Nos. 20-1530, 20-1531, 20-1778, and 20-1780

IN THE

Supreme Court of the United States

State of WEST VIRGINIA, et al.,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

THE NORTH AMERICAN COAL CORPORATION,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

WESTMORELAND MINING HOLDINGS LLC,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

State of NORTH DAKOTA,
Petitioner,
v.
ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR STATE OF NEW YORK AND OTHER STATE AND MUNICIPAL RESPONDENTS

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QUESTION PRESENTED

Section 7411 of the Clean Air Act (42 U.S.C. § 7411) provides that the Environmental Protection Agency (EPA) shall select the "best system of emission reduction" that has been "adequately demonstrated" for categories of stationary sources such as power plants, after taking into account several enumerated criteria. With respect to existing sources, EPA then promulgates regulations—known as emission guidelines—reflecting "the degree of emission limitation achievable through the application of the best system of emission reduction," and States use EPA's guidelines to develop state plans with source-specific performance standards. The question presented is:

Whether EPA, in determining the "best system of emission reduction," is forbidden from considering measures that the agency judged could not apply "to and at" an individual source standing alone—including measures that have been widely adopted and proven to significantly reduce emissions from sources.

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INTRODUCTION

To reduce harmful pollution from stationary sources, Section 7411 of the Clean Air Act directs EPA to study all means of emission reduction that have been "adequately demonstrated" for categories of sources, such as power plants, and to draw on that expert analysis to determine the "best system of emission reduction" for such sources. 42 U.S.C. § 7411(a)(1). For existing sources, the best system informs EPA's issuance of emission guidelines under which the States then establish performance standards for individual sources. *Id.* § 7411(d)(1).

This case concerns the scope of EPA's authority to determine the best system for reducing carbon dioxide (CO_2) emissions from existing power plants. Both the power sector and the States have long relied on a broad range of measures to cost-effectively reduce emissions of harmful pollutants, including CO_2, from sources on the electric grid. But in the Affordable Clean Energy (ACE) Rule, EPA concluded that certain of those measures were categorically disqualified from consideration as part of the best system—no matter how effective or "adequately demonstrated" they were—solely because they involved the activities of more than one entity. The Rule's insistence that the unambiguous meaning of "best system" in Section 7411(a)(1) was limited to "measures that can be applied to and at the level of the individual source" standing alone (J.A.1769) led it to disregard widely adopted and proven measures of reducing CO_2 emissions, such as cap-and-trade programs. And the Rule further concluded that this unambiguous meaning not only restrained EPA, but also barred States and sources from relying on such

measures to satisfy federal emission guidelines. (J.A.1893-1894.)

The court of appeals rejected the ACE Rule's limitations on both EPA authority and state flexibility, correctly finding that these limitations found no support in the text or structure of Section 7411. Contrary to petitioners' arguments, nothing in the decision below implicates this Court's cases on "major questions" or non-delegation. The lower court did not, as petitioners contend, give EPA untrammeled authority to regulate "any economic sector or almost any actor." (West Virginia (W.Va.) Br. 1.) Instead, it considered and rejected only the specific "to and at the source" limitation that the ACE Rule found to be unambiguously required by Section 7411.

Rather than focusing on the decision below or the ACE Rule's statutory interpretation, petitioners' arguments about agency overreach instead criticize an earlier rule, the Clean Power Plan, that EPA has said it no longer intends to enforce; or speculate about the impacts of future rules that EPA *might* adopt. These arguments face serious jurisdictional defects, as the United States and the Non-Governmental Organization and Trade Association (NGO) Respondents correctly note. (NGO Resp. Br. 23-32.) In any event, petitioners' claim that the ACE Rule's statutory interpretation is necessary to prevent EPA from overstepping its authority disregards important features of the underlying statutory scheme. Congress has already made the major policy choices to curb CO_2 emissions from existing power plants and to task EPA and the States with distinct responsibilities in a multi-step process to establish performance standards for such sources. And Congress also enacted other constraints on EPA's discretion in Section 7411 and the Act that

would more directly prevent the dire consequences that petitioners hypothesize, without resorting to the atextual and ahistorical interpretation of "best system of emission reduction" that the ACE Rule adopted.

STATEMENT

1. Section 7411 of the Clean Air Act is one of the statute's primary tools to address pollution from stationary sources, including power plants. Section 7411 adopts distinct regulatory approaches for new sources compared to existing sources. For new sources, Section 7411(b) authorizes EPA to directly set "standards of performance" for categories of stationary sources to curb their harmful emissions. 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).

For *existing* sources in the same source categories, Section 7411(d) uses a familiar cooperative-federalism approach that is borrowed from the Section 7410 process for national ambient air quality standards. *See id.* § 7411(d)(1) (cross-referencing 42 U.S.C. § 7410); *EPA v. EME Homer City Generation, L.P.*, 572 U.S. 489, 497-98 (2014). Instead of directly imposing

standards of performance on existing stationary sources, EPA promulgates regulations—known as emission guidelines—that contain EPA's determination of "the degree of emission limitation achievable through the application of the best system of emission reduction." 42 U.S.C. § 7411(a)(1) & (d)(1); 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*).

