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

United States Court of Appeals for the District of Columbia Circuit

AMERICAN LUNG ASSOCIATION, et al.,

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,

Respondents.

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

REPLY BRIEF OF STATE AND MUNICIPAL PETITIONERS AND PETITIONER-INTERVENOR STATE OF NEVADA

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GLOSSARY

ACE	Affordable Clean Energy rule
Act	Clean Air Act
CO_2	Carbon Dioxide
EPA	United States Environmental Protection Agency
JA	Joint Appendix
RGGI	Regional Greenhouse Gas Initiative
RIA	Regulatory Impact Analysis
State Br.	Opening Brief of State and Municipal Petitioners and Petitioner-Intervenor State of Nevada

PRELIMINARY STATEMENT

Despite its lengthy attack on the Clean Power Plan in its brief, the Environmental Protection Agency cannot change two fundamental facts that are fatal to its argument that it was required to repeal the Plan. First, EPA has not demonstrated any language in section 111 of the Clean Air Act that unambiguously limits the "best system of emission reduction" to measures that operate entirely at the level of an individual source. Second, accepting EPA's interpretation would mean that Congress's mandate for EPA to determine the "best" system of emission reduction would forbid the agency from considering the most cost-effective, widely-used approach to limit CO_2 emissions from power plants. Nothing in the Act compels this counterproductive result.

SUMMARY OF ARGUMENT

I. EPA fails to show that section 111, 42 U.S.C. § 7411, unambiguously required the agency to repeal the Clean Power Plan. Contrary to an assumption that runs throughout EPA's arguments, the fact that States use EPA guidelines to set standards for individual sources is not a reason that EPA's antecedent designation of the "best

system of emission reduction" is limited to measures that apply at the level of an individual source. Rather, the text and structure of section 111 assign distinct roles to EPA and the States and thereby authorize EPA to undertake a distinct inquiry in determining the best system. By conflating those roles, EPA shirks a responsibility Congress required it to fulfill.

Equally meritless is EPA's argument that the phrase "application of the best system of emission reduction" in section 111(a)(1) must take a specific indirect object, and that this indirect object must be drawn from section 111(d). When Congress enacts statutory language that, as here, omits a part of speech, that omission demonstrates Congress' intent to confer flexibility on the agency, not to restrain it. As EPA's own analysis acknowledges, there are many reasonable candidates for an indirect object for "application" in section 111(a)(1) that would not require the agency to reach into a separate subsection altogether. And EPA's attempt to splice together section 111(a)(1) and (d) does not even work on its own terms: it distorts the nature of EPA's authority under section 111(a)(1), and makes a hash of the actual language governing state responsibilities in section 111(d).

EPA's artificially narrow interpretation of its authority under section 111(a)(1) here undermines the objectives that Congress sought to pursue in the statute. Congress gave the agency flexibility to consider new methods of emission reduction "adequately demonstrated" in real life use in order to meaningfully reduce emissions of harmful pollutants. EPA's position here, by contrast, would preclude it from considering approaches such as generation shifting that the electricity industry actually uses to reduce emissions in a cost-effective manner. There is simply no indication that Congress's use of broad language in section 111 was intended to so hobble EPA's ability to abate harmful pollution.

II. The ACE rule suffers from the same flawed interpretation of the best system of emission reduction as the repeal. ACE is unlawful on several additional grounds as well.

There are three legal flaws with ACE's regulation of coal-fired plants. First, EPA failed to weigh the statutory factor of pollution reduction in choosing heat rate improvements alone as the best system of emission reduction. Relatedly, EPA failed to explain its reversal in position that heat rate improvements alone do not sufficiently reduce emissions to be the best system.

Second, EPA fails to rebut our points regarding how ACE's lack of a minimum degree of emission limitation undermines the allocation of responsibilities to EPA and the States in section 111(d). Congress intended EPA to use its expertise to quantify a minimum degree of limitation, and not leave that job to the States on a facility-by-facility basis. The lack of a minimum emissions requirement here also eliminates the substantive basis EPA uses to evaluate whether state plans are "satisfactory." EPA's response, focusing on ACE's procedural requirements, only re-emphasizes our point that, absent a minimum degree of emission limitation set by EPA, whether a state plan is satisfactory is left to EPA's whims.

Third, EPA incorrectly argues that section 116 of the Act—which preserves the right of States to adopt different emission standards than EPA's provided they are at least as stringent—is not relevant to its decision to bar the use of emissions trading or averaging in state plans. EPA's position is inconsistent with the Supreme Court's decision in *Union Electric Co. v. EPA*, which construed section 116 in relation to the similar state plan process under section 110. EPA fails to address *Union Electric* at all.

