

No. 20-1530

In The
Supreme Court of the United States

STATE OF WEST VIRGINIA, ET AL.,

Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
AND MICHAEL REGAN, ADMINISTRATOR OF THE
U.S. ENVIRONMENTAL PROTECTION AGENCY,

Respondents.

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

**BRIEF OF RESPONDENT BASIN ELECTRIC
POWER COOPERATIVE IN SUPPORT OF THE
PETITION FOR WRIT OF CERTIORARI**

EMILY C. SCHILLING
Counsel of Record
HOLLAND & HART LLP
901 K Street NW, Suite 850
Washington, DC 20001
ECSchilling@hollandhart.com
Tel: (202) 393-6500
Fax: (202) 747-6574

TINA R. VAN BOCKERN
HOLLAND & HART LLP
555 17th Street, Suite 3200
Denver, CO 80202
TRVanBockern@hol-
landhart.com
Tel: (303) 295-8107
Fax: (720) 545-9952

*Counsel for Respondent
Basin Electric Power Cooperative*

QUESTION PRESENTED

In 42 U.S.C. § 7411(d), an ancillary provision of the Clean Air Act, did Congress constitutionally authorize the Environmental Protection Agency to issue significant rules—including those capable of reshaping the Nation’s electricity grids and unilaterally decarbonizing virtually any sector of the economy—without any limits on what the agency can require so long as it considers cost, nonair impacts, and energy requirements?

CORPORATE DISCLOSURE STATEMENT

Basin Electric Power Cooperative (“Basin Electric”) is a not-for-profit regional wholesale electric generation and transmission cooperative owned by over 100 member cooperatives. Basin Electric has no parent companies. There are no publicly held corporations that have a 10% or greater ownership interest in Basin Electric.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.....	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES.....	iv
INTRODUCTION	1
INTERESTS OF BASIN ELECTRIC.....	2
ARGUMENT IN SUPPORT OF THE STATES’ PETITION	4
I. The States’ Petition Raises Important And Timely Questions.....	5
II. The Consequences Of The D.C. Circuit’s Ruling Are Significant.....	9
CONCLUSION.....	12

TABLE OF AUTHORITIES

	Page
CASES	
<i>Am. Lung Ass'n v. EPA</i> , 985 F.3d 914 (D.C. Cir. 2021)	1
<i>Ctr. for Biological Diversity v. EPA</i> , 722 F.3d 401 (D.C. Cir. 2013)	6
<i>Essex Chem. Corp. v. Ruckelshaus</i> , 486 F.2d 427 (D.C. Cir. 1973)	9
<i>La. Pub. Serv. Comm'n v. Fed. Commc'ns Comm'n</i> , 476 U.S. 355 (1986)	6
<i>Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n</i> , 461 U.S. 190 (1983)	8, 9
<i>Thomas v. Union Carbide Agr. Prod. Co.</i> , 473 U.S. 568 (1985)	7
<i>West Virginia v. EPA</i> , 136 S. Ct. 1000 (2016)	5
STATUTES AND RULES	
42 U.S.C. § 7411(a)(1)	9
42 U.S.C. § 7411(a)(3)	7
42 U.S.C. § 7411(a)(6)	7
42 U.S.C. § 7411(d)	<i>passim</i>
42 U.S.C. § 7411(d)(1)	6, 7
Supreme Court Rule 12.6	1

TABLE OF AUTHORITIES—Continued

	Page
OTHER AUTHORITIES	
2018 Integrated Resource Plan (2019–2028), <i>available at</i> https://www.wapa.gov/EnergyServices/Documents/BasinElectric2018.pdf	3, 4
Basin Electric Power Cooperative 2020 Annual Report, <i>available at</i> https://www.basinelectric.com/_files/pdf/financials/Annual-Report-2020-WEB.pdf	2, 3, 4, 10, 11
Basin Electric Power Cooperative’s Comments on Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guideline Implementing Regulations; Revisions to New Source Review Program (October 31, 2018), EPA Docket No. EPA-HQ-OAR-2017-0355-24401, <i>available at</i> https://www.regulations.gov/comment/EPA-HQ-OAR-2017-0355-24401 ...	10, 11
U.S. ENERGY INFORMATION ADMINISTRATION, ELECTRIC POWER ANNUAL 2019 (Feb. 2021).....	10