Under Section 7411(d), States have considerable flexibility in establishing performance standards for individual sources so long as they curb overall pollution to the levels provided in EPA's guidelines. *See* 42 U.S.C. § 7416. For example, States need not require sources to implement the system of emission reduction that EPA has determined to be the "best." States are also permitted to consider site-specific factors, such as a source's remaining useful life or implementation costs, in establishing a standard for a particular source. *See* 40 C.F.R. § 60.24a(e). When EPA's guidelines have included emission limits that each source must presumptively satisfy, *see e.g.*, Emission Guidelines for Sulfuric Acid Mist, 42 Fed. Reg. 55,796, 55,797 (Oct. 18, 1977), EPA has allowed state plans to rely on site-specific factors "to deviate from [these] generally applicable emission standards upon demonstration that costs are '[u]nreasonable,'" among other reasons. *AEP*, 564 U.S. at 427. In other instances, EPA has established statewide emission limits and provided for emissions averaging or trading programs that enable States to take site-specific factors into consideration when allocating responsibility for meeting the statewide targets. *See*, *e.g.*, Electric Utility Steam Generat-

ing Units, 70 Fed. Reg. 28,606, 28,649-50 (May 18, 2005) (mercury emissions from coal-fired power plants).[1]

Although States have flexibility in establishing standards for particular sources, EPA must ultimately ensure that state plans are "satisfactory," 42 U.S.C. § 7411(d)(2)—i.e., they "assure that meaningful controls will be imposed," State Plans for the Control of Certain Pollutants from Existing Facilities, 40 Fed. Reg. 53,340, 53,343-44 (Nov. 17, 1975). If a State does not submit a satisfactory plan, EPA must issue a federal plan that directly imposes standards of performance on the State's existing sources. 42 U.S.C. § 7411(d)(2).

2. In response to this Court's decision in *Massachusetts v. EPA*, 549 U.S. 497 (2007), EPA determined that elevated atmospheric concentrations of six greenhouse gases, including CO_2, endanger public health and welfare. Endangerment and Cause or Contribute Findings for Greenhouse Gases, 74 Fed. Reg. 66,496 (Dec. 15, 2009). These pollutants increase global average temperatures, cause sea levels to rise and coasts to erode; produce more intense, frequent, and long-lasting heat waves and wildfires; worsen smog; trigger longer and more severe droughts; and generate more intense storms and extreme weather events. *Id.* at 66,497-99. EPA and other agencies have emphasized the need for immediate efforts to reduce greenhouse-gas emissions in order to avoid "substantial damages on the U.S. economy, human health, and the environment," includeing "billions of dollars" of annual economic

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[1] The D.C. Circuit vacated this rule for reasons unrelated to its emissions-trading program; specifically, it held that EPA had unlawfully delisted mercury-emitting power plants under 42 U.S.C. § 7412. *See New Jersey v. EPA*, 517 F.3d 574, 582-84 (D.C. Cir. 2008).

losses as well as "physical and ecological impacts" that are "irreversible for thousands of years" or even "permanent."[2]

Fossil-fuel-fired power plants (predominantly coal- and gas-fired) emit about 25 percent of the nation's greenhouse gases, by far the highest emissions of any sector of stationary sources.[3] (J.A.393-396, 1736 n.4.). Despite the widespread recognition of the need for limits on these emissions, existing power plants were not subject to federal CO_2 limits for many decades. In the absence of federal limits, several States passed laws to require existing power plants to reduce their CO_2 emissions. For example, in 2009, ten northeastern States launched the Regional Greenhouse Gas Initiative (RGGI), which caps the total amount of CO_2 collectively emitted by covered power plants, requires emitters to obtain emission allowances, and uses proceeds from auctioning allowances to invest in programs that reduce electricity prices. Participating States have reduced power-plant CO_2 emissions by about 50 percent, while seeing electricity prices fall by 5.7 percent.[4] California and Washington use similar cap-and-trade programs to limit CO_2 emissions from electricity generation and other sources. *See* 17 Cal. Code Regs § 95811; Wash. Rev. Code § 70A.65.005 et seq.

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[2] U.S. Global Change Research Program, *Fourth National Climate Assessment* vol. 2, at 1347 (rev. Mar. 2021) (internet). (For sources available on the internet, URLs are available in the table of authorities. All websites were last visited on January 18, 2022.)

[3] *See* EPA, *Inventory of U.S. Greenhouse Gas Emissions and Sinks: 1990-2019*, at ES-27 (2021) (internet).

[4] Acadia Ctr., *The Regional Greenhouse Gas Initiative: 10 Years in Review* p. 1 (2019) (internet).

In 2004, several of the State and Municipal Respondents also brought a federal common-law public-nuisance action seeking to impose CO_2 limits on some of the nation's largest power plants. That lawsuit culminated in this Court's ruling in *AEP* that the Clean Air Act had displaced any relevant federal common law with respect to harms from power-plant CO_2 emissions. The Court held that Section 7411 "speaks directly to emissions of carbon dioxide," *AEP*, 564 U.S. at 424 (quotation marks omitted), and authorizes "limits on emissions of carbon dioxide from domestic power-plants." *id.* at 424-25 (quotation marks omitted). The Court acknowledged that such regulation requires an "informed assessment of competing interests," including economic consequences, and held that Congress had "entrust[ed] such complex balancing to EPA in the first instance, in combination with state regulators." *Id.* at 427.

3. In 2015, EPA promulgated regulations under Section 7411 that required new and existing fossil-fuel-fired power plants to limit their CO_2 emissions. *See* Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510 (Oct. 23, 2015) (new sources). The Clean Power Plan was the Section 7411(d) rule for existing sources. Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (reproduced at J.A.273-1668.)

In the Clean Power Plan, EPA began by considering which systems of reducing CO_2 emissions were "adequately demonstrated" for power plants in light of the unique characteristics of CO_2 as a pollutant and the unique features of the power sector. EPA found

that CO_2 cannot be removed at the smokestack as easily as other pollutants like sulfur dioxide, and that, unlike those pollutants, CO_2 principally causes global impacts regardless of where it is originally emitted. (J.A.397-401, 565-566.)