Finally, EPA violated section 111(d) when it repealed the Clean Power Plan's emission guidelines for gas-fired plants without replacing them. The agency is wrong that its decision was nonfinal and that it can lawfully withdraw CO_2 emission guidelines for existing plants given that EPA is regulating CO_2 from new gas-fired plants under section 111(b).

ARGUMENT

POINT I

EPA'S INTERPRETATION OF SECTION 111 IS NOT UNAMBIGUOUSLY COMPELLED BY THE STATUTE

EPA's repeal of the Clean Power Plan is based on the fiction that section 111 of the Act unambiguously prohibits EPA from deciding that the "best system of emission reduction" can include shifting electricity generation from dirtier to cleaner plants—even though EPA admits that this method is widely used and significantly reduces CO_2 emissions. *See* 84 Fed. Reg. 32,520, 32,532 (July 8, 2019). Petitioners have previously explained how the text, purpose, and structure of section 111 do not support—let alone unambiguously impose—the constraints that EPA now reads into the statute. EPA's further attempts to salvage its novel and highly restrictive reading of section 111 are meritless. Because EPA's

repeal of the Clean Power Plan relies on a mistaken interpretation of section 111, it must be set aside. *See Transitional Hosps. Corp. of La. v. Shalala*, 222 F.3d 1019, 1029 (D.C. Cir. 2000); *Prill v. NLRB*, 755 F.2d 941, 947-48 (D.C. Cir. 1985).

A. EPA's Determination of the Best System Under Section 111 Is Not Limited to Measures That Can Be Put into Place at a Single Source.

1. EPA's interpretation ignores the distinct roles of EPA and the States in the section 111 process.

One of EPA's core errors is the assumption that, because States use EPA's guidelines to determine performance standards for individual sources, EPA's determination of the "best system of emission reduction" is restricted to those measures that solely apply at the level of an individual source. EPA Br. 58-59, 151. As the Rule itself acknowledges, section 111 gives EPA and the States "distinct roles, responsibilities, and flexibilities." 84 Fed. Reg. at 32,521. EPA's argument here improperly conflates those distinctions.

The separate functions of EPA and the States are set out in separate provisions of section 111. It is EPA's initial responsibility under section 111(a)(1) to identify "the best system of emission reduction . . . the Administrator determines has been adequately demonstrated," "taking

into account" certain statutory factors. 42 U.S.C. § 7411(a)(1). EPA establishes emission guidelines based on the degree of emission limitation achievable by the best system. Only then, under section 111(d), do States "promulgate standards of performance" for particular existing sources that must satisfy EPA's emission limits. *See* 80 Fed. Reg. 64,662, 64,783 (Oct. 23, 2015).

This plain text rebuts EPA's startling assertion that it has "no independent regulatory authority" under section 111. EPA Br. 124. Section 111(a)(1) explicitly mentions EPA and requires it to both "determine[]" the best system and to "tak[e] into account" specified criteria in reaching that determination, *without* setting source-specific standards. Conversely, when States set source-specific standards under section 111(d), they do *not* do so based on their own (re)determination of the best system, but rather based on "the degree of emission limitation achievable" EPA has determined from the application of the best system set forth in EPA's emission guidelines. These provisions thus explicitly establish different decisions for federal and state actors to make at different stages of the regulatory process.

EPA's efforts to avoid its distinct regulatory role are unpersuasive. In its color-coded statutory addendum—purporting to show that section 111(d) is the source of EPA's authority (*see* EPA Br. 61-62)—the agency simply omits the language from section 111(a)(1) that requires that "the Administrator determine[]" the best system (*see* EPA's Statutory Addendum at 1). And EPA offers no support for its assertion that statutory language ordinarily conferring authority on an agency does not do so if it is contained in a definitional section. The cases that EPA cites (Br. 57-59) say only that statutes must be construed as a whole. *See Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 320 (2014) (*"UARG"*); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000). Here, that principle requires EPA to respect the actual substantive language that Congress chose in section 111(a)(1) to describe EPA's obligations.

