No. 20-1780

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

REPLY BRIEF OF PETITIONER STATE OF NORTH DAKOTA

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REPLY ARGUMENT

The relief North Dakota seeks in this case is (1) the reversal of the Court of Appeals' decision below, (2) the reinstatement of the U.S. Environmental Protection Agency's ("EPA") Clean Air Act ("CAA") rule improvidently vacated by the decision below, and (3) the affirmation of EPA's repeal of an earlier CAA rule that had been stayed by this Court. In seeking these specific and well-established forms of relief in the context of challenging agency rulemakings, North Dakota is not asking this Court to issue an "advisory opinion."

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). North Dakota has fundamental sovereign interests in regulating its natural resources and their development and use including the exercise of the States' specific authority and discretion established by Congress in Section 111(d) of the CAA. 42 U.S.C. § 7411(d). Ever since 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"), North Dakota has sought to protect its significant statutorily mandated role in CAA Section 111(d), including seeking and obtaining a nationwide stay of the CPP from this Court.

Also North Dakota supported 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 Reg. 32,520 (July 8, 2019) (the "ACE Rule"), which both rescinded the CPP and established a new rule recognizing the States' statutorily mandated role under CAA Section 111(d), including the responsibility to implement and enforce standards of performance for *existing* sources of air pollution, using the States' expertise in applying source-specific considerations and factors to controlling such emissions.

In response to North Dakota's Petition for Certiorari ("Petition") of the D.C. Circuit's decision below vacating the ACE Rule, the acting Solicitor General (along with all other Respondents and amici) argue that reviewing the D.C. Circuit's decision prior to EPA acting on that flawed decision would amount to an "advisory opinion." These arguments rely upon the misconception that this Court does not have the jurisdiction or authority to reverse the D.C. Circuit's vacatur of the ACE Rule, essentially arguing that Petitioners are deprived of their right of judicial review because the Respondents agree with the decision below. The relief sought by North Dakota, the reinstatement of the ACE Rule, is anything but advisory. Further, Respondents advance the fiction that the D.C. Circuit's flawed decision vacating the ACE Rule and granting EPA authority in conflict with the prior decisions of the Court does not harm North Dakota if and

until EPA acts on the broad license granted to it by the D.C. Circuit's decision. There is nothing credible to those arguments, as the D.C. Circuit's decision vacating the ACE Rule harms North Dakota's sovereign rights *now*.

Granting certiorari now to determine whether the ACE Rule should be reinstated is justiciable; otherwise, if Respondents' arguments were accepted, proponents of a vacated agency action could never seek review in this Court. The D.C. Circuit's decision effectively re-wrote the CAA, gifting EPA the authority to promulgate standards of performance for existing sources wholly divorced from Congress' express direction in Section 111(d) that States be afforded the ability to apply standards of performance to existing sources, at the source, with consideration of source-specific factors that the States are best situated to apply. The D.C. Circuit's improvident vacatur of the ACE Rule based on its re-writing of crucial provisions of the CAA are justiciable issues for which the Court may provide specific, not advisory, relief.

Granting North Dakota's Petition now is therefore 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 standby while EPA "embarks on this multiyear voyage of discovery" in promulgating new rules based on the D.C. Circuit's

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. The D.C. Circuit's Decision Presents a Justiciable Issue on EPA's Authority under the Clean Air Act.

Contrary to the Solicitor General and her allied Respondents' arguments, the D.C. Circuit's vacatur of the ACE Rule presents justiciable issues for the Court's review. 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, holding that Section 111(d) grants EPA broad authority at the expense of the States' statutorily proscribed authority and discretion. The D.C. Circuit's decision misreads the plain text of Section 111(d) and is contrary to the Court's prior decisions setting the bounds of the cooperative federalism required by the CAA. *See* Petition, at 18-27. The D.C. Circuit's decision also conflicts with the Court's prior rulings on the Major Question Doctrine and Clear Statement Rulings. *Id.* at 28-32. Because of those errors in statutory interpretation and departure from the Court's jurisprudence, the D.C. Circuit improperly vacated the ACE Rule. It is precisely these holdings that North Dakota contends are in error and is petitioning the Court to review, not for speculative advisory purposes but to expressly reverse the decision below and reinstate the

ACE Rule. If the D.C. Circuit's opinion is not reviewable, it is hard to imagine that *any* appellate court ruling on the bounds of an agency's statutory authority is reviewable on certiorari.