With respect to the nature of the power sector, EPA considered different types of measures that power plants could use to reduce their CO_2 emissions. For measures that reduce individual power plants' CO_2 emission rates, EPA determined that heat-rate improvements (i.e., increasing the efficiency of generating electricity) were adequately demonstrated and cost-effective and thus should be part of the "best" system; however, they would "lead to only small emission reductions for the source category." (J.A.577). EPA found that more substantial reductions were available from familiar approaches that power plants and state regulators had long relied on to reduce CO_2 or other emissions. Those approaches relied on the uniquely interconnected nature of the electric grid and the concomitant ability of power companies to cost-effectively shift generation to less-polluting sources. (J.A.578). Such "generation shifting" occurs as a matter of the routine operation of the electric grid, allowing the grid to satisfy demand while meeting "technical, environmental, and other constraints." (J.A.567.) EPA found that, due to falling prices for cleaner energy and the increasing costs of aging coal-fired plants, the power sector was already moving toward cleaner sources, and it expected those trends to continue. (J.A.352, 420-428, 894, 941-42.)

EPA identified several specific measures that the power sector had used for decades to substitute cleaner generation for higher-emitting generation. For example, power companies often have a mixed portfolio of

fossil-fueled and renewable generation resources, and routinely shift generation among these resources for environmental and economic reasons. (J.A.567, 898-899, 937-938.) As a result, a substantial degree of generation shifting could be accomplished within an owner's fleet, without involving any third parties. (*See*, *e.g.*, J.A.898.) Power companies also regularly used contractual and state-created mechanisms, including "well-developed" renewable energy credit markets, to substitute generation from one unit for another, such as the replacement of fossil-fueled generation with renewable energy. (J.A.901, 942-944; *see also* J.A.902-903 (noting that similar crediting approach could work for gas-fired units).) States had relied on such measures to cost-effectively reduce CO_2 emissions from existing power plants, including in cap-and-trade programs like RGGI (J.A.568), or to provide sources with compliance flexibility under state renewable portfolio standards, which require that a certain percentage of electricity be generated using renewable energy (J.A.425, 934-944). And EPA too had used emissions trading programs under the Clean Air Act to reduce other pollutants from the power sector. (J.A.430-439.)

Based on this evidence, EPA determined that the best system for reducing CO_2 emissions from existing power plants consisted of three "building blocks": (1) improving heat rates at coal-fired power plants; (2) substituting generation from existing natural gas power plants for generation from existing coal-fired power plants; and (3) substituting generation from new zero-emitting renewable energy sources for generation from existing fossil-fuel-fired plants. (J.A.657.)

EPA considered including other measures in the best system, such as carbon capture and storage, or co-firing coal-fired power plants with natural gas.

Although EPA found that these measures were feasible and cost-effective and could potentially achieve significant emission reductions, it ultimately did not include them because it found that they would be more expensive than the generation-shifting measures that power companies were already utilizing. (J.A.578.) Indeed, power companies made clear their preference to meet emission limits by shifting generation to lower- or zero-emitting sources because doing so would be cheaper than—yet still as effective as—these other measures. (J.A.578, 603 n.380.)

EPA then quantified the degree of emission limitation achievable under its determination of the best system for two subcategories of power plants—steam units (primarily coal-fired) and gas-fired combustion turbines—based on historical trends in heat-rate improvements (J.A.867) and projections about the capacity of gas plants and new renewable generation (J.A.890-891, 958). In determining these emission reductions, EPA used conservative estimates and built in significant compliance "headroom" to ease power plants' ability to achieve state performance standards. (J.A.300, 531, 643.) To provide States with flexibility in designing state plans, EPA then issued state-specific emission goals for 2030. (J.A.1008-1012.) EPA expressly allowed States to consider site-specific factors, such as remaining useful life, to vary the emission rates of individual plants, provided that the overall state goals were met. (J.A.1240-1256.)

EPA predicted that the Plan would achieve relatively modest CO_2 emission reductions when fully implemented in 2030: a 32 percent reduction below 2005 levels and a 16 percent reduction from forecasted 2020 levels. (J.A.1489-1490.) The agency also estimated that coal-fired power plants would continue to

provide a significant share of the country's electricity generation—27.4 percent, a decrease of 5.4 percentage points over ten years as compared to the status quo.[5] By way of comparison, EPA noted that coal's share of electricity generation had decreased by more than 5.4 percent during the past decade, even without any federal CO_2 regulations. (J.A.843-844.)

Various parties sought review of the Clean Power Plan in the D.C. Circuit, which denied a stay. *See West Virginia v. EPA*, No. 15-1363 (Jan. 21, 2016) (consolidated cases). Several petitioners then filed stay applications with this Court. Application for Stay, *West Virginia v. EPA*, No. 15A773 (Jan. 26, 2016). West Virginia asserted that a stay was necessary to prevent the States from "suffer[ing] immense sovereign and financial harms as a direct result of the Plan." *Id.* at 39-40. This Court granted the applications. *See West Virginia v. EPA*, 577 U.S. 1126 (2016).

4. In 2019, following a change in presidential administrations, EPA issued the ACE Rule, which repealed and replaced the Clean Power Plan. Repeal of the Clean Power Plan, 84 Fed. Reg. 32,520 (July 8, 2019) (reproduced at J.A.1725-2030).[6] In repealing the Clean Power Plan, EPA made what its general counsel referred to as a "bold" "strategic choice" to construe Section 7411 as unambiguously precluding the Plan.[7] The ACE Rule thus relied on the view that the Clean

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[5] EPA, *Regulatory Impact Analysis for the Clean Power Plan Final Rule* 3-27 (Oct. 23, 2015) (internet).

[6] After the finalization of the ACE Rule, the D.C. Circuit dismissed the earlier challenges to the Clean Power Plan. *West Virginia v. EPA*, No. 15-1363 (Sept. 17, 2019), CADC doc. 1809652.

[7] *Facing Risks, EPA's Counsel Defends 'Bold' ACE Rule Legal Interpretation*, Inside EPA (Aug. 2, 2019) (internet).