Because EPA has distinct regulatory responsibilities under section 111(a)(1), its attempt to infer limitations from section 111(d)'s language fails. For example, EPA repeatedly cites section 111(d)'s use of the singular (*e.g.*, EPA Br. 60-62), but that usage applies only to the States' establishment of source-specific standards of performance, which

undisputedly must pertain to individual sources. By contrast, section 111(a)(1), which requires EPA to determine the best system, does not contain any similar usage of the singular form, and thus does not suggest that EPA's antecedent determination of the best system is limited to measures that can be applied at individual sources.[1] Nor does section 111(a)(1) contain language found in other statutory provisions that explicitly refers to location-specific controls or approaches (such as by using the word "retrofit"). *See* State Br. 35 (listing statutory provisions that use this language to regulate existing sources). Instead, section 111(a)(1) uses flexible language ("system," "best," etc.) in describing the factors that EPA may consider in determining the best system. Nothing about this language prohibits EPA from taking into account the interaction of sources in the interconnected power grid or the practical experiences of sources in reducing pollution to decide what system of emission reduction is "best" for power plants.

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[1] EPA's invocation of section 111(d)'s use of the singular to limit the scope of section 111(a)(1) makes little sense for another reason as well. The definition in section 111(a)(1) informs not only section 111(d), which refers to singular sources, but also section 111(b), which refers to plural sources. Therefore, the meaning of section 111(a)(1) cannot be settled by the grammar of either of these two provisions.

Nor does this interpretation somehow "divorce" EPA's authority under section 111(a)(1) from the States' determination of performance standards under section 111(d), as EPA contends (Br. 65). There is nothing illogical about EPA considering actions across multiple sources to formulate guidelines for States to then determine source-specific emissions standards: as EPA acknowledges (Br. 135-36), other parts of the Clean Air Act, such as the acid rain program, explicitly rely on multi-source systems such as trading schemes that translate to individual "emission limitation[s]" for each source. 42 U.S.C. § 7651b(a)(1); *see also* 80 Fed. Reg. at 64,813. A broader view of EPA's authority to consider systems of emission reduction under section 111(a)(1) is thus perfectly compatible with the States' subsequent and coordinate responsibilities under section 111(d). By contrast, EPA's interpretation in the Rule would ignore the actual language that Congress chose and the distinct roles it assigned to EPA and the States.

2. EPA's "indirect object" argument is not a reasonable reading of section 111—let alone the only reasonable interpretation.

EPA is also wrong to argue (Br. 114-130) that its authority to determine the best system under section 111(a)(1) is limited by section

111(d)(1) because the word "application" in (a)(1) *must* take a specific indirect object, and that this indirect object *must* be drawn from (d)(1).

First, as EPA admits (Br. 119), it is "possible to write a sentence that doesn't tell a reader the indirect object to which the primary object is applied," and section 111(a)(1) uses "application" in just this way. Our opening brief (at 43-44) identified many other uses of the word "application" that are perfectly intelligible despite not specifying any indirect object. EPA nonetheless contends that this usage unambiguously requires it to find a specified indirect object somewhere in the same statute. That inference is the wrong one to draw.

When Congress uses statutory language that omits a part of speech—for example, by using the passive voice instead of the active voice—that choice expresses Congress's "agnosticism" about the words not used. *Watson v. United States*, 552 U.S. 74, 81 (2007). Such omissions are thus a sign of "the *absence* of an unambiguous expression of congressional intent" to fix a specific meaning, *Lehrfeld v. Richardson*, 132 F.3d 1463, 1465-66 (D.C. Cir. 1998) (emphasis added), thereby giving the agency discretion to act reasonably and consistently within "the gap the Congress left," *Gaughf Props., L.P. v. Commissioner of Internal*

Revenue, 738 F.3d 415, 424 (D.C. Cir. 2013). Far from constraining EPA, Congress's use of the word "application" without an indirect object in section 111(a)(1) instead provides the agency with flexibility to consider a broad range of systems of emission reduction in order to satisfy its mandate to select the "best" one that is "adequately demonstrated."

EPA's own arguments confirm that "application" in section 111(a)(1) can take a number of different indirect objects. In attempting to rebut petitioners' examples of "application" used without an explicit indirect object, EPA acknowledges that the indirect object can be drawn from other words in the same sentence (such as "problem" in the phrase "a mathematician solving a problem through the application of a formula"), or inferred from context (such as EPA's assertion that "data" is the implied indirect object for "apply the theory of gravitation to predict the orbits of celestial objects," despite "data" not appearing in that phrase). EPA Br. 116-117. By the same token, as petitioners have previously explained (State Br. 45), nothing required EPA to reach beyond section 111(a)(1) itself to make sense of that provision's use of the word "application": EPA could formulate guidelines based on the application of the best system of emission reduction to multiple sources

in that source category, or to emissions from those sources.[2] There is no basis for EPA's insistence that the *only* possible choice of an implied indirect object for "application" in section 111(a)(1) is the "any existing source" language in section 111(d).

