

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

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United States Court of Appeals  
for the District of Columbia Circuit

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AMERICAN LUNG ASSOCIATION, et al.,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION  
AGENCY, et al.,

*Respondents.*

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ON PETITION FOR REVIEW OF FINAL ACTION OF THE  
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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**STATE AND MUNICIPAL PETITIONERS' OPENING BRIEF**

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Dated: April 17, 2020

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**CERTIFICATE AS TO PARTIES, RULINGS,  
AND RELATED CASES**

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

**A. Parties**

Petitioners

The following parties appear as petitioners:

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) (State and Municipal Petitioners).

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.

In case no. 19-1173: Chesapeake Bay Foundation.

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 Corporation.

In case no. 19-1185: Biogenic CO<sub>2</sub> 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.

### Respondents

The following parties appear as respondents:

United States Environmental Protection Agency and Andrew Wheeler, in his official capacity as Administrator of the United States Environmental Protection Agency (together, EPA).

### Intervenors

The State of Nevada has intervened on the side of State and Municipal Petitioners.

The following parties have intervened on the side of respondents: State of West Virginia, State of Alabama, State of Alaska, State of Arkansas, State of Georgia, State of Indiana, State of Kansas, Kentucky by and through Governor Matthew G. Bevin, State of Louisiana, State of Missouri, State of Montana, State of Nebraska, State of North Dakota, State of Ohio, State of Oklahoma, State of South Dakota, State of South Carolina, State of Texas, State of Utah, State of Wyoming, and Governor

Phil Bryant of the State of Mississippi and the Mississippi Public Service Commission; Appalachian Power Co., 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; International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers & Helpers, AFL-CIO; 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, 19-1178, and 19-1179 only) 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 Defense Council, and Sierra Club; (in case nos. 19-1175, 19-1178, and 19-1179 only) 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).

Amici

In support of State and Municipal, Public Health and Environmental, Power Company, and Clean Energy Trade Association Petitioners: Maximilian Auffhammer, Philip Duffy, Kenneth Gillingham, Lawrence H. Goulder, James Stock, Gernot Wagner, and the Union of Concerned Scientists; Institute for Policy Integrity at New York University School of Law; National Parks Conservation Association and the Coalition to Protect America's National Parks; Thomas C. Jorling; The American Thoracic Society, The American Academy of Allergy, Asthma, & Immunology, The American College of Occupational and Environmental Medicine, The National Medical Association, and The

American College of Chest Physicians; Professors of Administrative Law  
Todd Aagaard, Blake Emerson, Daniel Farber, Kathryn Kovacs, Richard  
Lazarus, Ronald Levin, and Nina Mendelson.

In support of Respondents: National Association of Home Builders  
of the United States

## **B. Ruling Under Review**

State and Municipal Petitioners seek review of the final agency  
action by EPA entitled: “Repeal of the Clean Power Plan; Emission  
Guidelines for Greenhouse Gas Emissions from Existing Electric Utility  
Generating Units; Revisions to Emission Guidelines Implementing  
Regulations,” published at 84 Fed. Reg. 32,520 (July 8, 2019).

## **C. Related Cases**

The final agency action at issue in this proceeding has not been  
previously reviewed in this or any other court. There are no related cases  
within the meaning of D.C. Circuit Rule 28(a)(1)(C).

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## TABLE OF CONTENTS

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES.....	i
A. Parties .....	i
B. Ruling Under Review.....	vi
C. Related Cases.....	vi
TABLE OF AUTHORITIES.....	x
GLOSSARY .....	xv
PRELIMINARY STATEMENT.....	1
JURISDICTIONAL STATEMENT .....	3
ISSUES PRESENTED.....	3
STATUTES AND REGULATIONS .....	4
STATEMENT OF THE CASE .....	4
A. Factual Background.....	4
B. Statutory and Regulatory Background .....	6
1. Section 111 of the Clean Air Act .....	6
2. Prior regulation of power-plant emissions.....	8
3. The Clean Power Plan.....	10
C. The Rule.....	15
1. Repeal of the Clean Power Plan.....	16
2. ACE Rule .....	17



3. Revised implementing regulations for state plans .....	21
STANDARD OF REVIEW.....	22
SUMMARY OF ARGUMENT .....	23
STANDING .....	28
ARGUMENT .....	30
POINT I.....	30
THE REPEAL OF THE CLEAN POWER PLAN IS UNLAWFUL .....	30
A. The Text, Purpose, and Structure of Section 111 Do Not Support EPA’s Artificially Constrained View of the Emission-Reduction Measures It May Consider.....	33
1. Congress’s direction that EPA select the “best system of emission reduction” that is “adequately demonstrated” authorizes EPA to consider a wide range of measures to reduce CO <sub>2</sub> emissions. ....	33
2. The cooperative-federalism structure of section 111 further supports a broad interpretation of EPA’s authority to consider measures that would effectively reduce CO <sub>2</sub> emissions.....	37
B. EPA’s Novel, Restrictive Reading of Section 111 Is Not Compelled by the Statute. ....	42
1. Section 111 does not unambiguously limit a “system of emission reduction” to measures that can be put into place at a single source. ....	42
2. The Act’s separate provisions for new and modified sources implementing the Best Available Control Technology do not support, let alone compel, EPA’s restrictive reading of section 111. ....	49

3.	EPA’s restrictive interpretation of section 111 is not necessary to avoid an “infinite” of meanings. ....	51
4.	The major-questions doctrine is inapplicable. ....	52
5.	EPA’s new interpretation is not needed to prevent any improper encroachment on the authority of States. ....	55
	POINT II.....	57
	THE ACE RULE IS UNLAWFUL.....	57
	A. The ACE Rule’s Replacement Emission Guidelines for Coal-Fired Power Plants Are Unlawful.....	58
	1. EPA neither weighed pollution reduction in selecting the best system of emission reduction nor explained its reversal from its prior position that heat rate improvements alone are not the best system. ....	58
	2. EPA’s failure to establish a minimum degree of emission limitation for state plans contravenes section 111(d)’s structure and its roles for EPA and States. ....	61
	3. The Rule’s emission guidelines are inconsistent with section 116 of the Act. ....	65
	B. EPA’s Decision to Repeal Emission Guidelines for Gas-Fired Power Plants Without Replacing Them Is Unlawful.....	69
	CONCLUSION.....	71
	CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT.....	80
	CERTIFICATE OF SERVICE.....	81

## TABLE OF AUTHORITIES

	Page(s)
<b>CASES</b>	
<i>*American Elec. Power Co. v. Connecticut</i> , 564 U.S. 410 (2011).....	7, 11, 38, 53
<i>Chevron, U.S.A., Inc. v. NRDC</i> , 467 U.S. 837 (1984).....	22
<i>Connecticut Dep’t of Pub. Util. Control v. FERC</i> , 569 F.3d 477 (D.C. Cir. 2009) .....	57 n.12
<i>Dean v. United States</i> , 556 U.S. 568 (2009).....	47
<i>Encino Motorcars v. Navarro</i> , 136 S. Ct. 2117 (2016).....	22
<i>*FCC v. Fox Television Stations</i> , 556 U.S. 502 (2009).....	22, 61
<i>FERC v. Electronic Power Supply Ass’n</i> , 136 S. Ct. 760 (2016).....	56
<i>*Massachusetts v. EPA</i> , 549 U.S. 497 (2007).....	10, 11, 28, 31, 53
<i>National Fed’n of Indep. Bus. v. Sebelius</i> , 132 S. Ct. 2566 (2012).....	35
<i>Negusie v. Holder</i> , 555 U.S. 511 (2009).....	22
<i>New York v. FERC</i> , 535 U.S. 1 (2002).....	40
<i>*Prill v. NLRB</i> , 755 F.2d 941 (D.C. Cir. 1985) .....	22, 33

<i>*Sierra Club v. Costle</i> , 657 F.2d 298 (D.C. Cir. 1981) .....	35, 36, 59, 60
<i>Transitional Hosps. Corp. of La., Inc. v. Shalala</i> , 222 F.3d 1019 (D.C. Cir. 2000) .....	33
<i>*Union Elec. Co. v. EPA</i> , 427 U.S. 246 (1976) .....	67, 68, 69
<i>Utility Air Regulatory Grp. v. EPA</i> , 573 U.S. 302 (2014) .....	53, 69
<i>West Virginia v. EPA</i> , 362 F.3d 861 (D.C. Cir. 2004) .....	30
<i>West Virginia v. EPA</i> , D.C. Cir. No. 15-1363 (2019) .....	14

## FEDERAL STATUTES

10 U.S.C.	
§ 14306 .....	44 n.11
42 U.S.C.	
§ 7401(b)(1) .....	36
§ 7410(a)(2)(D)(i)(I) .....	8
§ 7411 .....	2
*§ 7411(a)(1) .....	6, 23, 36, 43, 52, 57 n.12
§ 7411(b)(1)(A) .....	6
§ 7411(b)(1)(B) .....	6
§ 7411(d) .....	46
*§ 7411(d)(1) .....	6, 7, 43, 47
*§ 7411(d)(2) .....	7
§ 7411(g)(3) .....	44 n.10
*§ 7416 .....	7, 67
§ 7479(1) .....	49
§ 7479(3) .....	49, 50
§ 7491(g)(2) .....	35
§ 7607(b) .....	3

§ 7607(d)(9) .....	22
§ 7651f(b)(2) .....	35
49 U.S.C.	
§ 24710(b) .....	44 n.11
Pub. L. No. 95-95, 91 Stat. 685 (1977) .....	50

## **FEDERAL REGULATIONS**

40 C.F.R. § 60.21a(e) .....	7
40 C.F.R. § 60.23(a)(1).....	21
40 C.F.R. § 60.23a(a)(1).....	21
40 C.F.R. § 60.24(c) .....	64
40 C.F.R. § 60.24a(c).....	64
40 C.F.R. § 60.24a(e) .....	7
40 C.F.R. § 60.24a(f).....	7
40 C.F.R. § 60.27(b) .....	21
40 C.F.R. § 60.27a(b) .....	21
40 C.F.R. § 60.5740a(a)(2)(i) .....	17, 63
40 C.F.R. § 60.5780a(2) .....	18 n.4

## **FEDERAL REGISTER**

40 Fed. Reg. 53,340 (Nov. 17, 1975).....	62, 64
42 Fed. Reg. 55,796 (Oct. 18, 1977).....	63 n.14
44 Fed. Reg. 33,580 (June 11, 1979) .....	55
61 Fed. Reg. 9,905 (Mar. 12, 1996) .....	63 n.14
70 Fed. Reg. 28,606 (May 18, 2005).....	63 n.14

74 Fed. Reg. 66,496 (Dec. 15, 2009) .....	4, 28
76 Fed. Reg. 48,208 (Aug. 8, 2011).....	8, 9
80 Fed. Reg. 64,510 (Oct. 23, 2015).....	11
80 Fed. Reg. 64,662 (Oct. 23, 2015).....	.8, 11, 12, 13, 14, 31, 38, 40, 41 n.9, 42, 48, 52, 54, 60, 66
82 Fed. Reg. 48,035 (Oct. 16, 2017).....	16
83 Fed. Reg. 44,746 (Aug. 31, 2018).....	16
84 Fed. Reg. 32,520 (July 8, 2019) .....	3, 16, 17, 18 n.4, 19, 20, 21, 23, 27, 29, 30, 32, 34, 40, 42, 43, 46, 47, 49, 50, 51, 52, 54, 55, 57 n.12, 59, 63, 64, 66, 67, 68, 70