Air Act limited the best system of emission reduction to "measures that can be applied to and at the level of the individual source." (J.A.1769.) EPA concluded that its new interpretation precluded the agency from relying on certain measures that States and power companies had already been implementing to reduce CO_2 emissions based on power plants' unique interconnection on the electric grid. Accordingly, the ACE Rule limited the best system for coal-fired power plants to a handful of minor efficiency (heat-rate) improvements. (J.A.1800-1825.) With respect to gas-fired power plants, EPA found that it could not identify *any* best system at all. (J.A.1791-1792.)

Rather than providing States with benchmark emission limitations, the ACE Rule instead presented States with a list of heat-rate improvements to be evaluated along with an expected—but nonbinding—range of outcomes. (J.A.1803-1809.) Abandoning EPA's long-held support for state flexibility, the ACE Rule also expressly prohibited States and sources from complying with EPA's guidelines by using emissions averaging or trading programs because these measures "would undermine the EPA's determination of the [best system] in this rule." (J.A.1895-1901.)

In analyzing the effect of repealing the Clean Power Plan, EPA did not find that the repeal would avert "immense sovereign and financial harms," as several of the petitioning States had previously claimed. Application for Stay at 39-40, *West Virginia v. EPA*. Instead, the agency found that the repeal would save *zero* costs. (J.A.1672.) That finding reflected the fact that, even though the Plan never went into effect, power plants had continued—and even accelerated—reductions in CO_2 emissions such that the sector would meet the Plan's emission-reduction goals for 2030

nearly a decade early. (J.A.1690-1693.) Moreover, EPA found that implementing the ACE Rule would lower power-sector CO_2 emissions by less than one percent by 2030.[8] And in more than a dozen States, emissions would *increase* compared to a baseline of no regulation at all.[9]

5. The State and Municipal Respondents, along with several power companies and nongovernmental organizations, challenged the ACE Rule in the D.C. Circuit. *See American Lung Ass'n v. EPA*, No. 19-1140 (and consolidated cases). The court of appeals held that the "ACE Rule must be vacated and remanded to the EPA" because it rested "squarely on the erroneous legal premise that the statutory text expressly foreclosed consideration of measures other than those that apply at and to the individual source." (J.A.214.).

The court identified three textual flaws with EPA's stated rationale for repealing the Clean Power Plan. First, the definition of the term "best system of emission reduction" in Section 7411(a)(1) "announces its own limitations," which "simply do not include the source-specific caveat that the EPA now interposes and casts as unambiguous." (J.A.106.) Second, there is no basis for EPA's assertion that the language of subsection (d)(1) concerning state performance standards for individual sources "must be read upstream" into the definition of the best system in (a)(1). (J.A.106-107.) Third, even assuming subsections (a)(1) and (d)(1)

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[8] EPA, *Regulatory Impact Analysis for the Repeal of the Clean Power Plan, and the Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units* ES-6 (2019) (internet).

[9] EPA, *Illustrative ACE Scenario, State Emission Projections* (2019) (internet).

could be so combined, EPA had improperly made an "unexplained replacement of the preposition 'for' in 'standards of performance for any existing source' [the language in subsection (d)(1)] with the prepositions 'at' and 'to,'" which do not appear in that phrase. (J.A.107.) The court further rejected the ACE Rule's prohibition of certain compliance measures by States, such as emissions averaging and trading, because that prohibition was tied to its "flawed interpretation of the statute as unambiguously confined to measures taken 'at' individual plants." (J.A.132-133.)

The court of appeals also rejected the argument that its interpretation of "best system of emission reduction" would allow EPA to resolve major questions in a way that Congress did not intend. First, the court noted that EPA's regulation of CO_2 emissions from existing power plants was expressly authorized by Section 7411(d) as interpreted by *AEP*. (J.A.137.) Second, the court found that the Clean Power Plan's incorporation of "generation-shifting measures" was neither radical nor transformative because such "measures . . . are already widely in use by States and power plants." (J.A.145.)[10]

EPA subsequently filed an unopposed motion with the court of appeals to withhold issuance of the mandate insofar as it would require reinstatement of the Clean Power Plan. EPA explained that it was beginning a new rulemaking to address CO_2 emissions

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[10] Judge Walker concurred in part and dissented in part. He would have held that the ACE Rule was invalid on the ground that EPA's regulation of hazardous air pollutants from power plants under Section 7412 of the Act precludes the agency from limiting power-plant CO_2 emissions under Section 7411(d). (J.A.217, 233.) This Court did not grant certiorari on the Section 7412 issue.

from existing power plants, and therefore had no intention of implementing the Clean Power Plan (or the ACE Rule). The court granted EPA's motion. (J.A.270-272.) EPA's rulemaking remains ongoing. *See* EPA Status Report at ¶4 (Jan. 17, 2022), CADC. doc. 1930863.

SUMMARY OF ARGUMENT

I.A. The ACE Rule misinterpreted Section 7411 as unambiguously limiting EPA's choice of the "best system of emission reduction" to "measures that can be applied to and at the level of the individual source." (J.A.1769.) That limitation appears nowhere in the text of Section 7411(a)(1). And Congress knew how to write such a limitation, if it had intended to include one: narrower language focusing EPA on specific types of emission-reduction tools appears elsewhere in Section 7411 and the Act, but not in Section 7411(a)(1)'s authorization for EPA to determine the best system.

The ACE Rule attempted to justify its "to and at the source" interpretation by splicing together language from Section 7411(a)(1) and (d)(1) and relying on language in (d)(1) that it deemed to be focused on "individual sources." (J.A.1746-1747.) But these two provisions govern distinct phases of the regulatory process: (a)(1) directs EPA to determine the best system of emission reduction for the source category, while (d)(1) directs States to establish standards of performance for individual sources. Any source-specific language in (d)(1) thus describes the distinct role of the States; it does not limit EPA's threshold determination of the best system.