INTRODUCTION

Pursuant to Supreme Court Rule 12.6, Basin Electric Power Cooperative (“Basin Electric”), an intervenor-respondent below, respectfully submits this response in support of the petition for a writ of certiorari of the States of West Virginia, Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Louisiana, Missouri, Montana, Nebraska, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, and Wyoming; and Mississippi Governor Tate Reeves (collectively, the “States”). On May 24, 2021, Basin Electric gave timely notice to all parties of its intention to file this brief in support of the petition for a writ of certiorari. This response is being submitted within 30 days of the States’ petition having been docketed on May 4, 2021.

The States seek review of the decision of the U.S. Court of Appeals for the District of Columbia Circuit in *American Lung Association v. Environmental Protection Agency*, 985 F.3d 914 (D.C. Cir. 2021), which held that a rarely used provision of the Clean Air Act, 42 U.S.C. § 7411(d) (“Section 111(d)”), grants the U.S. Environmental Protection Agency (“EPA”) unlimited power to impose measures to reduce greenhouse gas emissions that apply outside the fence line of regulated source facilities. As the States point out, the decision has significant consequences, particularly for owners and operators of coal- and natural gas-fired facilities subject to the regulation. States’ Pet. at 14–15. Through the decision, the D.C. Circuit upended decades of regulatory precedent limiting emission standards to those achievable by the facility itself and

“EPA now has a judicial edict not to limit itself to measures that can be successfully implemented at and for individual facilities.” *Id.* at 2. Based on this decision, EPA “can set standards on a regional or even national level, forcing dramatic changes in how and where electricity is produced[.]” *Id.* at 2–3.



INTERESTS OF BASIN ELECTRIC

This decision is of particular import to Basin Electric, which is a not-for-profit generation and transmission cooperative owned by 141-member cooperative systems. Basin Electric provides wholesale power to its members in nine States, with electric generation facilities in North Dakota, South Dakota, Wyoming, Montana, and Iowa serving approximately 3 million customers. It has a diverse energy portfolio consisting of coal, gas, oil, distributed, and renewable energy. Basin Electric knows that an all-of-the-above energy strategy, which takes advantage of the benefits of renewable energy development while maintaining a fleet of natural gas- and coal-fired baseload generation, is required to provide responsible, affordable, and reliable energy.

In the last decade, Basin Electric’s load has grown almost 50%, and 80% of that load growth has been met with wind, natural gas, and market purchases.¹ Basin

¹ See Basin Electric Power Cooperative 2020 Annual Report (“2020 Annual Report”), at 5, *available at* https://www.basinelectric.com/_files/pdf/financials/Annual-Report-2020-WEB.pdf.

Electric's current energy supply includes 2,835.7 megawatts ("MW") of coal, 1,776.4 MW of wind, and 1,353.7 MW of natural gas.² It also owns 2,513 miles and maintains 2,536 miles of high-voltage transmission.³ By 2028, Basin Electric expects peak demand on its system to grow by 660 MW and energy consumption to grow by approximately 4.3 million MW hours.⁴

Even as Basin Electric drives towards a more diversified portfolio and the market continues to shift towards renewables, coal and gas remain a critical piece of Basin Electric's generation puzzle. The majority of its generation is currently fossil-fuel based (2,835.7 MW of coal or 40.4% of total supply and 1,353.7 MW of natural gas or 19.3% of total supply).⁵ To provide the most economical means of supplying power to a load that varies every hour on an electric power system, Basin Electric relies upon three different types of generating capacity: (1) baseload units (such as coal-fired steam-cycle power plants, nuclear, and hydroelectric plants) that are capable of running at full-capacity continuously, (2) intermediate capacity units (such as oil and gas-fired steam cycle plants and some hydroelectric plants) designed to be cycled, and (3) peaking capacity units (such as combustion turbines or internal combustion engine plants) only operated during peak

² *Id.* at 19.