Second, EPA is wrong to assert (Br. 57) that section 111(d)(1) must supply an indirect object for (a)(1)'s use of "application" because (a)(1) is a definitional provision that must be "read into" (d)(1). No rule says that a statute's use of a defined term requires the full definition to be interpolated and read as part of the same sentence. It will often be impossible to do so if a definition is lengthy or contains multiple sentences—for example, the Act uses three sentences to define "best available control technology," or BACT, 42 U.S.C. § 7479(3), but it would be incomprehensible to drop that definition in every time a different section of the Act requires use of the BACT, *see, e.g.*, *id.* § 7475(a)(4).

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[2] EPA misses the mark in its lengthy objection (Br. 121-23) to the possibility that "emissions of air pollutants" might be an implied indirect object for "application" in section 111(a)(1). Petitioners' argument (see State Br. 45) was not that such an indirect object would be the *actual statutory text* in section 111(a)(1), as EPA appears to presume, but rather an implied reference that is particularly reasonable in context because it parallels the statutory text.

Even worse, such superficial splicing can often distort the meaning of the operative provision—as this case demonstrates. As discussed earlier (see *supra* at 8), EPA's insertion of section 111(a)(1)'s definition into (d)(1)—to support its argument that the indirect object for (a)(1)'s "application" must be (d)(1)'s "any existing source"—omits critical words from (a)(1). If the full definition were inserted, section 111(d)(1) would say that state emission standards must reflect 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* for any existing source." (The italicized language is what EPA omits.) But this interpolation would suggest that EPA makes a determination that the best system has been "adequately demonstrated" for *every regulated source*—and there is no question that EPA does *not* do so. *See supra* at 7.

Where EPA has gone wrong with its facile combination of section 111(a)(1) and (d)(1) is the same conflation of distinct regulatory responsibilities discussed earlier. When a definition refers to an earlier

phase of the regulatory process, then an operative provision's use of that defined term for a later phase does not somehow collapse the regulatory regime into just one step. Merely splicing in the definition under such circumstances omits this critical context and thus obscures rather than illuminates the meaning of the statute.

Third, EPA's insertion of section 111(a)(1)'s definition into (d)(1) does not even make sense on its own terms. EPA's premise is that when the word "application" is used, it necessarily means that "someone must apply something *to* something else." 84 Fed. Reg. at 32,524 (emphasis amended); *see* EPA Br. 66-67, 116-21. But the construction EPA offers does not result in "application . . . to," but instead in "application . . . for." Ordinary English does not equate a standard applied "*for* a source" with a standard applied "to" or "at" a source. *See* State Br. 47-48.

EPA's response is that the word "for" in section 111(d)(1) is in fact linked to the earlier word "plan": "it is grammatically correct for Congress to have spoken in terms of each state's '*plan* . . . *for* any existing source.'" (Br. 127-28 (emphasis in original).) But this argument leads to the bizarre consequence that (d)(1)'s phrase "for any existing source" now serves double duty: it both modifies "plan" from (d)(1) *and* "application"

from the inserted (a)(1) definition. This construct makes little sense as a matter of English usage and undermines EPA's attempt to divine some sort of unambiguous meaning from its splicing exercise.

3. EPA's restrictive interpretation of section 111 conflicts with Congress's intent to confer flexible authority on the agency to reduce harmful emissions.

EPA faults Petitioners for basing arguments on "good policy" rather than "statutory text." EPA Br. 134. But EPA's interpretation "undercut[s] the clear purpose of the congressional scheme," *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 582 (1981), by stripping the agency of the role that Congress assigned to it.

As an amicus curiae who worked on the original legislation explains (*see* Br. of Amicus Curiae Thomas C. Jorling 16-19), section 111(d) was designed to ensure that there are "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). *See* State Br. 37. Consistent with Congress's flexible design—and contrary to EPA's contention (Br. 136) that the Clean Power Plan was novel—EPA has previously promulgated regulations implementing the Act that were not limited to controls that could be implemented solely at the level of an

individual source. *See* Br. of Amicus Curiae Inst. for Policy Integrity 6-15 (discussing examples of emissions averaging and trading under section 111(d) as well as sections 110(a), 111(d), 169A, 202, and 211); *see also* 60 Fed. Reg. 65,387, 65,418 (Dec. 19, 1995) (emission guideline for municipal waste combustors allowed regulated entities to "engage in the trading of nitrogen oxides emissions credits"); *Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 535 (D.C. Cir. 1983) (upholding regulation allowing satisfaction of lead-content limitations through purchases of "lead credits from better equipped refineries at reasonable cost").