The ACE Rule's overly restrictive reading of "best system of emission reduction" also disregarded

Congress's repeated recognition in other statutory provisions that measures such as cap-and-trade programs, which involve multiple entities, can cost-effectively reduce emissions from regulated sources. State regulators and private industry have also relied on such measures to reduce CO_2 from power plants. The broader phrase "system of emission reduction" is sensibly read to include specific measures of emission reduction that Congress, the States, and the power sector have long recognized and implemented.

B. The ACE Rule was invalid for the independent reason that it prohibited States and sources from achieving EPA's emission guidelines by using emission-reduction measures involving multiple entities. That prohibition was inconsistent with the plain text of the Act, which allows States and sources to use any measures they choose to reduce emissions so long as state plans achieve at least the degree of emission reduction set forth in EPA's guidelines.

Disregarding this feature of the ACE Rule, petitioners instead contend that it was the decision below that violated the Act's requirements for state flexibility. But the court of appeals properly respected Section 7411's cooperative-federalism regime and the state flexibility that Congress built into that process. Petitioners' complaint that the Clean Power Plan did not leave the States with sufficient flexibility is both incorrect and immaterial here because the Plan is not the rule under review and will not be enforced by EPA going forward.

C. The ACE Rule's statutory interpretation is not needed to ensure appropriate constraints on EPA's discretion in selecting the best system. Petitioners' slippery-slope arguments ignore the fact that Section 7411 and the Act contain numerous other limitations on EPA. Among those limitations is the requirement that EPA select measures that are "adequately demonstrated," taking into account the nature of both the industry being regulated and the pollutant to be controlled. EPA must also consider energy requirements and the cost of achieving pollution reductions—limitations that more directly address petitioners' concerns about unduly burdensome rules than the ACE Rule's atextual "to and at the source" limitation.

Petitioners are also wrong to suggest that the decision below endorsed the Clean Power Plan in its entirety. The court of appeals considered only the specific interpretation of "best system of emission reduction" that the ACE Rule relied on as its exclusive rationale to repeal the Plan. The court accordingly did not review, let alone approve, other features of the Plan—including, for example, its inclusion of nonemitting facilities that are not regulated by the Act, or its reliance on new rather than existing renewable facilities in setting the stringency of its emission guidelines. A court could thus still consider the validity of these features if they are adopted by EPA in its forthcoming rule.

II. This case does not resemble those in which this Court has found that an agency exceeded its core regulatory mission and decided major questions that Congress did not intend it to address. To the contrary, as this Court has already held, Congress made the major policy choices here to curb CO_2 emissions from existing power plants and to utilize a cooperative-

federalism framework with distinct roles for both EPA and the States. These choices are incompatible with petitioners' assertion that Congress intended to reserve for itself the complex and technical task of establishing standards of performance for existing power plants.

Petitioners assert that EPA might make particular choices in determining the best system of emission reduction that would be so "transformative" as to raise a major question outside of the agency's authority to resolve. But without any extant rule that concretely affects petitioners, that concern is purely speculative. Equally speculative is petitioners' concern that EPA's forthcoming rule will unduly disrupt the federal-state balance. Nothing in the decision below purports to deviate from Section 7411's familiar cooperative-federalism framework.

ARGUMENT

The court of appeals decided a "relatively discrete" question about the validity of a statutory interpretation that the ACE Rule had chosen as its sole basis for repealing the Clean Power Plan. (J.A.102.) Specifically, the Rule had construed the phrase "best system of emission reduction" in Section 7411(a)(1) as being unambiguously limited to "measures that can be applied to and at the level of the individual source." (J.A.1796.) And it further found that this purportedly unambiguous meaning not only constrained EPA's emission guidelines but also barred States and sources from using compliance measures other than those that apply "to and at" an individual source. (J.A.1893-1894.)

The court of appeals correctly rejected the ACE Rule's statutory interpretation. That narrow ruling did not, as petitioners contend, leave EPA with "unfettered

discretion" (Westmoreland Mining Holdings (Westmoreland) Br. 43) to regulate "any producer in any economic sector—or really any building owner" (W.Va. Br. 23); indeed, the court acknowledged other textual constraints on EPA's determination of the best system. The ruling similarly raises no concerns about improper agency resolution of major questions or impermissible legislative delegation in light of the many indications in Section 7411 that Congress made the major policy choices here—including the choice to regulate CO_2 emissions from power plants, and the choice to employ a cooperative-federalism regime under which EPA and the States have distinct, well-defined responsibilities. Assuming that this Court has jurisdiction (*see* NGO Resp. Br. 23-32), it should affirm the judgment below.

I. The ACE Rule Relied on an Erroneous Interpretation of Section 7411.

A. The Text and Structure of Section 7411 Do Not Support the ACE Rule's Narrow Interpretation of "Best System of Emission Reduction."

1. a. Any analysis of EPA's authority under Section 7411 "begins with the statutory text." *National Ass'n of Mfrs. v. Department of Defense*, 138 S. Ct. 617, 631 (2018) (quotation marks omitted). The ACE Rule repealed the Clean Power Plan on the sole theory that Section 7411 unambiguously limits EPA's determination of the "best system of emission reduction" to "measures that can be applied to and at the level of the individual source," standing alone, and thus categorically precludes emission guidelines "premised on a system of emission reduction that is implementable only through the combined activities of sources or non-

sources." (J.A.1747, 1769, 1784, 1796.) But no language in Section 7411(a)(1) imposes this "to and at the source" limitation on EPA's selection of the best system. The absence of such limiting language is meaningful. "It is a fundamental principle of statutory interpretation that absent provision[s] cannot be supplied by the courts." *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (quotation marks omitted). And that principle specifically forbids courts from "imposing limits on an agency's discretion that are not supported by the text." *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020).