## STATE STATUTES

17 Cal. Code Regs.	
§ 95811 .....	10

## STATE REGULATIONS

6 N.Y.C.R.R.	
§ 201-6.4(f).....	39

## LEGISLATIVE HISTORY

H. Rep. No. 91-1146, <i>reprinted in</i> 1970 U.S.C.C.A.N 5356 (1970).....	65 n.17
S. Rep. No. 91-1196 (1970) .....	37
S. Rep. No. 101-228 (1989) .....	9

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EPA, <i>Illustrative ACE Scenario, State Emissions Projections</i> , <a href="https://www.epa.gov/airmarkets/analysis-final-ace-rule">https://www.epa.gov/airmarkets/analysis-final-ace-rule</a> (last visited April 17, 2020) .....	20 n.6, 29
--	------------

Merriam-Webster's Online Dictionary; Oxford English Dictionary Online (3d ed. 2008).....	43
Nat'l Oceanic & Atmospheric Administration, <i>2019 Was the 2nd Hottest Year on Record for Earth, Say NOAA, NASA</i> (Jan. 15, 2020) <a href="https://www.noaa.gov/news/2019-was-2nd-&lt;br/&gt;hottest-year-on-record-for-earth-say-noaa-nasa">https://www.noaa.gov/news/2019-was-2nd- hottest-year-on-record-for-earth-say-noaa-nasa</a> .....	5 n.2
Oxford Dictionary of English (3d ed. 2010) .....	33
Richard L. Revesz et al., <i>Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan</i> , 46 <i>Envtl. L. Rep.</i> 10,190 (2016), <a href="https://policyintegrity.org/files/publications/Familiar_Terr&lt;br/&gt;itory_ELRL.pdf">https://policyintegrity.org/files/publications/Familiar_Terr itory_ELRL.pdf</a> .....	41 n.9
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Webster's Third New International Dictionary of the English Language Unabridged 2322 (1968) .....	33

\*Authorities upon which we chiefly rely are marked with asterisks

## GLOSSARY

ACE	Affordable Clean Energy rule
Act	Clean Air Act
CO <sub>2</sub>	Carbon Dioxide
EPA	United States Environmental Protection Agency
JA	Joint Appendix
NO <sub>x</sub>	Nitrogen Oxides
RGGI	Regional Greenhouse Gas Initiative
RIA	Regulatory Impact Analysis
SO <sub>2</sub>	Sulfur Dioxide



## PRELIMINARY STATEMENT

Fossil-fueled power generation is one of the nation’s largest sources of greenhouse gases—pollutants that the Environmental Protection Agency (EPA) determined more than a decade ago cause grave and widespread harm to public health and welfare by contributing to climate change. In 2015, EPA promulgated the Clean Power Plan, which relied on proven measures widely used in the industry to require meaningful reductions in carbon dioxide (CO<sub>2</sub>) from existing power plants. In particular, the regulation accounted for the ability of power plants on an interconnected grid to generate any given amount of electricity with significantly less pollution by shifting from dirtier to cleaner plants.

The rule at issue here, however, repeals the Clean Power Plan and replaces it with a regulation (the “Affordable Clean Energy” (ACE) rule) that will reduce emissions from power plants by *less than one percent*—at most—when fully implemented in 2030. EPA does not deny that far greater emission reductions are needed to address power plants’ contribution to escalating climate change harms. Nor does it deny that there are available, cost-effective approaches that would accomplish much greater reductions, including the measures in the Clean Power

Plan. The agency contends, however, that Congress unambiguously forbade EPA from adopting such sensible and effective regulations in section 111 of the Clean Air Act (Act), 42 U.S.C. § 7411.

These purported shackles are of EPA's own making. EPA's new, cramped view of its authority is not compelled by the text, purpose, or structure of section 111. Moreover, EPA's new interpretation undercuts the Act's objective of reducing pollution and ignores common, effective approaches that power companies and States use to reduce CO<sub>2</sub> emissions. Because EPA's repeal of the Clean Power Plan is based solely on its new position that the statute unambiguously prohibits these emissions-reduction measures—EPA makes no effort to defend its interpretation as reasonable—the repeal is unlawful.

Because EPA relied on the same flawed legal interpretation in replacing the Clean Power Plan, its replacement rule—ACE—is likewise unlawful. The ACE rule makes a mockery of the Act by achieving only trivial emission reductions nationally (while *increasing* CO<sub>2</sub> and other pollutants in more than a dozen States), imposing rigid restrictions on state compliance plans, and exempting existing gas-fired plants from CO<sub>2</sub> regulation altogether.

## JURISDICTIONAL STATEMENT

The Court has exclusive jurisdiction under section 307(b) of the Act to review a challenge to “any standard of performance or requirement under section 7411.” 42 U.S.C. § 7607(b). The undersigned petitioner States and cities (State and Municipal Petitioners) filed their petition for review on August 13, 2019, within the requisite 60 days of publication of the rule at issue. *See* 84 Fed. Reg. 32,520 (July 8, 2019).

## ISSUES PRESENTED

1. Whether EPA acted contrary to law in repealing the Clean Power Plan and issuing a replacement rule based on its new position that section 111 of the Act unambiguously prohibits EPA from relying on any emissions-reduction measures other than those that can be installed at each individual source and implemented without regard to other sources.

2. Whether EPA acted contrary to law by issuing a replacement rule in which EPA: (i) did not consider the amount of pollution reduction in determining the best system of emission reduction or explain EPA’s reversal in its prior position that heat rate improvements are not the best system; (ii) failed to quantify for state plans the minimum degree of emission limitation from applying the best system of emission reduction;

(iii) prohibits equally or more stringent state plans that allow emissions averaging and trading; and (iv) repeals without replacing emission limitations on CO<sub>2</sub> for existing gas-fired power plants.

## STATUTES AND REGULATIONS

Relevant statutory and regulatory provisions and legislative history excerpts are reproduced in the Addendum filed herewith.

## STATEMENT OF THE CASE

### A. Factual Background

In 2009, EPA determined that greenhouse gases, including CO<sub>2</sub>, endanger public health and welfare by accumulating in the atmosphere and causing increased average temperatures; more intense, frequent, and long-lasting heat waves and wildfires; worse smog; longer and more severe droughts; more intense storms, hurricanes, and floods; the spread of disease; and dramatic sea-level rise. 74 Fed. Reg. 66,496, 66,497-99 (Dec. 15, 2009). Since then, climate change harms have continued to

mount<sup>1</sup>; the world's five hottest years on record have occurred since 2015.<sup>2</sup>

The National Climate Assessment issued in 2018 by EPA and other agencies underscores the catastrophic harms and imminent threats we face. “Climate-related changes in weather patterns and associated changes in air, water, food, and the environment are affecting the health and well-being of the American people, causing injuries, illnesses, and death.” U.S. Global Change Research Program, *Fourth National Climate Assessment, Volume II: Impacts, Risks, and Adaptation in the United States (Report-in-Brief)* 102 (JA\_\_\_\_).<sup>3</sup> The Assessment emphasized the need to take aggressive action now to reduce greenhouse gas emissions to prevent, among countless other harms, an “increase [in] the incidence

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<sup>1</sup> See ACE Climate Comments & App. A-C (EPA-HQ-OAR-2017-0355-24415) (JA\_\_\_\_) (describing and collecting recent studies).

<sup>2</sup> Nat'l Oceanic & Atmospheric Administration, *2019 Was the 2<sup>nd</sup> Hottest Year on Record for Earth, Say NOAA*, NASA (Jan. 15, 2020) <https://www.noaa.gov/news/2019-was-2nd-hottest-year-on-record-for-earth-say-noaa-nasa>.

<sup>3</sup> See EPA-HQ-OAR-2017-0355-26640, [https://nca2018.globalchange.gov/downloads/NCA4\\_Report-in-Brief.pdf](https://nca2018.globalchange.gov/downloads/NCA4_Report-in-Brief.pdf).

of adverse respiratory and cardiovascular health effects, including premature death.” *Id.* at 98 (JA\_\_\_\_).

## **B. Statutory and Regulatory Background**

### **1. Section 111 of the Clean Air Act**

Section 111 of the Act directs EPA to set standards of performance for categories of new stationary sources that cause or significantly contribute to air pollution that endangers public health or welfare. 42 U.S.C. § 7411(b)(1)(A), (B). The statute defines “standard of performance” as:

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.

*Id.* § 7411(a)(1).

Section 111(d) uses a cooperative federalism approach to address dangerous pollutants emitted by *existing* sources in the same categories for which EPA has issued new-source standards. Under section 111(d), EPA first promulgates regulations—“emission guidelines”—that provide substantive criteria for state plans. *See* 42 U.S.C. § 7411(d)(1). The

definition of “emission guideline” parallels the statutory definition of “standard of performance.” *See* 40 C.F.R. § 60.21a(e). “[I]n compliance with those guidelines and subject to federal oversight, the States then issue performance standards for stationary sources within their jurisdiction.” *American Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011) (“*AEP*”). EPA must review state plans under section 111(d) to ensure that they are “satisfactory.” 42 U.S.C. § 7411(d)(2). If a State does not submit a “satisfactory” plan, EPA must issue a federal plan that limits emissions from the State’s existing sources. *Id.*

Congress included a variance provision in section 111(d) directing EPA to permit States to consider a source’s remaining useful life, among other factors, “in applying a standard of performance to any particular source.” 42 U.S.C. § 7411(d)(1). A State may issue a variance that sets a less stringent standard for an individual source than required under EPA’s emission guideline provided that it “demonstrates” facts such as unreasonable cost or physical impossibility. *See* 40 C.F.R. § 60.24a(e). By contrast, and consistent with section 116 of the Act, 42 U.S.C. § 7416, the regulations fully preserve state authority to adopt *more* stringent requirements, requiring no demonstration to do so. 40 C.F.R. § 60.24a(f).

## 2. Prior regulation of power-plant emissions

Fossil-fueled power plants are the country's highest-emitting stationary sources of several pollutants, including CO<sub>2</sub>. To address these emissions, previous regulations at the state and federal levels have relied on the uniquely interconnected nature of the electric grid and the concomitant ability of power companies to shift generation to less-polluting sources.

At the federal level, substituting lower-emitting generation for higher-emitting generation has been an important component of three significant "transport" rules under the Act's Good Neighbor Provision, 42 U.S.C. § 7410(a)(2)(D)(i)(I), which requires upwind power plants to control emissions to avoid interfering with downwind States' attainment of air quality standards. 80 Fed. Reg. 64,661, 64,772 & n.545 (Oct. 23, 2015). The 2011 "Cross-State Air Pollution Rule," for example, sets statewide emissions budgets for nitrogen oxides (NO<sub>x</sub>) and sulfur dioxide (SO<sub>2</sub>), two pollutants that cause premature mortality, asthma attacks, and other harms to human health. *See, e.g.*, 76 Fed. Reg. 48,208, 48,218 (Aug. 8, 2011). EPA based those budgets in part on the ability of power companies to cost-effectively shift generation to lower-emitting plants. 80



Fed. Reg. at 64,772; 76 Fed. Reg. at 48,252. Similarly, in the acid rain program in Title IV of the Act, 42 U.S.C. §§ 7651-7651o, Congress recognized that “least-emissions dispatching” among plants on the interconnected grid could effectively reduce SO<sub>2</sub> emissions. *See* S. Rep. No. 101-228, at 316 (1989).