EPA attempts to distinguish one of these examples (the mercury rule) on the ground that it "relied on a combination of a cap-and-trade mechanism and control technology that could be applied to a source." EPA Br. 72 n.20. But as an amicus explains in detail (see Br. for Amicus Curiae Inst. for Policy Integrity 9-10), multiple-source emissions trading was indispensable to the mercury rule because EPA recognized that technological controls would be impractical for some sources. 70 Fed. Reg. 28,606, 28,619 (May 18, 2005).

Furthermore, it is immaterial whether, as EPA asserts (Br. 113), past Congresses would or would not have specifically contemplated multiple-source approaches under section 111. Congress's "expectations about [a statute's] operation" provide no basis to "disregard its plain terms." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1745, 1752 (2020). And here, the plain terms of section 111(a)(1) give EPA flexibility to determine the "best system" that would guide States' establishment of performance standards for sources. Although Congress is not required to build into every statute a provision that gives an agency the "the flexibility necessary to forestall [the statute's] obsolescence," it may, and in the case of section 111, it did. *See Massachusetts v. EPA*, 549 U.S. 497, 532 (2007).

Because of that flexibility, EPA is mistaken in calling section 111(d) a "mousehole" and suggesting that the major-questions doctrine is a basis for questioning EPA's authority. EPA Br. 12, 99, 113. EPA "cannot hide behind the no-elephants-in-mouseholes canon" when, as here, the underlying statute is already "written in starkly broad terms," *Bostock*, 140 S. Ct. at 1753. Section 111(a) and (d) form a principal mechanism by which the Act ensures that EPA has the power to respond to all harmful

air pollutants, as recognized by *Massachusetts*, 549 U.S. 497, and *American Electric Power Co. v. Connecticut*, 564 U.S. 410 (2011). Thus, EPA did not "discover" a new power under the statute (EPA Br. 98) when, in the Clean Power Plan, it considered the nature of CO_2 as a global rather than localized pollutant and the interconnected nature of power plants on the electrical grid and then selected generation shifting as part of the best system of emission reduction. Instead, it properly discharged its longstanding statutory duty in accordance with the criteria Congress chose.

The overheated rhetoric repeatedly used by EPA and supporting intervenors to cast the Clean Power Plan as a "radical" overhaul of the electricity industry that raises "a major question of agency power" (Br. 99) bears no resemblance to reality. As Petitioners have explained (State Br. 39-41), the Clean Power Plan in fact respected industry trends and adopted generation-shifting in large part because that method of emission reduction has already been widely adopted by the industry to reduce many pollutants, often in preference to single-source measures such as retrofit controls.

At base, it is EPA's current position, not the Clean Power Plan, that subverts congressional intent. EPA's crabbed legal interpretation would require this Court to conclude that Congress intended to forbid EPA from considering proven and broadly-adopted measures of emission reduction. But both common sense and every indicator of statutory meaning demonstrate otherwise. The current EPA may wish that Congress had written section 111 more narrowly. But whatever EPA's disagreements with the Clean Power Plan and the methodology that it adopted, there is no basis for the agency's assertion that the Clean Power Plan's best system was unambiguously forbidden by section 111. *Cf. Prill*, 755 F.2d at 947-48 (D.C. Cir. 1985).

B. EPA's Remaining Arguments Are Meritless.

First, EPA asserts that the Clean Power Plan undermined cooperative federalism (Br. 150-12), but it is the ACE rule that explicitly restricts rather than respects state choices. *See infra* Point II.A.3.

As EPA has recognized in prior rulemakings, States rely on EPA's expertise to set guidelines for emission reduction because EPA has a national mandate and the ability to obtain operational and emissions information from industry participants. *See, e.g.,* 40 Fed. Reg. 53,340,

53,343-44 (Nov. 17, 1975). *See* State Br. 37-41, 61-63; *infra* Point II.A.2. When, as here, EPA abandons that responsibility, States lose the guarantee that other States will be required to meet a minimum level of emissions reduction.

EPA's assertion (Br. 150-52) that its legal interpretation of section 111 preserves state "discretion" is also contradicted by other parts of the ACE rule that explicitly handcuff the States. Specifically, the ACE rule threatens to "disapprove" state plans that are more stringent than the weak ACE requirements, 84 Fed. Reg. at 32,555, 32,559-60, and expressly precludes States from using emissions averaging and trading to comply with emissions guidelines (see *infra* Point II.A.3). The Clean Power Plan, by contrast, left States and sources free to choose whether to use generation shifting or other approaches to comply with emissions guidelines. *See* 80 Fed. Reg. at 64,755; Comments of Former State Energy and Environmental Regulators (Apr. 26, 2018). *See* State Br. 38-39.