³ *Id.* at 25.

⁴ See 2018 Integrated Resource Plan (2019–2028) ("IRP"), at 1, available at <https://www.wapa.gov/EnergyServices/Documents/BasinElectric2018.pdf>.

⁵ 2020 Annual Report, at 19.

load periods and emergencies.⁶ While wind and solar are increasingly available energy sources, they are too unreliable to be considered sources of baseload generating capacity.⁷

◆

**ARGUMENT IN SUPPORT
OF THE STATES' PETITION**

Noting the virtually unlimited regulatory authority conferred on EPA by the D.C. Circuit, the States' petition argues persuasively that the Court's review is of paramount importance. *See* States' Pet. at 13–25. Basin Electric also agrees with the States' articulation of the numerous legal errors in the court's decision. *Id.* at 25–34. Basin Electric adds that EPA's unbridled authority under the decision—to regulate beyond the fence line of existing stationary sources as a means of imposing electricity generation shifting mandates to decarbonize the Nation's energy fleet—would severely undermine Basin Electric's (and other electric generation utilities') ability to continue transitioning to more diverse energy portfolios while meeting the Nation's energy demands.

⁶ IRP, at 100.

⁷ *See* Annual Report, at 5–6.

I. The States' Petition Raises Important And Timely Questions.

As the States correctly note, despite over five years of litigating these same issues, the States, regulated utilities, and the American people still lack resolution from this Court concerning the proper scope of EPA's authority under Section 111(d). In February 2016, this Court took the unprecedented step of staying EPA's Clean Power Plan ("CPP") before it took effect and before the lower court considered the many pending petitions for review. *West Virginia v. EPA*, 136 S. Ct. 1000 (2016). The stay signaled that the scope of EPA's authority under Section 111(d) is an important federal question and that EPA's attempt to reshape the energy sector by imposing standards and obligations outside the fence line of regulated source facilities exceeded the scope of EPA's statutory authority. Now, despite EPA's sound decision to heed this Court's message by repealing the CPP and adopting the Affordable Clean Energy Rule ("ACE"), the court of appeals nonetheless found that EPA's repeal was invalid and there are "no limits" on EPA's authority under Section 111(d). *See States' Pet. App. at 56a; see also States' Pet. at 2.*

In its February 12, 2021 Motion for a Partial Stay of Issuance of the Mandate filed below, EPA notified the court and parties that "EPA is obligated under Section 7411(d) to establish new emissions guidelines for existing coal-fired power plants" and it is considering the question of its authority under Section 111(d) "afresh" in "a new rulemaking action." *Resps.' Mot. for Partial Stay of Issuance of the Mandate, at 3–4, Am.*

Lung Ass'n v. EPA, No. 19-1140, Doc.1885168 (D.C. Cir. Feb. 12, 2021); *see also* Status Report, at 3, No. 19-1140, Doc.1899829 (D.C. Cir. May 24, 2021) (EPA indicating that “administrative proceedings to respond to the [court of appeals’] remand in a new rulemaking action are ongoing.”); 42 U.S.C. § 7411(d)(1) (establishing that EPA “*shall prescribe regulations*” under which the States must submit a plan to EPA establishing “standards of performance for any existing source” (emphasis added)). Indeed, as the States point out, President Biden has already committed to reducing the Nation’s greenhouse gas emissions by 50–52% of 2005 levels by 2030. *See* States’ Pet. at 15. Thus, a third round of Section 111(d) rulemaking is imminent.