States have similarly relied on the interconnected nature of the electric grid to successfully reduce CO<sub>2</sub> emissions. Ten northeastern States created the Regional Greenhouse Gas Initiative (RGGI), which caps the total amount of CO<sub>2</sub> emitted by regional power plants, requires plant owners to obtain emission allowances, and uses the proceeds from auctioning allowances to invest in programs that reduce energy demand and electricity prices. Zero-carbon-emitting generation (e.g., solar, wind) and lower-emitting generation (e.g., natural-gas combustion turbines) run more cleanly than coal plants and thus require no or fewer allowances to generate the same energy. Therefore, one practical effect of the program is that cleaner forms of generation are called on to operate more often than higher-polluting (and thus costlier) coal-fired units—thereby shifting generation to lower-polluting plants. *See* Comments of 14 State Agencies (EPA-HQ-OAR-2017-0355-23749) at 6-8 (JA\_\_\_\_-

\_\_\_\_). Participating States have reduced power-sector CO<sub>2</sub> emissions by more than 50 percent since 2005, while experiencing greater economic growth and lower electricity rates than the rest of the country. *Id.* at 6 (JA\_\_\_\_\_). California uses a similar cap-and-trade program to successfully limit CO<sub>2</sub> emissions from power plants and other sources. *See* 17 Cal. Code Regs § 95811; *see also* States’ and Cities’ Comments (EPA-HQ-OAR-2017-0355-24817), App. B (describing successful state programs, including renewable portfolio standards) (JA\_\_\_\_\_).

Although these state programs, combined with market trends (see *infra* at 15-16, 20), are significantly reducing power-sector CO<sub>2</sub> emissions, much greater nationwide reductions are needed to avoid catastrophic harms. Not only is the power sector a large source of greenhouse gas emissions, but cutting greenhouse gases from other large sectors such as transportation and buildings will require large-scale electrification of those sectors, increasing the need for cleaner generation. Comments of 14 State Agencies, *supra*, at 6 (JA \_\_\_\_\_).

### **3. The Clean Power Plan**

In *Massachusetts v. EPA*, the Supreme Court held that the “sweeping definition of ‘air pollutant’” in the Act unambiguously covers

“greenhouse gases,” including CO<sub>2</sub>. 549 U.S. 497, 528-29 (2007). And in *AEP*, the Court recognized that section 111 “speaks directly to emissions of carbon dioxide” and authorizes “limits on emissions of carbon dioxide from domestic powerplants.” *AEP*, 564 U.S. at 424-25 (quotation marks omitted).

In 2015, EPA issued regulations that limited carbon pollution from new coal and gas-fired power plants under section 111(b), 80 Fed. Reg. 64,510 (Oct. 23, 2015), and existing plants under section 111(d), 80 Fed. Reg. 64,662 (Oct. 23, 2015) (Clean Power Plan). EPA determined that CO<sub>2</sub> emissions from fossil fueled plants cause or significantly contribute to air pollution that endangers public health or welfare. 80 Fed. Reg. at 64,527, 64,530-31.

To determine the best system of emission reduction for existing plants, “EPA began by considering the characteristics of CO<sub>2</sub> pollution and the utility power sector.” 80 Fed. Reg. at 64,724. EPA observed that because CO<sub>2</sub> stays in the atmosphere for decades and mixes evenly around the world, “the specific location of emission reductions [is] unimportant.” *Id.* at 64,725. Moreover, “[g]eneration from one generating unit can be and routinely is substituted for generation from another

generating unit” to satisfy electricity demand while meeting the power grid’s many “technical, environmental, and other constraints and managing its costs.” *Id.*

EPA determined the best system of reducing CO<sub>2</sub> emissions from existing power plants was a combination of three “building blocks”: (1) improving heat rate (efficiency) at coal-fired units; (2) substituting electricity generation from gas-fired plants for generation from coal-fired plants; and (3) substituting generation from zero-emitting sources for generation from coal-fired and gas-fired plants. *Id.* at 64,666-67. EPA made this determination after finding these measures adequately demonstrated and considering the degree of pollution reduction achieved, costs, energy requirements, and non-air quality health and environmental impacts. *Id.* at 64,744-51. Regarding the second and third building blocks (“generation shifting” measures), EPA cited successful state programs like RGGI and power companies that use generation shifting to reduce CO<sub>2</sub> from their fleet of plants, whether to meet state requirements or for economic reasons. *Id.* at 64,725, 64,803-06. EPA thus “relie[d] on the accelerating transition to cleaner power generation that [was] already well underway in the utility power sector.” *Id.* at 64,663.

EPA also considered other systems of emission reduction, such as heat rate improvements alone, co-firing coal plants with gas, and carbon capture and storage. It determined such methods were either more expensive (e.g., carbon capture and storage), or could achieve only a small fraction of the reduction in CO<sub>2</sub> emissions (e.g., heat rate improvements alone). *Id.* at 64,727-28, 64,769. EPA noted that heat rate improvements alone could lead to increases in plant utilization, known as the “rebound effect,” that “could partially or even entirely offset” the small emission reductions expected from heat rate improvements. *Id.* at 64,727 n.370. Regarding another system, “reduced generation by individual higher-emitting [power plants],” EPA found this approach also met several “best system” criteria and that each plant could use reduced generation to implement building blocks two and three. *Id.* at 64,782 n.602.

EPA applied the three building blocks to determine the degree of CO<sub>2</sub> emission limitation for state plans achievable by coal- and gas-fired plants by the final compliance date, 2030: 1,305 pounds of CO<sub>2</sub> per net megawatt-hour for coal plants, and 771 pounds of CO<sub>2</sub> per net megawatt-hour for gas plants. *Id.* at 64,667. EPA found each plant could achieve those limits at a reasonable cost, either by directly controlling its

emissions or by acquiring emission credits (i.e., transferrable allowances authorizing emission of a given amount of CO<sub>2</sub>). *Id.* at 64,730. EPA provided States with significant flexibility in developing their plans, explaining that States could limit emissions from individual plants, adopt trading programs, and/or enact state programs (e.g., energy efficiency, demand response) that achieved the required emission reductions from power plants. *Id.* at 64,674-75, 64,719, 64,938.

EPA estimated the Clean Power Plan would reduce CO<sub>2</sub> by 415 million short tons annually in 2030—the emissions equivalent of 80 million passenger cars—compared to the no-regulation scenario EPA projected at the time. *Id.* at 64,924. EPA acknowledged that further action to reduce greenhouse gas emissions was necessary: the Clean Power Plan was “an important step” in an “essential series of long-term actions” to achieve the greenhouse gas reductions needed to address the serious threat of climate change.” *Id.* at 64,677.

A group of States and industry groups challenged the Clean Power Plan in *West Virginia v. EPA*, D.C. Cir. No. 15-1363. After the Supreme Court stayed the rule in February 2016, the case was briefed and argued before this Court sitting en banc. After the change in presidential

administrations and before this Court issued a merits decision, EPA moved to hold the case in abeyance while deciding whether to repeal or replace the Clean Power Plan. This Court granted EPA's motion and eventually dismissed *West Virginia* as moot after this Rule became effective.

### C. The Rule

Between promulgation of the Clean Power Plan and its repeal, the transition to cleaner power generation that EPA noted in 2015 was already “well underway” significantly accelerated:

While the [Clean Power Plan] was stayed by the Supreme Court in 2016, the power sector will have complied with the final 2030 goals of the [Clean Power Plan]—in terms of gross emissions reductions—before the 2022 start date included in that program. This trend is not unique to the largest owner-operators of coal-fired generation; smaller utilities, public power, cooperatives, and municipal entities are also contributing to these changes.

Regulatory Impact Analysis on Final Rule (RIA) (EPA-HQ-OAR-2017-0355-26743) at 2-12 (JA\_\_\_\_\_) (internal quotation marks and citation omitted).

In July 2019, EPA finalized the Rule at issue here, which completed the agency's earlier proposals to repeal and replace the Clean Power

Plan. 84 Fed. Reg. at 32,520; *see* 82 Fed. Reg. 48,035 (Oct. 16, 2017) (proposed repeal); 83 Fed. Reg. 44,746 (Aug. 31, 2018) (proposed replacement). The Rule contains three main components: repeal of the Clean Power Plan, the ACE rule, and revised implementing regulations for state plans.

### **1. Repeal of the Clean Power Plan**

EPA repealed the Clean Power Plan on the sole theory that section 111 of the Act unambiguously prohibits EPA's prior determination of the best system of emission reduction. *See* 84 Fed. Reg. at 32,523. EPA now contends section 111 unambiguously limits the "best system of emission reduction" to emission controls that can be "applied to and at the level of the individual source." *Id.* at 32,529. The agency further asserted that the Clean Power Plan conflicted with this new interpretation because "strategies like generation shifting . . . cannot be put into use at the regulated [source]." *Id.* at 32,523-24. Although EPA conceded that the Clean Power Plan's approach "might be a workable policy for achieving sector-wide carbon-intensity reduction goals," the agency insisted that the Act left EPA "no interpretive room" to adopt the Clean Power Plan. *Id.* at 32,532.



## 2. ACE Rule

Using the “legal interpretation adopted in the repeal of the [Clean Power Plan],” 84 Fed. Reg. at 32,532, EPA determined in the ACE rule that the best system of emission reduction for CO<sub>2</sub> at coal-fired power plants consists solely of minor heat rate improvements. Departing from longstanding practice, EPA did not quantify a minimum emission limitation for state plans. Instead, EPA included a table listing the “most impactful” heat rate improvements and for each, a range of estimated efficiency percentage increases. 40 C.F.R. § 60.5740a(a)(2)(i), Table 1. To derive standards of performance for coal-fired plants, EPA tasked States with evaluating the range of efficiency improvements for every measure in Table 1 at each electricity generating unit subject to the Rule. *Id.* EPA stated, however, that States need not adopt performance standards *within* these ranges if unit-specific considerations such as cost and “other factors” counseled otherwise. 84 Fed. Reg. at 32,537-38. Thus, one “appropriate outcome” could be an emission standard that reflected “business as usual,” or, put another way, required *no* emission reductions. *Id.* at 32,554 (quotation marks omitted).

EPA rejected several other emission-reduction systems—including gas co-firing and carbon capture and storage—that it acknowledged would fit its new view of its statutory authority and achieve greater pollution cuts. *Id.* at 32,543-44. EPA asserted these approaches did not qualify as the best system because they were not widely available. *Id.* at 32,544, 32,547-48. EPA also rejected reduced generation, asserting it had previously rejected this approach as a “system” of emission reduction. *Id.* at 32,531.

The ACE rule applies only to coal-fired plants,<sup>4</sup> notwithstanding that natural gas now accounts for significantly more electric generation than coal.<sup>5</sup> EPA repealed the Clean Power Plan’s emission limits for natural gas combustion cycle turbines and integrated gasification combined cycle units (as well for as gas- and oil-fired steam generating

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<sup>4</sup> ACE exempts coal-fired plants that accept a permit limiting annual net-electric sales to one-third or less of its potential electrical output, or 219,000 megawatt-hours or less. 84 Fed. Reg. at 32,582 (40 C.F.R. § 60.5780a(2)).

<sup>5</sup> See, e.g., U.S. Energy Info. Admin., *What is U.S. electricity generation by energy source?* (last updated Feb. 27, 2020), <https://www.eia.gov/tools/faqs/faq.php?id=427&t=3> (2019 data showing that natural-gas plants account for approximately 60 percent more generation than coal plants).

units) without replacing those limits. EPA asserted that, under its new legal interpretation, there is no best system of emission reduction for these plants. *Id.* at 32,533; ACE Response to Comments (EPA-HQ-OAR-2017-0355-26741), ch. 2 at 12 (JA\_\_\_\_\_).