Second, EPA incorrectly argues (Br. 63-64, 82-83, 151) that the Clean Power Plan improperly interfered with the authority of States under section 111(d)(1) to consider "the remaining useful life" of an existing source when determining a standard of performance. As we

explained in our opening brief (at 7), a State performs the "remaining useful life" evaluation *after* EPA has set general emissions guidelines. The Clean Power Plan's flexible design allowed States to perform that evaluation and consider the remaining useful life of any particular source. *See* 80 Fed. Reg. at 64,871-72.

Third, EPA mistakenly argues (Br. 109-13) that designating generation shifting as a system of emission reduction would intrude on the States' traditional jurisdiction over electricity generation. As we have explained (State Br. 56), an EPA regulation targeting pollution does not intrude on state authority merely because it necessarily affects electricity generation. *See FERC v. Electric Power Supply Ass'n*, 136 S. Ct. 760 (2016) ("*EPSA*"). The test for improper federal encroachment is not whether the federal agency affects, "even substantially," electricity generation. *Id.* at 776. Instead, the question is whether the agency is properly "carrying out its charge" under its statutory authority in an area properly within the agency's sphere of responsibility. *Id.*

EPA tries to distinguish *EPSA* by arguing (Br. 112) that including generation shifting in the best system of emission reduction would effectively compel States to make some changes to generation mix, and

thus amount to direct regulation of generation mix. But the Supreme Court rejected a similar argument in *EPSA*. *See* 136 S. Ct. at 777-78. EPA does not exceed its delegated authority to reduce harmful emissions just because its actions targeting pollution may "alter[] . . . incentives" with respect to generation mix. *Id.* at 777.

Fourth, as we explained in our opening brief (at 49-51), the "applicable" standards under section 111 for purposes of the Best Available Control Technology (BACT) requirement for new and modified facilities under the New Source Review program are the parallel standards for new and modified sources under section 111(b), and thus this provision has no relevance to section 111(d), which governs existing sources. *See* 42 U.S.C. § 7479(3). Even if an emission standard under section 111(d) were "applicable" in considering BACT for a new or modified source—and EPA cites no examples of using a section 111(d) standard as a BACT "floor"—EPA's arguments (Br. 83-87, 130-33) do not show that repealing the Clean Power Plan is necessary to make the two provisions work together.

When Congress created the New Source Review program in 1977, it added a cross-reference to section 111 to ensure that BACT would not

cause a source to violate a section 111 standard. *See* State Br. 50. This language shows that Congress was focused on ensuring that the two programs work together to achieve the necessary level of emission reductions. Accordingly, in EPA's hypothetical example (Br. 87), where the section 111(d) guidelines set a stricter standard for CO_2 than BACT by itself can achieve, the solution would not be to *weaken* the section 111(d) standard, but to comply with the section 111(d) standard through appropriate measures while also applying BACT.

Fifth, EPA incorrectly relies on this Court's decision in *California Independent System Operator Corp. v. FERC*, 372 F.3d 395 (D.C. Cir. 2004) ("*Cal ISO*"), for the proposition that the Clean Power Plan read EPA's authority too broadly (*see* EPA Br. 92-97). In that case, FERC exceeded its regulatory authority over rate-setting by attempting to use that authority to replace a board of directors—an action with at most an indirect, downstream effect on wholesale rates. *Id.* at 403. By contrast, an EPA determination that the "best system of emission reduction" involves shifting generation to lower-emitting facilities would directly reduce emissions from regulated sources—a far cry from "the kind of

interpretive 'leap' that concerned the court in *Cal ISO*," *South Carolina Pub. Serv. Auth. v. FERC*, 762 F.3d 41, 57 (D.C. Cir. 2014).

Finally, EPA contends (Br. 76-77) that the Clean Power Plan improperly conflated an "owner" or "operator" of a source with the source itself. EPA's argument merely restates EPA's ultimate conclusion that, because a standard of performance is applied to an individual source, the best system of emission reduction can only be one that is set at the level of an individual source. As we have already explained (see *supra* at 6), that argument is wrong.

POINT II

THE ACE RULE IS UNLAWFUL

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

Because EPA's erroneous statutory interpretation in the repeal underlies the ACE rule, ACE is unlawful on those same grounds. ACE is legally flawed for several additional reasons.