But any new EPA rule that relies on the court of appeals’ decision to establish the bounds of the agency’s authority—rather than the bounds clearly established by Congress—will inevitably go too far. *See id.* at 25–34. Agencies only have the powers granted to them by Congress. *La. Pub. Serv. Comm’n v. Fed. Commc’ns Comm’n*, 476 U.S. 355, 374 (1986) (“[A]n agency literally has no power to act . . . unless and until Congress confers power upon it[.]”); *Ctr. for Biological Diversity v. EPA*, 722 F.3d 401, 413 (D.C. Cir. 2013) (Kavanaugh, J., concurring) (“EPA has discretion to act only within the statutory limits set by Congress[.]”). Here, Congress authorized EPA to direct States to set “standards of performance for *any existing source*.” 42 U.S.C. § 7411(d)(1) (emphasis added). An “existing source” is defined as a “stationary source other than a new source” and a “stationary source” in turn is clearly

defined as “any building, structure, facility, or installation which emits or may emit any air pollutant.” *Id.* § 7411(a)(3), (6). Nowhere does Congress grant EPA authority to regulate directly or indirectly wholesale energy markets, or impose requirements outside the fence line of an existing source’s facility. *See States’ Pet.* at 29–32. And the Clean Air Act is silent regarding EPA’s authority to intentionally shift the Nation’s energy portfolio from fossil-fuel based sources to renewables.

Granting review now—rather than awaiting petitions for review of EPA’s third rule—will allow the Court to decide important legal issues that will necessarily control how EPA exercises its statutory authority in future Section 111(d) proceedings. The issues have been thoroughly developed over the last five years, and the remaining issues before the Court are legal in nature. *See States’ Pet.* at 24–25. “Nothing would be gained by postponing a decision, and the public interest would be well served by a prompt resolution[.]” *Thomas v. Union Carbide Agr. Prod. Co.*, 473 U.S. 568, 581–82 (1985) (finding issues concerning statutory interpretation were ripe for review where “[t]he issue presented . . . is purely legal, and will not be clarified by further factual development”).

Further, a decision resolving EPA’s Section 111(d) authority is necessary to ensure Basin Electric and other utilities know whether they will soon face an EPA-driven upheaval in the Nation’s energy sector. Basin Electric and other energy producers across the country require regulatory certainty to develop and

manage a diversified fleet to meet customer demands. But “[i]nfrastructure cannot change on a dime.” States’ Pet. at 23. Basin Electric and other electric generation utilities must plan ahead and make resource commitments years in advance. *See Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm’n*, 461 U.S. 190, 201 (1983) (recognizing utilities’ development of new facilities “requires considerable advance planning”). For example, Basin Electric’s latest planning document, developed and submitted in 2018 to the U.S. Department of Energy’s Western Area Power Administration, analyzes long-term system needs and provides justification for new energy resources that may be needed through 2028.⁸ Basin Electric must engage in advanced planning to identify member load forecasts, review power supply needs, assess various power supply regions’ needs (including neighboring utilities and whether excess power is available for purchase), and compare the market power costs to the costs of building new resources.⁹

Integrated resource planning is, in part, an exercise of predicting short- and long-term trends in federal regulations, and choosing options that are most likely to be (a) permitted under the regulations, and (b) built in a timely way to meet changing generation and transmission resource needs. Massive uncertainty in the regulatory landscape imposes countless hurdles to overcome in the planning process. *See Pac. Gas &*

⁸ IRP, at 1.

⁹ *Id.* at 4.

Elec. Co., 461 U.S. at 203 (finding that because the Court resolved the legal question governing utilities, “there is little likelihood that industry behavior would be uniquely affected by whatever uncertainty surrounds the [statute’s] provisions”). The Court can resolve that uncertainty by granting the States’ Petition.

II. The Consequences Of The D.C. Circuit’s Ruling Are Significant.

The D.C. Circuit’s decision would leave EPA’s discretion untethered to any limiting standards and open the door for rules aimed at further limiting operation of and investment in existing coal- and natural gas-fired plants. Section 111(d) regulations, however, were not intended to render existing energy sources obsolete. Section 111(d)’s application to “existing sources” presumes that those sources will continue to operate economically. *See* 42 U.S.C. § 7411(a)(1) (directing EPA to “tak[e] into account the cost of achieving” emission reductions in determining the best system of emission reduction); *see also* *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973) (“An adequately demonstrated system is one which has been shown to be reasonably reliable, reasonably efficient, and which can reasonably be expected to serve the interests of pollution control *without becoming exorbitantly costly in an economic or environmental way.*” (emphasis added)). Any regulation that artificially drives down demand for reliable power from coal- and natural gas-fired plants is unwise and introduces a level of uncertainty that endangers Basin Electric’s and other

electric generation utilities' ability to meet the Nation's energy demands.