EPA modeled the costs and emissions effects of the ACE rule through a single “illustrative policy scenario.” RIA at 1-16 to 1-17 (JA\_\_\_\_\_ - \_\_\_\_\_). EPA’s analysis excluded two of the most effective heat-rate measures it included in its best system (turbine blade and economizer upgrades). EPA stated that plants would not adopt those measures unless EPA finalized revisions to the New Source Review program, revisions it had included in the proposal but omitted from the final Rule. *Id.*

EPA’s illustrative scenario projects ACE will result in negligible emission reductions of CO<sub>2</sub> from the power sector in 2030—11 million tons, or less than one percent, compared to no regulation at all. *See* RIA ES-6 (JA\_\_\_\_\_). By way of comparison, many individual states have achieved greater CO<sub>2</sub> reductions from their power sectors in recent years. *See* States and Cities’ Comments, *supra*, at 82 (JA\_\_\_\_\_ ) (18 States reduced CO<sub>2</sub> from power plants by at least 11 million tons *each* from

2006-16). Nowhere did EPA confront whether the ACE rule’s minimal reductions were reasonable in light of EPA’s recognition of endangerment from CO<sub>2</sub> emissions; instead, EPA merely stated that “[i]mplementation of heat rate improvement measures also would achieve reasonable reductions in CO<sub>2</sub> emissions from designated facilities in light of the limited cost-effective and technically feasible emissions control opportunities.” 84 Fed. Reg. at 32,542. By contrast, EPA found that substantial CO<sub>2</sub> reductions have occurred nationwide—and are anticipated to continue—due to the very types of emission-reduction measures that the agency now contends are prohibited by the statute. See RIA 2-6 to 2-11 (JA\_\_\_\_\_-\_\_\_\_). EPA also found that ACE would also cause CO<sub>2</sub>, NO<sub>x</sub>, and SO<sub>2</sub> emissions to *increase* in more than a dozen states compared to no regulation at all.<sup>6</sup>

Unlike the Clean Power Plan, the ACE rule sets no required level of emission reduction for state plans and narrowly prescribes the approaches power plants can use for compliance. For example, although States could comply with the Clean Power Plan by joining a regional cap-

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<sup>6</sup> See EPA, *Illustrative ACE Scenario, State Emissions Projections*, <https://www.epa.gov/airmarkets/analysis-final-ace-rule>.

and-trade program that limited the emissions of power plants in their jurisdictions, ACE prohibits such compliance measures because “those measures would be inconsistent with the EPA’s interpretation of the [best system] as limited to measures that apply at and to an individual source and reduce emissions from that source.” 84 Fed Reg. at 32,555-56. EPA further stated it likely will disapprove more stringent state plans that call for emission reductions beyond the minimal reductions anticipated under ACE. *See id.* at 32,559-61.

### **3. Revised implementing regulations for state plans**

Finally, the Rule includes revisions to the section 111(d) implementing regulations that would apply both to the ACE rule and to any future section 111(d) rules. Overall, the changes would substantially increase the time for development and approval of state plans. 84 Fed. Reg. at 32,565. For example, instead of having nine months to prepare state plans, States will have three years. *Compare* 40 C.F.R. § 60.23(a)(1) *with* § 60.23a(a)(1). Similarly, while EPA previously had four months to evaluate the sufficiency of state plans, it will have one year. *Compare* 40 C.F.R. § 60.27(b) *with* § 60.27a(b). The result is to significantly lengthen the time before sources will be required to limit their emissions.

## STANDARD OF REVIEW

If “Congress has directly spoken to the precise question at issue [and] the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984). However, if an agency acts on the mistaken view that the statute unambiguously compelled the agency’s action, its “decision cannot be sustained.” *Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985); *see also Negusie v. Holder*, 555 U.S. 511, 516 (2009) (“The agency must confront the same question free of this mistaken legal premise.”).

This Court must set aside EPA action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law.” 42 U.S.C. § 7607(d)(9); *Encino Motorcars v. Navarro*, 136 S. Ct. 2117, 2125 (2016) (agency decision is arbitrary and capricious if agency fails to rationally connect its choice to the facts). An agency that changes course must “provide a more detailed justification than would suffice for a new policy . . . when, for example, its new policy rests upon factual findings that contradict those which underlay its prior policy.” *FCC v. Fox Television Stations*, 556 U.S. 502, 515-16 (2009).

## SUMMARY OF ARGUMENT

I. EPA's repeal of the Clean Power Plan relies on a fundamentally mistaken interpretation of section 111. In a sharp break from its prior interpretation, EPA now reads section 111's direction that EPA select the "best system of emission reduction" that is "adequately demonstrated," 42 U.S.C. § 7411(a)(1), as unambiguously constraining EPA to consider only measures of emission reduction "that can be put into operation *at a building, structure, facility, or installation,*" 84 Fed. Reg. at 32,524 (emphasis in original). But section 111 contains no such limitation.

To the contrary, Congress's deliberate use of the broad word "system"—instead of narrower language that it used in other sections—demonstrates that Congress intended to authorize EPA to consider a wide range of measures that would substantially reduce emissions from regulated sources, including measures that would involve multiple sources rather than just a single source. Likewise, Congress's direction that EPA consider a range of factors to select the "best" system that is "adequately demonstrated" to reduce emissions confirms EPA's authority to prioritize results and rely on practical experience. EPA's current interpretation unlawfully and unreasonably disregards Congress's

command by drawing artificial limitations on its authority that would lead it to forgo proven, cost-effective, and widely adopted methods of reducing CO<sub>2</sub> emissions.

EPA's defense of its interpretation of section 111 relies on a contorted and unpersuasive reading of the statutory text. EPA construes section 111(a)(1)'s use of the word "application" as requiring an "indirect object," and finds that "indirect object" in a separate provision, section 111(d). Merging these provisions, EPA concludes that any "system of emission reduction" (section 111(a)(1)) must be "for any existing source" (section 111(d)). But EPA's statutory interpretation is defective in multiple respects.

For one thing, the word "application" is commonly used without a specified indirect object when it refers to reliance on a principle or process to achieve an outcome—for instance, a mathematician solving a problem through the application of a formula. Moreover, even if some "indirect object" were required, there was no need for EPA to look beyond section 111(a)(1) to find one. That provision refers to "emissions of air pollutants" by regulated sources, and EPA could apply a broad range of "system[s]" to such emissions in order to reduce them.



By contrast, EPA’s attempt to find an “indirect object” in section 111(d) conflates distinct regulatory responsibilities because section 111(d) concerns *the States’* obligation to establish standards of performance “for any existing source,” not *EPA’s* responsibility to identify an overarching “best system of emission reduction.” In any event, even EPA’s improper conflation of section 111(a)(1) and (d) does not support its current interpretation: that conflation would still enable EPA to adopt systems of emission reduction “for” regulated sources, which is broader than EPA’s current view that it is limited to measures that can be implemented “at” a single source standing alone.

EPA’s remaining arguments in defense of its repeal of the Clean Power Plan are meritless. The Act’s later-enacted provision requiring new and modified sources to apply the Best Available Control Technology does not constrain the measures that EPA can consider to curb emissions from existing sources. An appropriately broad reading of “system of emission reduction” would not lead to an “infinite” of meanings because EPA would still be subject to meaningful statutory constraints on the systems it could select. The Clean Power Plan’s reliance on shifting production to cleaner sources did not implicate the major-questions

doctrine because, far from being transformative, that measure of emission reduction is well-established and already adopted by the industry. And finally, the Clean Power Plan did not encroach on any state authority to allocate energy production because it was appropriately focused first and foremost on curbing emissions—an objective that the Clean Air Act plainly authorizes EPA to pursue.

II. EPA's replacement rule (ACE) is based on the agency's same impermissibly constrained interpretation of the measures it can consider in determining the best system of emission reduction, and therefore should be invalidated for the same reasons as the repeal. ACE is unlawful on additional grounds as well.

Regarding regulation of coal-fired power plants, EPA erred in at least three ways. First, EPA did not weigh pollution *reduction* in determining the best system of emission reduction, contrary to the statutory language, congressional intent, and this Court's precedent. Moreover, EPA selected heat rate improvements alone as the best system without explaining its reversal of its prior position that such an approach cannot constitute the best system because of its negligible emission reductions.

Second, EPA failed to provide crucial guardrails for state plans by not quantifying a minimum degree of emission limitation, in violation of the agency's obligation under section 111(d). EPA's unlawful approach undermines the roles of EPA and the States created by section 111(d)'s structure. EPA has tasked States that may lack the expertise and resources to perform EPA's job, abandoning its longstanding role of using its expertise to establish a minimum degree of limitation for existing sources in state plans. The ACE rule's lack of any minimum criteria also means that EPA lacks an objective, substantive basis to evaluate whether state plans are "satisfactory" under section 111(d)(2).

Third, the ACE rule is inconsistent with section 116 of the Act, which preserves States' ability to adopt more stringent standards. EPA's prohibition of state plans that allow emissions averaging and trading, read together with its statement that these more flexible and effective approaches "would undermine the EPA's determination of the [best system] in this rule," 84 Fed. Reg. at 32,557, further underscores that EPA's best system interpretation under section 111 is unlawful.

Finally, EPA's decision to repeal the emission guidelines for gas-fired power plants without replacing them violates EPA's statutory

obligation under the Act and is contravened by the record showing demonstrated systems of emission reduction for these plants.

## STANDING

It is well-established that the adverse effects of climate change injure States, including through increased heat-related deaths, damaged or lost coastal areas, disrupted ecosystems, more severe weather events, and longer and more frequent droughts. *See Massachusetts*, 549 U.S. at 522-23; 74 Fed. Reg. at 66,523-36. State and Municipal Petitioners are submitting several declarations highlighting these harms.<sup>7</sup> *See* Cal. Decl. (Chamberlin) ¶¶ 5-15; Ct. Decl. (Dykes) ¶¶ 9-13; Mass. Decl. (Engler) ¶¶ 7-26; Md. Decl. (Aburn) ¶¶ 5-6, 10-16; Minn. Decl. (Kohlasch) ¶¶ 5-9; N.C. Decl. (Abraczinskas) ¶¶ 8-15; N.J. Decl. (McCabe) ¶¶ 6-20; N.Y. Decl. (Snyder) ¶¶ 23-37; Or. Decl. (Fleishman) ¶¶ 6-15; Vt. Decl. (Moore) ¶¶ 5-19; Wis. Decl. (Watermolen) ¶¶ 6-20; D.C. Decl. (Johnson) ¶¶ 8-10; Boulder Decl. (Weaver) ¶¶ 4-19; Denver Decl. (Babcock) ¶¶ 5-9, 15; NYC Decl. (Parris) ¶¶ 8-18; Philadelphia Decl. (Knapp) ¶¶ 5-8; South Miami

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<sup>7</sup> State and Municipal Petitioners are filing a compilation of standing declarations with an index. In this brief, these declarations are referred to by the declarant's state/city affiliation and last name.

Decl. (Stoddard) ¶¶ 3-23, 29-33; *see also* States’ and Cities’ Comments, *supra*, at 2-10, 87-93 & Appendix A (JA\_\_\_\_\_ - \_\_\_\_\_, JA\_\_\_\_\_ - \_\_\_\_\_, and JA\_\_\_\_\_ ) (summarizing climate-related injuries).