1. EPA erred in determining the best system of emission reduction for coal plants.

Our opening brief noted two errors EPA made in selecting heat rate improvements alone as the best system: First, it failed to consider

pollution reduction, a factor it concedes (Br. 215) it must take into account under the statute. Second, EPA failed to explain its reversal from its previous position that this approach has a disqualifying "critical" flaw: insufficient pollution reduction to address the endangerment EPA has found.

On our first point, EPA contends that it had a "limited group" of systems it could consider as "best" after excluding generation shifting measures as unlawful (Br. 216). This observation, even if true, does not explain EPA's failure to consider pollution reduction. EPA had a statutory obligation to weigh emissions reductions achievable from other approaches it acknowledges *are* "systems"—e.g., co-firing with natural gas, carbon capture and storage—compared to those from heat rate improvements alone. State Br. 59-60 (citing *Sierra Club v. Costle*, 657 F.2d 298, 325-26 (D.C. Cir. 1981)).

Although EPA asserts (Br. 218) that the RIA shows there is no "need" for ACE to achieve meaningful emission reductions in light of market trends toward cleaner generation, EPA did not rely on this rationale in the rulemaking, and it cannot do so now. *See SEC v. Chenery Corp.*, 318 U.S. 80, 93-95 (1943). Even if EPA's market trend rationale

were not post hoc, EPA could not satisfy its statutory obligation by merely hand waving at the RIA; it must consider the gravity of the endangerment and the CO_2 reductions needed to mitigate those harms, and weigh that against other statutory factors, including cost. *See Sierra Club*, 657 F.2d at 330 (EPA has authority "to weigh cost, energy, and environmental impacts in the broadest sense at the national and regional levels and over time as opposed to simply at the plant level in the immediate present"). The RIA contains no such analysis.

EPA also fails to rebut our related argument that, under *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502 (2009), the agency failed to explain how heat rate improvements alone can qualify as the best system of emission reduction given EPA's earlier finding that heat rate improvements alone result in, at most, minimal emission reductions. State Br. 60-61.[3] EPA does not dispute that its findings regarding the grave threat posed by climate change and the need for large emission reductions from power plants remain in place. But EPA insists (Br. 217)

[3] Even these minimal reductions will be eroded by the "rebound effect" at 20 percent of plants and by extending the lives of uneconomic plants that would otherwise retire. *See* Public Health/Env. Pet. Reply 18-20.

"there is no *Fox Television* problem . . . because what EPA considered 'best' in the CPP[] was unlawful."

That does not follow. Even if EPA were correct that the Clean Power Plan was illegal—and it is not—that would not supply a reasoned basis for reversing EPA's past finding that selection of heat rate improvements alone as the best system suffers from a "critical" flaw. Answering the question of whether generation shifting may lawfully be part of the best system of emission reduction does not provide an answer to the distinct question of whether heat rate improvements alone are sufficient to qualify as the best system. The latter question requires independent analysis, and EPA did not perform that analysis. An agency cannot broadly invoke the alleged illegality of one aspect of a regulation to justify its decision on a separate aspect of that regulatory program, especially where the agency had other viable options to choose. *See Department of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1912-13 (2020). Here, EPA cannot invoke its (erroneous) conclusion that the Clean Power Plan was unlawful to explain its choice of heat rate improvements alone as the best system given that it had other options—

such as co-firing and carbon capture and storage—that do not have that "critical" flaw.

2. ACE's lack of a minimum degree of emission limitation contravenes section 111(d)'s structure.

ACE is also unlawful because it lacks a minimum degree of emission limitation for state plans, contrary to the structure of section 111(d).[4] As Public Health/Environmental Petitioners explain (Reply 12-15), EPA's Table 1 of ranges of heat rate improvements does not meet its statutory obligation to establish an *emission* limitation reflecting application of the best system of emission reduction. Even if Table 1 actually reflected the achievable degree of emission limitation, nothing in ACE requires States to adopt emission standards that reflect these ranges. Although EPA insists (Br. 231) that Table 1 provides the "floor or minimum criteria" EPA will use in evaluating state plans, this "floor" is imaginary because "states . . . *may ultimately establish standards of*

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[4] EPA is incorrect (Br. 227) that "Petitioners have not exhausted the argument that EPA failed to adequately define the degree of emission limitation achievable." *See* Comments of 14 State Agencies (EPA-HQ-OAR-2017-0355-23749) at 16 (JA____) (ACE proposal did "not identify either an actual best system of emission reduction *or the emission reductions that could be achieved by deploying that system*" (emphasis added)).

performance . . . that reflect a value of [heat rate improvements] that falls outside of these ranges."). 84 Fed. Reg. at 32,538 (emphasis added).