As the States explain, “[T]he ruling threatens the existence of over 200 gigawatts of coal plants and over 500 gigawatts of natural gas plants, or roughly two-thirds of the nation’s total electricity-generation capacity.” States’ Pet. at 14 (citing U.S. ENERGY INFORMATION ADMINISTRATION, *ELECTRIC POWER ANNUAL 2019*, tbl. 4.3 (Feb. 2021)). But forced generation shifting from existing sources to other sources poses significant burdens on the owners and operators of coal and natural gas plants, forcing the premature retirement of existing units and the stranding of those assets (many of which have not been fully depreciated).¹⁰

While Basin Electric continues to diversify its energy portfolio and the market continues to shift towards renewables, coal and gas remain critical to Basin Electric’s ability to supply reliable and affordable energy to its members. It relies on 2,835.7 MW of coal and 1,353.7 MW of natural gas generation.¹¹ But, due to increased availability of wind energy, Basin Electric’s coal-fired baseload units are operating at lower loads than they did historically, cycling from

¹⁰ See Basin Electric’s Comments on Emissions Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emissions Guideline Implementing Regulations; Revisions to New Source Review Program (October 31, 2018), EPA Docket No. EPA-HQ-OAR-2017-0355-24401 (“ACE Comment Letter”), at 11, *available at* <https://www.regulations.gov/comment/EPA-HQ-OAR-2017-0355-24401>.

¹¹ 2020 Annual Report, at 19.

minimum to maximum load.¹² Any regulation that drives further cycling of baseload units—or extends the anticipated length of time that these units will be cycled—not only will have costly long-term impacts on the equipment but will reduce overall efficiency of the units. And lower efficiencies result in higher emissions of greenhouse gases.¹³

Additionally, reliability cannot be ignored.¹⁴ Wind and solar only generate power when the weather permits. Until economical and proven battery storage technology is commercially available, wind and solar cannot be considered reliable sources of baseload generating capacity.¹⁵ Coal generation may be less flexible—because it cannot be quickly cycled to follow wind in meeting market demand—but it is reliable and cost efficient, especially because most of Basin Electric’s power plants are located adjacent to coal mines, which eliminates the costs to transport the fuel.¹⁶ Each type of power generation performs an important function within Basin Electric’s portfolio and driving generation away from a particular resource will have myriad short- and long-term impacts on costs of generating power and reliability.

In short, Basin Electric—and many other energy producers—depends on an all-of-the-above energy strategy

¹² See ACE Comment Letter, at 21.

¹³ *Id.* at 22–23.

¹⁴ 2020 Annual Report, at 6.

¹⁵ *Id.*

¹⁶ *Id.*

that recognizes flexibility and reliability. By utilizing diversified resources, Basin Electric is able to meet its members' energy needs through reliable sources, and also better manage its carbon footprint by incorporating resources into its portfolio that have either low or no carbon emissions.¹⁷ But imposing another round of regulation that artificially increases demand for renewables without considering the importance of maintaining baseload generation will upend Basin Electric's strategic planning towards greater investment in renewables. The D.C. Circuit's decision granting EPA the authority that even Congress did not grant it to eliminate whole swaths of the Nation's energy supply is erroneous and should be reversed.

◆

CONCLUSION

Basin Electric respectfully requests that this Court grant the States' petition for writ of certiorari.

Respectfully submitted,

EMILY C. SCHILLING
Counsel of Record
 HOLLAND & HART LLP
 901 K Street NW, Suite 850
 Washington, DC 20001
 ECSchilling@hollandhart.com
 Tel: (202) 393-6500
 Fax: (202) 747-6574

TINA R. VAN BOCKERN
 HOLLAND & HART LLP
 555 17th Street, Suite 3200
 Denver, CO 80202
 TRVanBockern@hollandhart.com
 Tel: (303) 295-8107
 Fax: (720) 545-9952

Counsel for Respondent
Basin Electric Power Cooperative

¹⁷ IRP, at 101.