Moreover, as EPA has found, greenhouse gas emissions from existing fossil fuel-fired power plants—“by far” the country’s largest stationary source category of such emissions—“contribute” to these climate change harms. 84 Fed. Reg. at 32,522 n.4, 32,533 (quotation marks omitted). The ACE rule fails to require meaningful emission reductions from power plants, despite the agency’s recognition that substantial greenhouse gas cuts are needed now to avert worsening climate change harms to the States. ACE will also increase emissions of CO<sub>2</sub>, NO<sub>x</sub>, and SO<sub>2</sub> in more than a dozen States, including several Petitioners. *See* EPA, *Illustrative ACE Scenario*, *supra*. EPA’s interpretation of the Act will also hamstring the agency’s ability in the future to use section 111(d) to mitigate climate change harms to States from power plants and other large sources of greenhouse gas emissions. A ruling that the Act does not require repeal of the Clean Power Plan would compel EPA on remand to consider measures it has found meaningfully limit CO<sub>2</sub> and other pollutants from power plants.

The ACE rule also increases the resource burden on state agencies, as EPA acknowledges. 84 Fed. Reg. at 32,573; *see also* Colo. Decl. (Kaufman) ¶¶ 4-13; Ct. Decl. (Dykes) ¶¶ 14-36; Ill. Decl. (Bloomberg) ¶¶ 6-12; Md. Decl. (Aburn) ¶¶ 18-23; Minn. Decl. (Kohlasch) ¶¶ 11-30; N.C. Decl. (Abraczinskas) ¶¶ 21-32; N.J. Decl. (McCabe) ¶¶ 21-23; N.Y. Decl. (Snyder) ¶¶ 7-22, 38; Pa. Decl. (Trivedi) ¶¶ 7-16; Vt. Decl. (Moore) ¶¶ 20-24; Wis. Decl. (Watermolen) ¶¶ 21-24. Vacating the ACE rule would mean that state agencies could forego time-consuming and wasteful work to implement the rule for little (if any) emissions-reduction benefit. This anticipated harm provides an additional, independent ground for standing. *See West Virginia v. EPA*, 362 F.3d 861, 868 (D.C. Cir. 2004).

## ARGUMENT

### POINT I

#### **THE REPEAL OF THE CLEAN POWER PLAN IS UNLAWFUL**

Congress wrote the Clean Air Act broadly because it understood that “without regulatory flexibility, changing circumstances and scientific developments would soon render the Clean Air Act obsolete”; the Act’s use of “broad language” thus “reflects an intentional effort to

confer the flexibility necessary to forestall such obsolescence.” *Massachusetts*, 549 U.S. at 532. In section 111, Congress directed EPA to conduct a broad, experience-based inquiry to select a “best system of emission reduction” that would achieve the Act’s goal of reducing emissions of harmful pollutants. Consistent with this prioritization of practical results over technical formalities, Congress intended that EPA would determine the “best system” based on the effectiveness and feasibility of methods of emission reduction.

In the Clean Power Plan, EPA followed section 111’s requirements when it determined that the “best system of emission reduction” for CO<sub>2</sub> included not only technologies that “improv[e] the emission rates of individual sources,” but also broader approaches for “shifting generation from dirtier to cleaner sources”—allowing any given amount of electricity from the grid to be produced with fewer CO<sub>2</sub> emissions. 80 Fed. Reg. at 64,726; *id.* at 64,776. EPA found that this broader approach was cheaper than other measures, including retrofit controls, *id.* at 64,728; was already “widely used” by sources, *id.* at 64,725, 64,769-72; and was highly effective at reducing overall emissions, *id.*

EPA does not dispute any of its prior findings. It nonetheless concludes that section 111 unambiguously forbids the Clean Power Plan’s approach to setting emission guidelines for existing stationary sources, and limits EPA to considering only “systems that can be put into operation *at* a building, structure, facility, or installation.” 84 Fed. Reg. at 32,524 (emphasis in original). But that restrictive interpretation is inconsistent with the text, purpose, and structure of section 111(d)—and, at minimum, is not compelled by that provision. It defies both Congress’s purpose and common sense to interpret section 111 as unambiguously barring EPA from even considering emission-reduction approaches that have proven to be the most effective means for regulated sources to reduce CO<sub>2</sub> at lower cost, and that are already widely relied on by both States and industry.

EPA’s repeal of the Clean Power Plan should be set aside because it relies on a fundamentally mistaken interpretation of section 111. A court must remand agency action that was based not on the agency’s exercise of judgment but rather on the agency’s mistaken belief that a particular regulatory approach is unambiguously prohibited by statute.



See *Transitional Hosps. Corp. of La., Inc. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000); *Prill*, 755 F.2d at 947-48.

**A. The Text, Purpose, and Structure of Section 111 Do Not Support EPA’s Artificially Constrained View of the Emission-Reduction Measures It May Consider.**

- 1. Congress’s direction that EPA select the “best system of emission reduction” that is “adequately demonstrated” authorizes EPA to consider a wide range of measures to reduce CO<sub>2</sub> emissions.**

In section 111, rather than limiting EPA to particular types of emissions-reduction measures, Congress authorized EPA to consider any “system of emission reduction” and required it to select the “best” one. But in repealing the Clean Power Plan, EPA disregarded this inherently broad language. EPA’s new approach cannot be reconciled with the actual language that Congress chose.

The plain meaning of “system” is “a set of principles or procedures according to which something is done,” *Oxford Dictionary of English* (3d ed. 2010), or, at the time Congress enacted section 111, “a complex unity formed of many often diverse parts subject to a common plan or serving a common purpose,” *Webster’s Third New International Dictionary of the English Language Unabridged* 2322 (1968). Nothing in these definitions suggests any restriction on EPA’s ability to consider all measures by

which sources may in practice reduce their emissions of dangerous pollutants.

Indeed, EPA concedes that “system of emission reduction” is not “limited to technological improvements.” 84 Fed. Reg. at 32,526 n.62. And the broad meaning of “system” also forecloses EPA’s insistence that “system of emission reduction” is limited to measures that a single source could install or implement on its own, as if it were hermetically sealed off from the rest of the world. “System” is often used to describe an overarching construct (“a complex unity,” “a set of principles or procedures”) that makes sense of the connections between disparate but related components, like a system of government, a healthcare system, or a transportation system. Congress’s use of the word “system” is thus a natural way to authorize EPA to take a more comprehensive approach to emissions reduction not limited to “systems that can be put into operation *at*” a single source, *id.* at 32,524—an approach that is particularly appropriate for power plants, which are all connected to a complex and interconnected grid in which any individual source’s generation decisions necessarily affect every other source’s. See *supra* at 8-13.

In contrast to the broad phrase “system of emission reduction,” Congress employed narrower language in other provisions of the Clean Air Act. “Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.” *National Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012). For example, section 407(b)(2) of the Act authorizes EPA to set emission rates for nitrogen oxides based “on the degree of reduction achievable through the *retrofit* application of the best system of continuous emission reduction, taking into account available technology . . . .” 42 U.S.C. § 7651f(b)(2) (emphasis added); *see also id.* § 7491(g)(2) (requiring “best available retrofit technology” to improve visibility in certain areas). The language in these provisions expressly refers to physical modification of sources (“retrofit”)—language that is absent from section 111. If Congress had meant “to curtail EPA’s discretion . . . it would have explicitly said so in section 111, as it did in other parts of the statute.” *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981).

Beyond its use of the broad term “system,” other language in section 111 confirms that Congress intended EPA to think expansively, not

narrowly, in considering systems to reduce emissions. The objective of section 111 is plain on the face of the statute: the system that EPA must determine is the one that is “best” at “emission reduction.” 42 U.S.C. § 7411(a)(1). This focus on practical results is consistent with section 111’s specific aim to address dangerous pollution from stationary sources and Congress’s ultimate goal in the Act “to protect and enhance the quality of the Nation’s air resources so as to promote the public health and welfare.” *Id.* § 7401(b)(1). To achieve those purposes, Congress directed that “[section 111] standards must reduc[e] emissions as much as practicable.” *Sierra Club*, 657 F.2d at 325-26 (quotation marks omitted).

Congress also directed EPA to consider a broad range of factors in determining the best system of emission reduction. EPA’s chosen system must be the “best” system that is “adequately demonstrated”; EPA must assess the “degree of emission limitation” that is “achievable” as well as “the cost of achieving such reduction”; and EPA must consider not only air quality but also energy requirements and “nonair” environmental and health impacts. 42 U.S.C. § 7411(a)(1). This language plainly authorizes EPA to draw on expertise and empirical evidence, including the actual

experiences of sources and regulators with various measures of emission reduction.

That pragmatic approach makes particular sense given that section 111(d) applies to a wide array of pollutants not covered by other provisions of the Act, and thus serves as a catch-all provision for existing sources to ensure “no gaps in control activities pertaining to stationary source emissions that pose any significant danger to public health or welfare.” S. Rep. No. 91-1196, at 20 (1970). Because section 111 requires EPA to address diverse sources and pollutants, Congress sensibly granted EPA flexibility to identify and tailor the “best system of emission reduction” based on real-world experience.

**2. The cooperative-federalism structure of section 111 further supports a broad interpretation of EPA’s authority to consider measures that would effectively reduce CO<sub>2</sub> emissions.**

EPA’s distinct role in the section 111(d) process likewise supports its consideration of emission-reduction systems that take into account the interconnected nature of power plants on the electric grid. EPA’s initial responsibility is not to regulate existing sources directly, but rather to promulgate regulations that establish the minimum emissions

limitation that each State must satisfy in establishing “standards of performance” for existing sources. *See AEP*, 564 U.S. at 424. Nothing about this responsibility constrains EPA to considering only measures of emission reduction that single sources can implement standing alone. To the contrary, because EPA issues its emission guidelines before source-specific standards are set and must consider the overall effect of its guidelines on emissions from regulated sources (see *infra* Point II), it is particularly appropriate for EPA to consider whether measures involving more than one source on the interconnected electric grid (such as increasing production from cleaner sources in place of dirtier sources) could be an effective means of reducing CO<sub>2</sub> emissions.

The flexibility that both States and sources have in section 111(d)’s regulatory scheme also supports EPA’s authority to consider a broad range of emission-reduction measures in determining the best system of emission reduction. Section 111(d) does not mandate that States apply any particular measure of emission reduction to satisfy the emission limits set by EPA. Rather, States have discretion to pursue their own solutions so long as they accomplish the same emissions-reducing result that EPA’s guidelines require. *See* 80 Fed. Reg. at 64,755. Similarly,

States typically give sources discretion to decide how to meet state-imposed standards of performance, again so long as sources effectively reduce emissions of harmful pollutants. *See, e.g.*, 6 N.Y.C.R.R. § 201-6.4(f) (allowing facilities “operational flexibility,” including but not limited to “emissions trading”).<sup>8</sup> It would make little sense for Congress to direct EPA to identify the “best” system of emission reduction but then deny EPA the ability to even consider measures that States and sources consider the best at effectively reducing CO<sub>2</sub> emissions.

There is no serious dispute that, among the CO<sub>2</sub>-reducing measures that States and sources have chosen in recent years, a critical one has been increasing the relative production of lower-polluting sources on the electric grid, as the Power Company Petitioners and Trade Association Petitioners more fully explain. *See* Power Co. Pet. Br. at 14-17; Trade Assoc. Br. at 6-10. Indeed, EPA acknowledges that “widespread implementation of generation shifting might be a workable policy for

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<sup>8</sup> As discussed in more detail *infra* at Point II.A.3, EPA’s failure to consider a broad range of systems of emission reduction is exacerbated by its threat to forbid *the States* from relying on proven methods of emission reduction such as averaging and trading in state plans to adopt more stringent emission limits than EPA’s.

achieving sector-wide carbon-intensity reduction goals.” 84 Fed. Reg. at 32,532. The effectiveness of this measure of emission reduction reflects the distinctive natures of both the electric grid and CO<sub>2</sub>. “[A]ny electricity that enters the [electric] grid immediately becomes a part of a vast pool of energy,” allowing energy to be transported “from region to region” almost instantaneously, regardless of where it was originally produced. *New York v. FERC*, 535 U.S. 1, 7-8 (2002). Just as it is largely irrelevant to the power grid where electricity is generated, it is largely irrelevant to the climate where CO<sub>2</sub> emissions originate: CO<sub>2</sub> is a global pollutant that generally has the same aggregate effect on climate wherever it is emitted. CO<sub>2</sub> is therefore “exceptionally well-suited to emission reduction efforts optimized on a broad geographic scale rather than on a unit-by-unit basis.” 80 Fed. Reg. at 64,769.