In response to our argument that ACE's lack of a defined emission limitation undermines the statutory structure by thrusting States—who may lack the necessary expertise and/or resources—into EPA's role, EPA says dismissively (Br. 233, n. 64) that "states have the ability to undertake the analysis required." The agency cites (Br. 233, n. 64) its advance notice of proposed rulemaking, which refers to the experience of only one state, North Carolina, in evaluating heat rate improvements at power plants to establish CO_2 emission standards. But North Carolina's experience does not support EPA. As explained by its Director of the Division of Air Quality in his declaration in this case, North Carolina "determined that it would be impractical to establish emissions rates for each affected unit." N.C. Decl. (Abraczinskas) ¶ 26.

Next, ACE's failure to specify a minimum degree of emission limitation eliminates the objective basis for determining whether state plans are "satisfactory" under section 111(d)(2), 42 U.S.C. § 7411(d)(2). EPA contends (Br. 225-26, 232) that it will still require "rigorous inquiry" by States. But EPA long ago rejected evaluating whether state plans are

"satisfactory" based "solely on procedural criteria" because that approach could lead to weak and inconsistent standards. State Br. 63-64. EPA's reassurances that it "expects" States to take the process seriously, EPA Br. 233, do nothing to change the fact that under ACE, what constitutes a "satisfactory" plan is up to the whims of EPA. This approach will thwart section 111's goal to ensure meaningful limits on dangerous pollutants in all States. State Br. 64-65.

3. Section 116 further demonstrates that EPA took a wrong turn in its interpretation of section 111(d).

EPA's constricted view of section 111(d) led it to prohibit emissions averaging and trading to comply with ACE—despite the express language of section 116, 42 U.S.C. § 7416, which preserves States' rights to adopt standards using such approaches. That result "should have alerted EPA that it had taken a wrong interpretive turn." *UARG*, 573 U.S. at 328.

As explained in our opening brief (at 9-10), state emissions trading programs have achieved substantial CO_2 reductions from the power sector. Abandoning its earlier trumpeting of "state discretion" in developing section 111(d) plans (Br. 150-51), EPA claims (Br. 242) authority to bar these proven and cost-effective measures in state plans

because they "would undermine the EPA's determination of the [best system] in this rule," 84 Fed. Reg. at 32,557. Section 116, however, preserves the right of States to adopt "any standard or limitation" provided that it is no "less stringent than" EPA's emission guideline. State Br. 67-68; *see* 40 C.F.R. § 60.24a(f)(1).

EPA and supporting intervenors contend section 116 has no applicability to the approval of section 111(d) plans. But neither responds to our point that in *Union Electric Co. v. EPA*, 427 U.S. 246 (1976), the Supreme Court rejected a similar argument. State Br. 68-69; *see also* Power Co. Pet. Op. Br. 29-31. The Court held that EPA could not disapprove a section 110 state implementation plan on the grounds that it contained stricter standards than the federal requirements, citing section 116 as supporting its interpretation of section 110. 427 U.S. at 264. In light of the similarities between the state plan processes under section 111(d) and section 110—and the former's cross-reference to the latter—*Union Electric's* logic likewise applies to section 111(d) plans. State Br. 67-69.

EPA's argument (Br. 240) that allowing emissions trading and averaging for power plant CO_2 would require the agency to allow

emissions trading for *all* pollutants regulated under section 111(d) is wrong. A state plan authorizing trading to comply with sulfuric acid mist standards, for example, may not qualify as being as "stringent" under section 116 if it would result in localized pollution problems. EPA acknowledges (Br. 239) that a CO_2 emissions trading program would not pose any localized pollution concerns; therefore it cannot use that rationale to prohibit emissions trading and averaging here.

B. EPA Acted Unlawfully by Repealing the Emission Guidelines for Gas-Fired Power Plants Without Replacing Them.

EPA fails to rebut our arguments that its repeal of the Clean Power Plan's emission guidelines for gas-fired power plants without replacing them was unlawful. State Br. 69-70. As Public Health/Environmental Petitioners explain (Reply Br. 24-26), EPA is wrong that its decision is not a final agency action. Given that EPA regulates CO_2 from new gas plants under section 111(b), its withdrawal of the emission guidelines for those sources under section 111(d) is unlawful. EPA also makes no attempt to defend its decision on the record, leaving Petitioners' record-based arguments unrefuted.

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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CERTIFICATE OF SERVICE

I certify that on July 30, 2020, the foregoing Reply 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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