota, at 14, Case No. 19-1140 (Doc. No. 1856454) (October 13, 2020).

States to set standards of performance “untethered from any federal requirements” (NGO Respondents Br., at 50) and that North Dakota seeks a “free pass” to “ignore federal emission limits broadly achievable by sources in a given category” (NGO Br., at 52). To the contrary, consistent with the federal-state cooperative federalism framework, North Dakota explicitly acknowledges that the standards of performance set by States must be based on “emission limitations that are achievable through the application” of the BSER which is established by EPA. North Dakota Merits Br., at 29 (citing to 42 U.S.C. 7411(a)(1)).

EPA’s BSER must be “adequately demonstrated” and take “into account the cost of achieving [emission reductions through the application of that system] and any nonair quality health and environmental impact and energy requirements.” 42 U.S.C. § 7411(a)(1). While EPA’s BSER cannot infringe on the State’s authority under Section 111(d)(1) to establish performance standards and to take into account source-specific factors, the States must apply the BSER guidelines to set an achievable “emission limitation” for existing sources. *Id.* at (a)(1). In addition to establishing the BSER (i.e., the practically achievable and affordable “guardrails” within which the States exercise their responsibility to establish standards of performance in State plans), EPA also has the opportunity to review and approve the State plans. Lastly, if a State declines to exercise its authority, then EPA may create a plan establishing performance standards for that State. But what EPA cannot do is use its limited BSER authority

to effectively eviscerate the States' authority to establish performance standards in State plans. North Dakota's position is consistent with the cooperative EPA-State partnership established by Congress in the CAA, pursuant to which neither EPA's nor the State's authority is unfettered.

NGO Respondents reject the cooperative federalism framework of the CAA and imply that any limitation on EPA's power, or any exercise of authority or discretion by the States, will result in chaotic "free rides" of unregulated emissions. However, the CAA did not grant EPA such unfettered and centralized power. States are constrained to apply EPA's BSER guidelines to set emission limitations for "any particular source," and to "take into consideration" source-specific factors such as "the remaining useful life of the existing source to which such standard applies." *Id.* at (d)(1). In turn, EPA's BSER guidelines must be capable of being applied so that State-established emission limitations can take source-specific considerations into account, and are achievable and affordable for existing sources. EPA's authority to establish BSER guidelines cannot be read to transform the BSER into centralized and nationally applicable performance standards that effectively eliminate the State's primary responsibility and authority to establish standards of performance for existing sources through State plans.

The NGO Respondents also cannot rely on *American Electric Power Co. v. Connecticut* ("AEP") as support for their incorrect proposition that State section

111(d) plans must “achieve EPA[‘s] emission standards.” NGO Br., at 51 (citing to *AEP*, 564 U.S. 410, 428). *AEP* stated 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.*” 564 U.S. 410, 424 (2011) (emphasis added). *AEP* does not support NGO Respondents’ effort to transform EPA’s BSER emission guidelines into binding national performance standards and reduce State plans to mere procedures to implement EPA’s diktats.

The D.C. Circuit failed to recognize and adhere to this Court’s direction in *AEP* that Section 111(d) restricts EPA to creating *guidelines* that apply to generation sources “within the same category,” which States then use to “issue performance standards” that can be applied to individual “stationary sources” within the States’ jurisdiction. *Id.* at 424.

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## CONCLUSION

For the foregoing reasons and the reasons set forth in North Dakota’s Merit’s Brief, the judgment below should be reversed, the D.C. Circuit’s decision vacating

the ACE Rule should be vacated, and the ACE Rule re-instated.

Respectfully submitted,

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