In light of these factors, owners and operators have already begun increasing use of lower-polluting generation to reduce CO<sub>2</sub> emissions, often in preference to single-source measures such as retrofit controls installed at the source. *See id.* at 64,769. As industry explained, and EPA found in the Clean Power Plan, such shifts to cleaner production are less costly than other methods at achieving equivalent levels of reductions in



CO<sub>2</sub> emissions. *Id.* at 64,755. And state regulators have increasingly relied on power plants' ability to shift production to less-polluting sources to achieve meaningful CO<sub>2</sub> reductions, such as in RGGI. *Id.* at 64,803, 64,806. See *supra* at 9-10.<sup>9</sup>

EPA's new interpretation of section 111 would require it to ignore these real-world practices and forgo meaningful and effective measures of emission reduction that have been chosen by States and industry and that EPA itself has admitted to be "workable." That interpretation cannot be reconciled with the results-focused and experience-based language of section 111.

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<sup>9</sup> For a fuller explanation of the many other regulatory precedents for the Clean Power Plan's reliance on generation-shifting measures, *see, e.g.*, 80 Fed. Reg. at 64,678, 64,696-98; Clean Power Plan Legal Memorandum (EPA-HQ-OAR-2013-0602) at 61-81 (JA\_\_\_\_-\_\_\_\_); ACE Climate Comments, *supra*, at 14-22 (JA\_\_\_\_-\_\_\_\_); Richard L. Revesz et al., *Familiar Territory: A Survey of Legal Precedents for the Clean Power Plan*, 46 *Envtl. L. Rep.* 10,190 (2016), [https://policyintegrity.org/files/publications/Familiar\\_Territory\\_ELR.pdf](https://policyintegrity.org/files/publications/Familiar_Territory_ELR.pdf)

**B. EPA’s Novel, Restrictive Reading of Section 111 Is Not Compelled by the Statute.**

**1. Section 111 does not unambiguously limit a “system of emission reduction” to measures that can be put into place at a single source.**

EPA relies on an artificially constrained reading of the statute to assert that section 111 *unambiguously* limits the best system of emission reduction to measures a single source could implement alone—and thus, according to EPA, prohibits measures that achieve meaningful emission reductions by shifting production to lower-emitting sources. *See* 84 Fed. Reg. at 32,524. In the Clean Power Plan, EPA rightly concluded that section 111 “by its terms and when read in context, contains no such limits.” 80 Fed. Reg. at 64,761. EPA now wrongly concludes that its previous reading is unambiguously foreclosed. In any event, even EPA’s new interpretation would not categorically exclude generation-shifting measures as part of the “best system.”

To justify its new interpretation, EPA construes section 111(a)(1)’s definition of “standard of performance” as grammatically incomplete, and imports section 111(d) to fill the purported gap. But each step of that analysis is mistaken. First, the definition in section 111(a)(1) is not

incomplete. And second, even if it were, EPA erred in looking to section 111(d) to fill the gap, rather than to section 111(a)(1) itself.

Section 111(a)(1) defines a standard of performance as an emission standard that “reflects the degree of emission limitation achievable through the *application* of the best system of emission reduction,” 42 U.S.C. § 7411(a)(1) (emphasis added). EPA argues that this definition is incomplete because the word “application” “requires both a direct object and an indirect object. In other words, someone must apply *something* to *something else*.” 84 Fed. Reg. at 32,524 (emphasis in original). And EPA then finds the “something else” in section 111(d), which provides that States will “establish standards of performance for any existing source for any air pollutant.” 42 U.S.C. § 7411(d)(1).

But EPA’s interpretation simply does not follow from the text it purports to interpret. Section 111(a)(1)’s use of the word “application” does not require a hunt for an “indirect object” in some other provision. The word “application” is commonly used without an “indirect object” to mean the process of “bring[ing] into action” (or “put[ting] into operation or effect”) some general principle or process to achieve a particular outcome. *See apply*, Merriam-Webster’s Online Dictionary; Oxford

English Dictionary Online, s.v. *apply* (3d ed. 2008) (def. 9). Thus, for example, a lawyer might apply her expertise to make a recommendation to a client; a scientist might apply the theory of gravitation to predict the orbits of celestial objects; and a judge might apply a precedent to reach a holding in a particular case. Similar usages are present in other subsections of section 111<sup>10</sup> and routinely appear elsewhere in federal law.<sup>11</sup> Under this conventional usage, a principle or process is applied to accomplish a particular result, without the need to specify an indirect object for that application.

Section 111(a)(1) uses “application” in this common-sense way. The stated objective of this provision is to identify “standard[s] for emissions of air pollutants” that reflect an “achievable” “degree of emission

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<sup>10</sup> See, e.g., 42 U.S.C. § 7411(g)(3) (Upon a “showing that the Administrator has failed to apply properly the criteria required to be considered under subsection (f)(2), the Administrator shall revise the list under subsection (b)(1)(A) to apply properly such criteria.”).

<sup>11</sup> See, e.g., 49 U.S.C. § 24710(b) (“Amtrak shall develop . . . a performance improvement plan . . . based on the data collected through the application of the financial and performance metrics.”); 10 U.S.C. § 14306 (“[T]he number of officers to be considered from below the [promotion] zone may be established through the application of the running mate system or otherwise as the Secretary determines to be appropriate . . .”).

limitation.” And the means of determining what emission reductions are “achievable” is “through the application of the best system of emission reduction.” There is nothing incomplete about this formulation that requires importing language from elsewhere in section 111. It is enough under section 111(a)(1) that EPA’s “best system” determination inform its assessment of the “degree of emission limitation achievable” through standards of performance.

Second, even if ordinary usage required the word “application” to have an implicit indirect object, the reasonable place to look for such an indirect object would be section 111(a)(1) itself. It would make perfect grammatical sense—and accurately describe EPA’s regulatory responsibilities—to speak of EPA applying a system of emission reduction to “emissions of air pollutants”—language that actually appears in the text of section 111(a)(1). Such a formulation would easily encompass measures that rely on the ability of plants to shift production from dirtier to cleaner sources to directly reduce “emissions of air pollutants” from the power sector.

Instead, EPA has inexplicably reached outside of section 111(a)(1) and asserted that the implied indirect object of the word “application” in

section 111(a)(1) must be found in section 111(d). EPA then reasons that because a “standard of performance” in section 111(d) is established “for any existing source,” then the “best system of emission reduction” in section 111(a)(1) is also “for any existing source”—language that EPA further interprets as limiting EPA to considering systems “that can be put into operation *at* [an existing source].” 84 Fed. Reg. at 32,524 (emphasis in original).

EPA’s splicing of these distinct provisions ignores the fact that section 111(d) pertains to a different phase of the regulatory process and thus cannot simply be merged with section 111(a)(1). Section 111(a)(1)’s reference to the “best system” describes *EPA’s* mandate to promulgate guidelines that will direct the States’ formulation of emission standards. By contrast, section 111(d) describes *the States’* subsequent obligation to “establish[] standards of performance for any existing source.” 42 U.S.C. § 7411(d). In other words, although States may establish “standards of performance” “for any existing source” under section 111(d), EPA determines the “best system of emission reduction” in section 111(a)(1) not “for” any particular source, but rather to guide the subsequent formulation of standards of performance.

EPA ignores the entirely distinct functions of section 111(a)(1) and (d) and thus improperly conflates the future emission standards that States will set for particular sources with the best system of emission reduction used to establish what those standards must achieve within a given State. That conflation of “standards” with “system” is not a reasonable interpretation of the distinct language and purposes of section 111(a)(1) and (d)—and at minimum is not unambiguously required by the language of those separate provisions. “The most natural reading of the statute” is to look at the “nearby” words as opposed to words that “appear in separate subsections and are in a different voice.” *Dean v. United States*, 556 U.S. 568, 573 (2009).

Finally, even if EPA were right that section 111(a)(1) and (d) could be combined, that combination would *still* not support its view that the only eligible “system[s] of emission reduction” are those “that can be put into operation *at*” an existing source. 84 Fed. Reg. at 32,524 (emphasis in original). The language that EPA relies on from section 111(d) does not refer to standards “at” a source, but instead discusses the establishment of “standards of performance *for* any existing source,” 42 U.S.C. § 7411(d)(1) (emphasis added). A system of emission reduction “for” a

source is not necessarily one that must be implemented physically “at” that source—for example, a system “for” a hotel to manage reservations can be handled off-site as well as “at” the front desk.

Likewise here, generation shifting is properly regarded as a system of emission reduction “for” existing sources because it necessarily involves actions by polluting sources to address the harms caused by their own operations. For example, as EPA recognized in the Clean Power Plan, generation shifting can involve fossil-fueled plants limiting their own emissions of CO<sub>2</sub> by reducing their own generation of electricity. *See* 80 Fed. Reg. at 64,780. Sources can also engage in other transactions, as part of emissions averaging and trading more broadly, to acquire credits from other regulated sources that have reduced emissions. In all these instances, compliance reduces pollution from regulated sources and addresses the external harm caused by such sources’ own emissions. This measure of emission reduction is thus established “for” existing sources.



**2. The Act's separate provisions for new and modified sources implementing the Best Available Control Technology do not support, let alone compel, EPA's restrictive reading of section 111.**

Contrary to EPA's contention (*see* 84 Fed. Reg. at 32,524), the Best Available Control Technology provision in the Act's New Source Review program does not support its narrow interpretation of section 111(d). Section 165 (together with a related definitional provision, section 169) requires new and modified sources, on a source-by-source basis, to obtain permits affirming that they will apply the "best available control technology" "including fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques." 42 U.S.C. § 7479(1), (3). The "best available control technology" cannot be one that will "result in emissions of any pollutants which will exceed the emissions allowed by any applicable standard established pursuant to section [1]11 or [1]12" of the Act. *Id.* § 7479(3).

EPA incorrectly argues that section 111(d) incorporates section 165's focus on control technologies at individual sources. *See* 84 Fed. Reg. at 32,525 & n.50. As an initial matter, EPA ignores that section 165 is limited to *new and modified* sources. The standard from section 111 that would generally be "applicable" to such sources is thus a new-source

standard under section 111(b), not a standard under section 111(d), which applies to *existing* sources. Regulation under section 165 is also distinct because, unlike section 111(d) emission guidelines, which EPA issues for categories of sources, section 165 permits are issued on “a case-by-case basis” for individual facilities at the time they are built or modified. 42 U.S.C. § 7479(3). There was thus no basis for EPA to rely on section 165’s distinct regulation of a different set of sources to limit its authority under section 111(d).

Even if section 165 were relevant to section 111(d) regulations, EPA is wrong to assert that section 165’s cross-reference to section 111 standards requires the two provisions to use the exact same “set of tools” to reduce emissions. 84 Fed. Reg. at 32,525. Congress enacted section 165 as part of the New Source Review program in 1977—seven years after enacting section 111—and included the cross-reference to section 111 merely to ensure that neither section would undermine the other, not to constrain EPA’s preexisting authority under section 111. *See* Pub. L. No. 95-95, § 127(a), 91 Stat. 685, 741 (1977).