The absence of any express "to and at the source" limitation in Section 7411(a)(1) is particularly striking because that provision explicitly constrains EPA's determination of the best system in other ways, including by requiring that the best system be "adequately demonstrated." See *infra* at 33-38. Congress also knows how to narrow EPA's focus to "more specific categories of emission-reduction tools." (J.A.120.) Section 7411 itself does so in other provisions that refer more narrowly to a "*technological* system" of emission reduction. 42 U.S.C. § 7411(h) & (j) (emphasis added). Similarly, other provisions of the Clean Air Act refer to "retrofit technology" (i.e., updated equipment), *id.* § 7491(b)(2)(A), (g)(2); *see also id.* § 7651f(b)(2); to measures that "collect, capture or treat . . . pollutants when released," *id.* § 7412(d)(2)(C); or to specific measures like "fuel cleaning, clean fuels, or treatment or innovative fuel combustion techniques," *id.* § 7479(3). These other provisions demonstrate that "Congress could have taken a more parsimonious approach," *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020), to EPA's selection of the "best system of emission reduction" in Section 7411(a)(1). But Congress omitted any such

limitations. This Court "do[es] not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and [its] reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest." *Jama v. ICE*, 543 U.S. 335, 341 (2005); *see also National Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 544 (2012) ("Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.").

Instead, Section 7411(a)(1) refers simply to the "best system of emission reduction." Nothing about this phrase supports the ACE Rule's "to and at the source" limitation. The ordinary meaning of "system" refers to "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); *see also Merriam-Webster Dictionary* s.v. system (2021) (defining "system" as any "interdependent group of items" that "serv[e] a common purpose"). What ties together the components of a "system of emission reduction" is that they are all measures that are directed toward the shared objective of reducing emissions from regulated sources—regardless of whether they take into account actions by just one entity, or many. *Cf., e.g.*, National Defense Authorization Act for Fiscal Year 2012, Pub. L. 112-81, § 2841(b), 125 Stat. 1298, 1696 (requiring design of a "health care system" consisting of multiple components, including a medical plan, contractor-provided health services, and access to local healthcare assets).

Similarly, the phrase "emission reduction" does not support the ACE Rule's interpretation because there is no dispute that measures implementable through the

combined activities of multiple entities can meaningfully reduce regulated sources' emissions. Indeed, the Rule admitted that the measures considered by the Clean Power Plan—including measures that would increase the relative production of lower-polluting sources on the electric grid—could be "a workable policy for achieving sector-wide carbon-intensity reduction goals." (J.A.1785.) That admission reflected the practical reality that States and power plants have extensive experience with strategies involving multiple entities as a cost-effective means of reducing CO_2 emissions. (J.A.568-569.) See *supra* at 8-9.

Congress's decision not to include narrowing language in Section 7411(a)(1) was a deliberate one. Before enacting Section 7411 during the 1970 legislative session, both chambers considered language that would have more specifically referred to the types of control measures that EPA could consider in selecting the best system of emission reduction. *See* S. 4358, 91st Cong. § 6 (1970) ("the latest available control technology, processes, operating methods, or other alternatives"); H.R. 17255, 91st Cong. § 5 (1970) (requiring the use of "available technology" for new sources only). But Congress chose instead the broader phrase "best system of emission reduction" for Section 7411(a)(1). Similarly, from 1977 through 1990, Congress temporarily limited EPA's choice of controls for *new* sources to "the best technological system of continuous emission reduction." *See* Clean Air Amendments Act of 1977, Pub. L. No. 95-95, § 109(c)(1)(A), 91 Stat. 685, 700; Clean Air Act Amendments of 1990, Pub. L. No. 101-549, § 403(a), 104 Stat. 2399, 2631. But at no time has Congress imposed the same restriction on EPA's choice of systems for *existing* sources. Its decision not to do so precluded EPA from engrafting such extratextual

limitations on the statute in the ACE Rule. *See Little Sisters of the Poor*, 140 S. Ct. at 2380 (rejecting limits on agency authority when "Congress could have limited [the agency's] discretion in any number of ways, but it chose not to do so").

b. The ACE Rule defended its "to and at the source" interpretation by making a grammatical argument centered on the word "application." (*See* J.A.1744-1747.) According to the Rule, the relevant phrase in Section 7411(a)(1)—"through the application of the best system of emission reduction"—required EPA to identify an "indirect object" to which the "best system" would be applied. (J.A.1746.) The Rule then reasoned that a different subsection—Section 7411(d)(1)—"provides that the indirect object is the 'existing source,'" based on the latter subsection's requirement that States establish "standards of performance for any existing source." (J.A.1746.) The Rule concluded that this splicing together of Section 7411(a)(1) and (d)(1) "unambiguously limits the [best system of emission reduction] to those systems that can be put into operation *at* a building, structure, facility, or installation." (J.A.1746) (italics in original.)

For several independent reasons, the ACE Rule's reasoning is not persuasive, let alone unambiguously compelled by the text. *First*, the Rule erred in assuming that the phrase "application of the best system of emission reduction" in Section 7411(a)(1) is grammatically incomplete in a way that requires the identification of an indirect object at all. As the court of appeals correctly recognized, the noun "application" does not require an indirect object but is instead a "nominalization" that "enables the drafter to leave certain information unspecified—namely, who is acting and where their action is directed." (J.A.113-114.) In similar

contexts, where Congress chooses a grammatical construction that allows for the omission of a part of speech—for example, omitting the subject by using the passive voice—that choice ordinarily reflects Congress's "agnosticism" about the part of speech that is not used; it does not constitute a clear command to fill in the missing part of speech in a specific way. *See Watson v. United States*, 552 U.S. 74, 81 (2007); *Lehrfeld v. Richardson*, 132 F.3d 1463, 1465-66 (D.C. Cir. 1998).