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). The D.C. Circuit's opinion excises North Dakota's (and all other States') statutorily mandated role in regulating existing sources in a cooperative federalism framework alongside EPA, and cannot be squared with that statutory mandate in Section 111(d).

None of the Respondents claimed in front of the D.C. Circuit that EPA's interpretation of its authority under Section 111(d) in the ACE Rule presented nonjusticiable issues that would result in 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). Those same Respondents specifically challenged the ACE Rule under the judicial review provision of the CAA, 42 U.S.C.

§ 7607, that they now claim 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).[1] To claim now that the Court's review of a decision vacating the ACE Rule would be advisory, in a continuation of the same proceedings below where the Respondents exercised their right of judicial review to challenge the ACE Rule, is disingenuous.

That EPA has since indicated it will pursue a new rulemaking to replace both the ACE Rule and the CPP does not render the decision below unreviewable. *See* Brief for the Federal Respondents in Opposition, at 16; Brief for State and Municipalities in Opposition, at 1. The Executive Branch's announcements cannot deprive this Court of its jurisdiction or authority or deprive Petitioner of its rights of judicial review of the D.C. Circuit's opinion below. "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).

Here, North Dakota has challenged the D.C. Circuit's ruling vacating the ACE Rule because it bestowed authority on EPA not granted to it by Congress

[1] With the exception of Federal Respondents, who defended EPA's authority to promulgate the ACE Rule in front of the D.C. Circuit, but who also did not challenge the D.C. Circuit's ability to hear the case.

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). Respondents cannot be permitted, "by agreeing on the legal issue presented" (i.e., agreeing that the ACE Rule no longer applies to Petitioners *because* the D.C. Circuit's opinion vacated the rule), to now characterize North Dakota's Petition as "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. 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 vacate 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 by 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 vacated the D.C. Circuit's decision. *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.")

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, as it has indicated it plans to do. It may also choose to change its mind. Whatever EPA's future plans are, they do not deprive the Court of its jurisdiction to review the decision below or its authority to reinstate the ACE Rule that was improvidently vacated. Further, EPA's future 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 based on an interpretation of the CAA that gives EPA far greater authority than Congress intended, then the ACE Rule should be reinstated. EPA may offer advisory views on whatever future plans it wishes, but if the vacatur below was wrongly decided, then the ACE Rule should be reinstated and in force while the EPA ponders next steps.

Similarly, Respondents' claims that North Dakota and other Petitioners are challenging the CPP miss the mark. They ignore that part of the ACE Rule was the rescission of the CPP and that the vacatur of the ACE Rule implicated not only the replacement rule but the rescission of the CPP. Further, the D.C. Circuit relied on the reasoning behind the CPP, which had been stayed by this Court, to justify its vacatur of the ACE Rule. Therefore, any discussion of the ACE Rule and

the decision below cannot avoid some discussion of the CPP, since the rescission of the CPP was part and parcel of the ACE Rule and the erroneous decision below was based in large measure on the CPP.

North Dakota is *not* bringing this Petition asking the Court to speculate or opine on whatever future action EPA may take with the broad license granted to it by the D.C. Circuit. North Dakota is seeking the vacatur of the D.C. Circuit's opinion and the reinstatement of the ACE Rule because the D.C. Circuit erroneously bestowed on EPA powers not granted to EPA by Congress in Section 111(d), and in doing so deprived States of all implementation and decision-making power under Section 111(d) plans in violation of their sovereign authority recognized by Congress in the CAA. *See* Petition at i (Question Presented).