EPA fails to identify any conflict between section 165’s text and the provisions in section 111 regarding emission reductions from power

plants. The language in section 165 does not, on its face, speak to the measures that EPA can consider under section 111 at all, let alone limit those measures. And sources can satisfy the provision cross-referencing section 111 by ensuring that the controls they implement under section 165—whatever they may be—do not result in greater emissions than permitted by section 111. EPA identifies no obstacle preventing a source from complying with both section 165 permits and section 111 standards of performance.

**3. EPA’s restrictive interpretation of section 111 is not necessary to avoid an “infinite” of meanings.**

EPA is wrong to assert that the Clean Power Plan’s understanding of “system of emission reduction” would improperly “encompass *any* ‘set of measures’ that would—through some chain of causation—lead to a reduction in emissions.” 84 Fed. Reg. at 32,528 (emphasis in original). However broadly EPA’s evaluation of emission-reduction systems *begins*, its selection of the “best system” is subject to significant statutory constraints that meaningfully guide the agency’s discretion.

First, the statute requires EPA to consider the “degree of emission limitation” that is “achievable” and “the cost of achieving such reduction”;

and it requires EPA to consider not only air quality but also “energy requirements” and “nonair quality health and environmental impact.” 42 U.S.C. § 7411(a)(1). Second, EPA must select a system that has been “adequately demonstrated,” *id.*, precluding EPA from selecting systems based on speculation. Third, EPA must consider measures that are within the control of sources to reduce emissions from those sources, rather than measures that only indirectly reduce emissions. Thus, for example, EPA previously found that the “best system of emission reduction” could not include changes in consumer behavior (such as usage of more energy-efficient products) outside the control of sources. *See* 80 Fed. Reg. at 64,776-79. These limitations meaningfully channel EPA’s discretion without undercutting Congress’s overarching objective to ensure that EPA considers all proven methods of emission reduction in identifying the “best system.”

#### **4. The major-questions doctrine is inapplicable.**

EPA is wrong to assert that the Clean Power Plan’s reliance on generation shifting implicated the major-questions doctrine by triggering consequences beyond Congress’s contemplation. *See* 84 Fed. Reg. at 32,529. In *Massachusetts*, the Supreme Court rejected the view that

“climate change [i]s so important that unless Congress spoke with exacting specificity, it could not have meant [EPA] to address it.” 549 U.S. at 512. Then, in *AEP*—which involved the same pollutant, the same provision of the Act, and the same sources as here—the Court acknowledged that any effective plan to combat greenhouse gases from power plants under section 111 may have broad national consequences, including economic consequences, and held that Congress had “entrust[ed] such complex balancing to EPA in the first instance.” 564 U.S. at 427. Given that delegation, EPA’s exercise of authority over “entities already subject to its regulation” to reduce emissions of a pollutant that it unambiguously has authority to control does not implicate the major-questions doctrine. *See Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 332 (2014) (“*UARG*”).

Even if economic impact alone could make a section 111 rule transformative, EPA has not shown that increased generation shifting goes beyond “moderately increas[ing] the demands EPA” makes of already-regulated entities. *Id.* EPA chose generation-shifting measures as part of the best system in the Clean Power Plan in part because these measures are far more affordable than single-source methods that might

qualify as adequately demonstrated, such as carbon capture and storage. *See* 80 Fed. Reg. at 64,727-28. There, EPA balanced the very factors Congress told the agency to balance, and selected the *least* disruptive option that achieved meaningful emission reductions.

EPA is also wrong to invoke the major-questions doctrine on the ground that generation shifting is “far afield from the core activity of . . . [section 111]” based on the fact that section 111 rulemakings prior to the Clean Power Plan did not rely on generation shifting. *See* 84 Fed. Reg. at 32,529. The regulations that EPA adopted under section 111 prior to *Massachusetts* in 2007 and *AEP* in 2011 have minimal interpretative relevance because the Supreme Court had not yet recognized that the Act clearly authorizes EPA to regulate CO<sub>2</sub> from existing power plants under section 111.

Moreover, EPA relied on generation shifting under other parts of the Act in rules prior to the Clean Power Plan. For example, when EPA set new source performance standards for sulfur dioxide in 1979, it recognized that “[a]lmost all electric utility generating units in the United States are electrically interconnected,” and that therefore the performance standard for any particular source should take into account

“the amount of power that could be purchased from neighboring interconnected utility companies.” 44 Fed. Reg. 33,580, 33,597-600 (June 11, 1979). EPA’s own past rulemaking thus demonstrates that the Clean Power Plan was not transformative in the methods it used or in its effect on utility industry trends. To the contrary, the record conclusively confirms EPA’s position in 2015 that the Clean Power Plan was in fact a “trend-following” rule. See EPA, *Basis for Denial of Petitions to Reconsider and Petitions to Stay the Clean Power Plan* (Jan. 17, 2017) at 22 (JA\_\_\_\_); RIA at 2-6 to 2-11. See Point I.B.5, *infra*.

**5. EPA’s new interpretation is not needed to prevent any improper encroachment on the authority of States.**

Considering the Clean Power Plan’s system of emission reduction would not, as EPA mistakenly asserts, improperly encroach on States’ authority to determine the “generation mix” of the sources within their borders. 84 Fed. Reg. at 32,530.

To the extent that States have exclusive authority over the mix of *electricity generation* within their borders, it does not follow that EPA is thereby restrained from regulating *pollution*. As the Supreme Court has explained, whether a federal regulation improperly intrudes on an area

of state control should be judged by assessing what it directly regulates, not by looking at any downstream effects it may have. *FERC v. Electronic Power Supply Ass'n*, 136 S. Ct. 760, 776-79 (2016) (“*EPSA*”). In *EPSA*, the Supreme Court upheld a federal rule that directly “regulate[d] what takes place on the *wholesale* [electricity] market”—an area of federal regulation authorized by the Federal Power Act—even though the rule “of necessity” affected *retail* electricity rates—an area expressly reserved to the States. *Id.* at 776. As *EPSA* recognized, a federal agency is not restrained from regulating in an area where it has express delegated authority simply because the consequences of its regulation may affect areas of exclusive state control.

The same reasoning would support EPA’s consideration of generation shifting in promulgating regulations under section 111(d). In that context, EPA regulations under section 111(d) are “all about, and only about,” reducing carbon pollution. *Id.* Because electricity and pollution “are not hermetically sealed from each other,” it is inevitable—and “of no legal consequence”—that any effective pollution regulation may influence the relative generation of sources within a State. *See id.* Indeed, it would be difficult or even impossible for EPA to require



meaningful pollution reductions from power plants if its regulations could not in any way influence state or private choices about electricity generation. There is thus no indication that Congress intended to undercut its own objectives by allowing the relationship between pollution and electricity generation to disable EPA's regulatory authority.<sup>12</sup>

## POINT II

### THE ACE RULE IS UNLAWFUL

Because the ACE rule relies on the same unlawful interpretation of the Act as EPA's repeal, it should be set aside for the reasons discussed in Point I. The ACE rule's replacement emission guidelines for coal-fired power plants and rescission of the guidelines for gas-fired plants are

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<sup>12</sup> Similarly, consideration of generation-shifting would not improperly intrude on the rate-setting authority of the Federal Energy Regulatory Commission. *See* 84 Fed. Reg. at 32,530. Section 111 expressly *requires* EPA to consider "energy requirements" in determining the best system of emission reduction. 42 U.S.C. § 7411(a)(1). So long as EPA is acting within the "heartland" of the Act's purpose of regulating pollution, it is not forbidden from acting simply because its regulation may have a downstream effect on rates set by another agency. *See Connecticut Dep't of Pub. Util. Control v. FERC*, 569 F.3d 477, 483 (D.C. Cir. 2009).

additionally unlawful and arbitrary and capricious because they fail to satisfy EPA's obligations under the Act.

**A. The ACE Rule's Replacement Emission Guidelines for Coal-Fired Power Plants Are Unlawful.**

The ACE rule's emission guidelines for coal-fired power plants are flawed in multiple respects, as other petitioners' briefs fully explain. *See* Pub. Health and Env. Pet. Br. at 19-45; Power Co. Pet. Br. at 23-31; Trade Assoc. Pet. Br. at 10-14. State and Municipal Petitioners focus here on three legal errors: (1) EPA did not weigh pollution reduction in determining the best system of emission reduction, and relatedly did not explain its reversal from its prior position that heat rate improvements alone reduced too little pollution to be the best system, (2) EPA failed to quantify a minimum degree of emission limitation for state plans, and (3) EPA's prohibition of more effective pollution-control measures from state plans is inconsistent with section 116 of the Act.

- 1. EPA neither weighed pollution reduction in selecting the best system of emission reduction nor explained its reversal from its prior position that heat rate improvements alone are not the best system.**

There is "no sensible interpretation" of the best system of emission reduction that would fail to incorporate "the amount of air pollution as a

relevant factor to be weighed.” *Sierra Club*, 657 F.2d at 325-26. Here, not only did EPA fail to weigh pollution reduction in determining the best system, it also failed to explain its reversal of its prior position that heat rate improvements alone achieve emission reductions too minimal to be the best system.

EPA failed in the Rule to weigh the amount of pollution reduction as a factor in determining the best system of emission reduction. The agency merely remarked that “[i]mplementation of heat rate improvement measures also would achieve reasonable reductions in CO<sub>2</sub> emissions from designated facilities in light of the limited cost-effective and technically feasible emissions control opportunities.” 84 Fed. Reg. at 32,542. As a preliminary matter, EPA was wrong to conclude that there are “limited” opportunities for cost-effective and technically feasible emissions control, even under the agency’s new, constricted reading of the best system. *See* Pub. Health and Env. Pet. Br. at 31-40; Trade Assoc. Pet. Br. at 10-14. Moreover, EPA could have, but did not, weigh emission reduction in choosing the best system. For example, EPA could have compared CO<sub>2</sub> emission reductions from heat rate improvements to other systems that fit EPA’s new, narrow interpretation of a “system” (such as

co-firing and carbon capture and storage). No matter which systems of emission reduction EPA considers permissible, EPA must actually evaluate the *amount* of pollution reduction in deciding which system is the “best” one. EPA’s failure to do so here was unlawful. *See Sierra Club*, 657 F.2d at 325-26.

Nor was EPA writing on a blank slate: in the Clean Power Plan, EPA rejected heat rate improvements alone as the best system of emission reduction because such measures “would not meet one of the considerations *critical* to the [best system] determination—the quantity of emission reductions.” 80 Fed. Reg. at 64,727 (emphasis added). EPA explained that the amount of pollution reduced using heat rate improvements alone “is too small for these measures to be the [best system] by themselves for this source category,” especially in light of “the magnitude of the environmental problem and projections by climate scientists that much larger emission reductions are needed from fossil fuel-fired [power plants] to address climate change.” *Id.*

EPA has not retracted its findings about the grave threat posed by climate change and the need to promptly mitigate CO<sub>2</sub> emissions to address current and future harms. To the contrary, as discussed above,

EPA recently reaffirmed in the National Climate Assessment the need to substantially and immediately mitigate greenhouse gas emissions to prevent serious harms from climate change. Despite this record, the agency made no effort to explain how a system that results in less than one percent reduction in CO<sub>2</sub> emissions by 2030 can produce the amount of emission reduction required to satisfy this “critical” factor. EPA’s unexplained reversal is unlawful. *See Fox Television*, 556 U.S. at 515-16.<sup>13</sup>

**2. EPA’s failure to establish a minimum degree of emission limitation for state plans contravenes section 111(d)’s structure and its roles for EPA and States.**

The ACE rule violates section 111(d) because it fails to quantify a minimum degree of emission limitation for performance standards in state plans. *See Pub. Health and Env. Pet. Br.* at 19-26. State and

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<sup>13</sup> In addition, EPA has not reasonably explained its change in position that the “rebound effect,” in which emission reductions from efficiency increases at coal-fired plants are offset or fully overcome by emission increases if those plants run more often is an additional reason heat rate improvements alone are not the best system of emission reduction. *See Pub. Health and Env. Pet. Br.* at 28-31.