Second, even if a particular indirect object were grammatically necessary, such an indirect object can typically be inferred from context and does not require an explicit textual reference. Here, as the court of appeals observed, "other contextually appropriate indirect objects" would include the source category or the emissions themselves. (J.A.115.) Nothing required EPA to identify a specific indirect object elsewhere in Section 7411.

Third, the text of Section 7411(d) does not support the ACE Rule's grammatical claim that the "best system of emission reduction" must be applied exclusively "to" or "at" the source of emissions. The relevant language in Section 7411(d)(1) references "standards of performance for any existing source for any air pollutant." But the Rule then departs from this text in two ways. For one thing, although subsection (d)(1) uses "for any existing source" to modify "standards of performance," the Rule instead uses it to modify subsection (a)(1)'s "best system of emission reduction"—a phrase that is only *part* of the definition of "standard of performance" and thus cannot simply be substituted into subsection (d)(1). (J.A.111.) In addition, although the language in subsection (d)(1) uses the preposition "for," the ACE Rule concludes that the "best system of emission reduction" must be "put into operation *at* a building,

structure, facility, or installation," or applied "*to* the designated facility." (J.A.1746-1747 (second emphasis added).) As the court of appeals observed, "[t]he word Congress actually used—'for' the source—lacks the site-specific connotation on which the [Rule's] case depends." (J.A.116.) For example, a reservation system "for" a hotel may be handled off-site as well as "at" the hotel's front desk. "[N]owhere in the ACE Rule does the EPA explain this swap of one preposition for two meaningfully more restrictive ones." (J.A.117.) Thus, the Rule's interpretation of "best system of emission reduction" in Section 7411(a)(1) depends on a reading of the statute that is not consistent with "the words on the page," *Bostock*, 140 S. Ct. at 1738.

2. The ACE Rule's narrow interpretation of "best system of emission reduction" also conflicts with the broader structure of Section 7411 and the Clean Air Act.

First, the Rule makes a fundamental mistake in using language from Section 7411(d)(1) to limit EPA's determination of the best system in Section 7411(a)(1) because the two provisions govern distinct phases of the regulatory process. Subsection (a)(1) directs EPA to "study all 'adequately demonstrated' means of emission reduction" and then to draw on that analysis "to determine the 'best' system to reduce emissions" for the source category. (J.A.108.) EPA's determination of the best system informs its emission guidelines, and those guidelines in turn provide the criteria under which "the States then issue performance standards for stationary sources within their jurisdiction" pursuant to subsection (d)(1). *AEP*, 564 U.S. at 424.

In other words, EPA determines the best system under subsection (a)(1) and issues emission guidelines for the entire source category *before* States set perform-

ance standards for individual sources under subsection (d)(1). Petitioners do not dispute that EPA's threshold determination of the best system at the start of this process evaluates many of the other statutory factors—including costs, health and environmental impacts, and energy requirements—on a sector-wide as well as individual-source level. (J.A.808.) *See Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981). It would be anomalous if the same scope did not govern EPA's responsibility to identify the measures of emission reduction that are "adequately demonstrated" for the source category and thus should be considered for inclusion in the best system. By contrast, the statutory language in subsection (d)(1) identified by petitioners as reflecting a "source-specific focus" (N. Am. Coal Corp. (NACCO) Br. 33; *see also id.* 35-37) pertains to *the States*' establishment of standards of performance for particular sources; it does not restrict *EPA's* threshold responsibility under Section 7411(a)(1) to select the "best system of emission reduction."

Second, the ACE Rule's restrictive reading of "best system of emission reduction" conflicts with the fact that Congress has repeatedly recognized, in multiple other statutory provisions, that measures can cost-effectively reduce emissions through the activities of multiple entities, including through cap-and-trade programs. For example, in Section 7410 of the Act—a statute whose cooperative-federalism scheme Section 7411 expressly references, *see* 42 U.S.C. § 7411(d)(1)—Congress recognized that air quality could be improved not only by "enforceable emission limitations" but also by "other control measures" including, specifically, "marketable permits, and auctions of emissions rights." *Id.* § 7410(a)(2)(A). Similarly, in Title IV of the Act, Congress established a trading scheme as part of the

"emission limitation programs" to address acid rain, *see* 42 U.S.C. § 7651b(a)(1), and specifically found that this "emission allocation and transfer system" provided a way for sources to meet "prescribed emission limitations," *id.* § 7651(b). Petitioners argue (W.Va. Br. 42) that these other programs are inapposite because their implementing statutes specifically mention trading, but that argument ignores the explicit textual link between Sections 7410 and 7411, as well as the fact that Congress chose to use broader language in Section 7411—"system of emission reduction"—than in the statutes that petitioners discuss. There is nothing suggesting that Congress silently intended the phrase "system of emission reduction" to exclude measures that involve multiple entities, while elsewhere recognizing such measures to be effective methods for reducing air pollution.