II. The D.C. Circuit's Decision Implicates Issues the Court has Recognized as Presenting a Case and Controversy Meriting Certiorari Review.

The Court has held that to enforce the Article III limitation that courts only adjudicate "cases" or "controversies" an applicant must demonstrate a "personal stake" in the suit. *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). The party invoking the Court's authority has such a stake when three conditions are satisfied: the Petitioner must show that he has "suffered an injury in fact" that is 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 allowing North Dakota the autonomy to apply source-specific considerations to Section 111(d) determinations. *Id.* at 519.

Contrary to Respondents' suggestion that the D.C. Circuit's opinion "does not subject Petitioners to any present or imminent concrete harm" (Brief for the Federal Respondents in Opposition, at 17), the D.C. Circuit's opinion imposes immediate and substantial harm on North Dakota that exists today. That is because the ACE Rule, a rule supported by North Dakota that regulates air emissions from existing coal-fueled electric power generation, a central method of power generation in North Dakota, has been vacated. The ACE Rule benefited North Dakota by rescinding the CPP and replacing it with a rule in line with the authority granted to EPA by Congress. The decision to vacate the ACE Rule harmed North Dakota by removing the benefit of the ACE Rule and exacerbated the harm by relying on the unlawful reasoning of the CPP rule to justify the vacatur. No court or party has ever suggested that North Dakota, as a major fossil-fuel energy producing and generating State, did not have

standing to support the rescission of the CPP and the promulgation of the replacement ACE Rule, and North Dakota did not lose that standing when the ACE Rule was vacated. Respondents, opponents of the ACE Rule, are now 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. 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.

III. The D.C. Circuit's Decision Implicates Issues of National Importance and the Court Should Not Wait for the Conclusion of EPA's Contemplated Rulemaking to Address Those Important Issues.

The Supreme Court has weighed whether the issue is one of national importance in determining whether to grant certiorari. *Pharmaceutical Research and Mfrs. of America v. Walsh*, 538 U.S. 644, 650 (2003) ("[W]e granted certiorari because the questions presented are of national importance.").

As raised in North Dakota's Petition, the D.C. Circuit's decision below implicates many issues of national importance related to the control of air emissions from the generation of energy, as shown by the Court's prior stay of the CPP, and the conflicts between the D.C. Circuit's Opinion and the Court's prior rulings. Petition at

32-35. This is amplified by the potential reach of the vacatur of the ACE Rule and the D.C. Circuit's opinion, which goes beyond the coal-fueled electric generation sector, and implicates all other existing sources of air emissions regulated by EPA under Section 111(d). *Id.* at 35-37. Further, if the D.C. Circuit's decision granting unauthorized power to EPA and excising state sovereignty in violation of the CAA's principles of cooperative federalism is allowed to stand, many more federal statutes implicating cooperative federalism are at risk. *Id.* at 37-38.

The D.C. Circuit's ruling has attracted vast national interest. This is evidenced by the four separate Petitions for Certiorari filed challenging the D.C. Circuit's decision, the three additional briefs in support of the Petitioners, the five separate amici briefs in support of Petitioners, and the four opposition briefs, representing a multitude of states, non-governmental organizations, and trade associations. *See* Dockets in Nos. 20-1778, 20-1780, 20-1530, 20-1531. As evidenced by the numerous participants who have weighed in on the question presented in the Petitions, and with the growing national attention to climate change, clarifying the respective roles of the States, Executive Branch and Congress in controlling air emissions from energy generation is certainly a matter of great national interest.

A decision with such troubling and far-reaching implications, attracting such national attention, should

not be permitted to stand unreviewed. North Dakota's Petition should be granted.

CONCLUSION

For the foregoing reasons and the reasons set forth in North Dakota's Petition, the Petition for a Writ of Certiorari should be granted, and the judgment below reversed.

Respectfully submitted,

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