Municipal Petitioners focus here on two ways in which EPA's failure undermines the statutory structure and the roles of EPA and the States.

First, EPA's approach is inconsistent with its longstanding position that Congress intended it to use the expertise it has gained from setting section 111(b) new-source standards to quantify a minimum degree of limitation for existing sources in state plans. In its original implementing regulations, EPA recognized the importance of developing substantive emission guidelines to "assure that meaningful controls will be imposed" in state plans. 40 Fed. Reg. 53,340, 53,343-44 (Nov. 17, 1975). The agency noted it was better positioned than States to fill this role, citing its experience from establishing performance standards for categories of new sources under section 111(b), and its authority under the Act to obtain relevant operational and emissions information from the industry as necessary. *Id.* EPA has since issued substantive emission guidelines with quantified emission limitations that States have used to set standards for individual sources.<sup>14</sup>

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<sup>14</sup> In section 111(d) rules over the years, EPA has quantified the degree of emission limitation using various metrics. *See, e.g.*, 42 Fed. Reg. 55,796, 55,797 (Oct. 18, 1977) (setting limit of 0.25 grams of acid  
(continued on the next page)

In the ACE rule, however, EPA tasked *States* with quantifying the degree of emission limitation achievable, on a facility-by-facility basis using EPA's table of heat rate improvements (40 C.F.R. § 60.5735a(a)(2)(i), Table 1). 84 Fed. Reg. at 32,549-51. EPA did so despite concerns raised by States during the comment period that they lacked the necessary expertise and resources to perform this function.<sup>15</sup> In doing so, EPA abdicated its proper role under the statutory structure.

Second, EPA's failure to include a minimum degree of emission limitation in its guidelines renders its evaluation of state plans a standardless exercise. The agency has long recognized that "EPA review of such plans for their substantive adequacy is essential." 40 Fed. Reg. at 53,342-43. EPA explained that if its review of state plans were based "solely on procedural criteria," then "states could set extremely lenient

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mist/kilogram of acid produced by existing sulfuric acid plants); 61 Fed. Reg. 9,905, 9,919 (Mar. 12, 1996) (limiting concentration of non-methane organic compounds from existing solid waste landfills to 20 parts per million by volume or 98-percent reduction); 70 Fed. Reg. 28,606, 28,649-50 (May 18, 2005) (establishing state-specific caps on annual tons of mercury from existing power plants) (vacated on other grounds).

<sup>15</sup> See Mich. Dep't of Env'tl. Quality Comments (EPA-HQ-OAR-2017-0355-23751) at 2 (JA\_\_\_\_); S.C. Dep't of Health & Env'tl. Control Comments (EPA-HQ-OAR-2017-0355-24035) at 1-2 (JA\_\_\_\_).

standards . . . so long as EPA’s procedural requirements were met.” *Id.* at 53,343. Since its initial regulations in 1975, EPA’s quantification of a minimum degree of emission limitation has provided the fundamental substantive criterion for its evaluation of state plans and whether such plans contain “emission standards . . . no less stringent than the corresponding emission guideline(s).” 40 C.F.R. § 60.24(c); *see also id.* § 60.24a(c) (revised implementing regulations retain same language).

Here, EPA not only failed to quantify the degree of emission limitation achievable, it also decided state plans’ performance standards need not even reflect efficiency improvements within the possible ranges EPA identified. *See* 84 Fed. Reg. at 32,537-38. The lack of any floor or minimum criteria means that EPA lacks objective criteria with which to evaluate the “substantive adequacy” of state plans and determine whether they are “satisfactory” under section 111(d)(2). *See* 40 Fed. Reg. at 53,342-43.

EPA’s failure to include an objective basis for evaluating state plans undermines the structure Congress created in section 111(d). This failure will likely lead to inconsistent standards among states and/or greater



litigation risk for states defending their plans as satisfactory.<sup>16</sup> And without EPA setting the minimum level of emissions reduction for state plans, some States may opt to require little or no emission reductions, further undermining the ACE rule's limited benefits. *See* Comments of 14 State Agencies, *supra*, at 16 (JA\_\_\_\_\_). EPA's approach will likely lead to weak and inconsistent standards among the States, thwarting section 111's goal to ensure meaningful limits on dangerous pollutants in all States.<sup>17</sup>

### **3. The Rule's emission guidelines are inconsistent with section 116 of the Act.**

EPA has exacerbated its erroneous interpretation of the "best system of emission" reduction (see *supra* Point I) and its failure to

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<sup>16</sup> *See* Comments of 14 State Agencies, *supra*, at 17 (JA\_\_\_\_\_); Michigan Dep't of Env'tl. Quality Comments, *supra*, at 3 (JA\_\_\_\_\_); Nat'l Ass'n of Clean Air Agencies (EPA-HQ-OAR-2017-0355-23788) at 4 (JA\_\_\_\_\_).

<sup>17</sup> In the Clean Power Plan, EPA recognized that preventing a "race to the bottom"—which Congress cited in passing section 111—applied to emission standards for existing power plants. *See* Clean Power Plan Legal Memorandum, *supra*, at 19, n.34 (citing H. Rep. No. 91-1146 at 893, *reprinted in* 1970 U.S.C.C.A.N 5356, 5358) (JA\_\_\_\_\_). In particular, EPA noted that companies typically make investment decisions across a diverse portfolio of assets that may be located in different states with different state and local requirements and incentives. *Id.*

quantify a minimum degree of emission limitation for state plans (see *supra* Point II.A.2) by wrongly prohibiting *States* from using emissions averaging and trading to comply with the ACE rule. This prohibition violates section 111, as explained by Power Company Petitioners. *See Br.* at 23-29. It is also inconsistent with section 116 of the Act, further demonstrating the flawed nature of EPA's approach.

As EPA recognized in the Clean Power Plan, given the success in state programs using emissions trading and averaging to substantially and cost-efficiently cut CO<sub>2</sub> emissions, States would likely use these approaches in establishing performance standards. 80 Fed. Reg. at 64,733-35, 64,783. In the ACE rule, EPA precluded the use of averaging and trading not only as the basis for its emissions guidelines, but also as a means for state plans to *comply* with emission reductions requirements. 84 Fed. Reg. at 32,555. And EPA did so despite overwhelming support among States and companies for emissions averaging and/or trading—including among those that intervened on EPA's side to defend the

Rule.<sup>18</sup> EPA also opined that—contrary to longstanding practice—it will likely disapprove state plans with performance standards that are “more stringent than those that would result from application of the [best system].” *Id.* at 32,559-60.

As Power Company Petitioners explain, EPA’s disapproval of more stringent state plans—*i.e.*, plans that combine stricter standards of performance with trading and averaging—would be unlawful under section 116, which expressly preserves the “right of any State . . . to adopt or enforce . . . *any* standard or limitation respecting emissions of air pollutants” as long as such standard or limitation is at least as stringent as one “in effect under an applicable implementation plan or under section 7411” of the Act. 42 U.S.C. § 7416 (emphasis added). *See* Power Co. Pet. Br. at 29-31 (discussing *Union Elec. Co. v. EPA*, 427 U.S. 246 (1976)).

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<sup>18</sup> *See, e.g.*, Comments of American Elec. Power (EPA-HQ-OAR-2017-0355-24822) at 27 (JA\_\_\_\_\_), Ark. Dep’t of Env’tl. Quality Comments (EPA-HQ-OAR-2017-0355-24248) at 6-10 (JA\_\_\_\_\_), Mo. Dep’t of Nat. Res. Comments (EPA-HQ-OAR-2017-0355-24010) at 3-4 (JA\_\_\_\_\_), Southern Co. Comments (EPA-HQ-OAR-2017-0355-23787) at 33-36 (JA\_\_\_\_\_); Tex. Comm’n on Env’tl. Quality Comments (EPA-HQ-OAR-2017-0355-23666) at 8 (JA\_\_\_\_\_).

If States adopt plans that achieve emission reductions equal to or greater than the minimum required by the EPA emission guideline, then under sections 111(d) and 116, EPA has no lawful basis for plan disapproval. State greenhouse gas programs such as RGGI and California's cap-and-trade law include emissions trading measures and require substantially greater pollution reductions from the power sector than the ACE rule mandates. EPA must approve state plans based on these programs. *See Union Elec. Co.*, 427 U.S. at 264 (rejecting interpretation of section 116 that would require States desiring stricter standards than mandated under section 110 to enact two sets of emission standards—one federally approved plan and one stricter state plan).

The ACE rule's contrary position stems from EPA's concern that state plans with more flexible and effective approaches "would undermine the EPA's determination of the [best system] in this rule," 84 Fed. Reg. at 32,557. That is not a proper reason to trample on state choice: EPA's mandate is not to defend its choice of best system, but to guide States in reducing as much pollution as is feasible, which is what more stringent state plans do. The tension between these effective, low-cost, preferred measures and EPA's rigid interpretation of the best

system is not evidence that such measures should be *excluded* from state plans, *see id.* at 32,556; rather, it is evidence that EPA should not have excluded such measures when it defined the best system. EPA’s “need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn.” *UARG*, 573 U.S. at 329.

EPA’s legal error has further practical consequences for States. To adopt more ambitious pollution reductions, States would have to operate two separate programs—a rigid section 111(d) plan achieving few if any emission reductions and a more demanding but more flexible state-law program. And those programs could work at cross-purposes: the 111(d) plan would encourage investments in high-emitting coal-fired power plants, incentivizing them to run more, while the state program would encourage those same sources to run less. There is “no basis” to conclude that Congress intended the Act to place “such wasteful burdens upon the States.” *Union Elec. Co.*, 427 U.S. at 264.

**B. EPA’s Decision to Repeal Emission Guidelines for Gas-Fired Power Plants Without Replacing Them Is Unlawful.**

The ACE rule repeals the Clean Power Plan’s emission guidelines limiting CO<sub>2</sub> from gas-fired power plants—the country’s largest source of

electricity generation—without replacing them. 84 Fed. Reg. at 32,533. This action both violates EPA’s statutory obligation under the Act and is contravened by the record, which shows demonstrated systems of emission reduction from these plants are readily available. *See* Pub. Health and Env. Pet. Br. at 42-45 (EPA acknowledged in proposed rule it had extensive data on efficiency improvements for gas plants at the unit level and further ignored engineering report and other rulemaking comments providing additional evidence on emission reduction opportunities).

## CONCLUSION

Based on the foregoing, the Court should grant State and Municipal Petitioners' petition for review.

Dated: Albany, New York  
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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT**

The undersigned attorney, Michael J. Myers, hereby certifies:

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/s/ Michael J. Myers  
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**CERTIFICATE OF SERVICE**

I certify that on April 17, 2020, the foregoing Opening Brief was electronically filed with the Clerk of the Court for the United States Court of Appeals for the District of Columbia Circuit through the Court's CM/ECF system, which effected service upon counsel of record through the Court's system.

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