More broadly, States (including several of the petitioners) have long relied on trading programs as one tool to help reduce pollution, in both state-specific schemes and regional programs such as RGGI.[11] *See, e.g.*, W.Va. Code § 22-5-18; 30 Tex. Admin. Code § 101.300 et seq. See also *supra* at 9. The power sector likewise "has a long and well-established history" of

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[11] Indeed, every State that is a petitioner here previously supported cap-and-trade programs as a means of emission reduction in connection with the Clean Air Mercury Rule, a Section 7411 rule. These States (except one, which accepted a federal plan) informed EPA that they planned to participate in a national cap-and-trade program that EPA intended to establish. *See, e.g.*, 73 Fed. Reg. 3,194 (Jan. 17, 2008) (Missouri); 72 Fed. Reg. 72,978 (Dec. 26, 2007) (Kansas); 72 Fed. Reg. 46,161 (Aug. 17, 2007) (Louisiana); *see also* National Assoc. of Clean Air Agencies, State Mercury Programs for Utilities (Dec. 4, 2007) (internet) (summary table of state plan submissions).

engaging in multi-entity actions, including trading, "for the purpose of reducing CO_2 emissions—and certainly always with the effect of reducing emissions." (J.A.771-772, 805-806; see Power Company Resp. Br. 35-41.) This Court recently relied on similar examples of "pre-existing state requirements" and industry experience to uphold a COVID-19 vaccination rule by the Centers for Medicare and Medicaid Services, pointing to analogous vaccine policies by the States and public-health sector as support for the federal agency's authority to do the same under its power to protect "health and safety." *Biden v. Missouri*, No. 21A240, 2022 WL 120950, at *3-4 (U.S. Jan. 13, 2022) (per curiam). Here, too, the widespread state and industry practice of reducing emissions through the actions of multiple entities supports an interpretation of "best system of emission reduction" that would include such measures.

B. The ACE Rule's Statutory Interpretation Improperly Constrained the States' Compliance Choices.

1. The ACE Rule's interpretation of Section 7411 was invalid for the additional reason that it forbade States and sources alike from achieving EPA's emission guidelines by relying on commonly used methods of emission reduction involving multiple entities—including cap-and-trade programs—for no reason other than that such methods "would be inconsistent with the EPA's interpretation of the [best system of emission reduction] as limited to measures that apply at and to an individual source and reduce emissions from that source." (J.A.1893; *see also* J.A.1914-1915.)

This constraint on state compliance measures finds no support in the statutory text. (J.A.133.) Instead, it

conflicts with the cooperative-federalism regime that Congress established for regulating existing sources. Section 7411(d) empowers States in the first instance to establish standards of performance for sources within their jurisdictions. And Congress expressly provided that "nothing in [the Act] shall preclude or deny the right of any State . . . to adopt or enforce (1) *any* standard or limitation respecting emissions of air pollutants or (2) *any* requirement respecting control or abatement of air pollution," so long as such standard, limitation, or requirement is at least as stringent in curbing emissions as one "in effect . . . under section 7411" of the Act. 42 U.S.C. § 7416 (emphases added).

In other words, so long as States adopt plans under Section 7411(d) that achieve emission reductions equal to or greater than the minimum required by the emission guidelines issued by EPA under Section 7411(a)(1), EPA has no lawful basis to interfere with the manner in which state plans regulate sources within their borders. *See Union Electric Co. v. EPA*, 427 U.S. 246, 264 (1976) (discussing Section 7410). In particular, although EPA must identify a "best system of emission reduction" in order to promulgate its emission guidelines under Section 7411(a)(1), States need not follow EPA's choice of the best system if they may achieve equal or greater emission reductions through some other means. EPA's "need to rewrite clear provisions of the statute should have alerted EPA that it had taken a wrong interpretive turn." *Utility Air Reg. Grp. v. EPA*, 573 U.S. 302, 328 (2014) (*UARG*).

2. Petitioners largely ignore the ACE Rule's explicit and unprecedented constraint on state compliance measures. Instead, Petitioner North Dakota asserts that it is the court of appeals' decision, not the Rule, that somehow overrides state flexibility under Section 7411.

(North Dakota (N.D.) Br. 5.) But nothing in the decision below disturbed Section 7411's framework for regulating existing sources, which borrows the familiar cooperative-federalism regime governing national ambient air quality standards under Section 7410. As this Court has long recognized, this structure "plainly charge[s]" EPA with the authority to issue binding general guidelines, but then leaves to the States "the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the [federal] standards [EPA] has set are to be met." *Train v. Natural Resources Defense Council*, 421 U.S. 60, 79 (1975). The court of appeals' decision preserves these roles by upholding EPA's authority to determine the best system of emission reduction while rejecting the ACE Rule's improper constraints on States' discretion to choose compliance measures that achieve those federal guidelines. (J.A.98-100.)

To be sure, EPA's emissions guidelines will constrain state discretion to at least some degree. But that effect is the intended result of the cooperative-federalism scheme. As this Court has previously explained, in describing the analogous process for national ambient air quality standards, "the statute speaks without reservation" about the substantive requirements that a State must address, and EPA has a "statutory duty" to ensure that States comply with these minimum requirements. *EME Homer City*, 572 U.S. 489 at 508-09. Indeed, Section 7411 expressly authorizes EPA to review state plans to ensure that they are "satisfactory," 42 U.S.C. § 7411(d)(2)(A), confirming that EPA has the authority to ensure that minimum federal requirements are satisfied. And the federal oversight role conferred by Section 7411 is particularly important where a pollutant—such as

CO_2—is "heedless of state boundaries" and thus inflicts cross-state harms that States have limited power on their own to curb. *See EME Homer City*, 572 U.S. at 496*; see also Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 486 (2004). The court of appeals' decision properly respects this essential federal role.

Some petitioners separately raise the fear that, in practice, the court of appeals' interpretation of "best system of emission reduction" in Section 7411(a)(1) will allow EPA to promulgate emission guidelines that effectively leave the States with no discretion in setting source-specific standards. (*E.g.*, N.D. Br. 45; W.Va. Br. 29-30.) But the court of appeals' reasoning does not lead to any such inevitable interference with state authority. The court held only that EPA was permitted to consider emission-reduction measures beyond those that apply "to or at" an individual source; it did not hold that EPA was required to adopt them, let alone that EPA must employ those measures in such a manner that the resulting federal guidelines would eliminate state flexibility. (J.A.104, 161, 214.) Petitioners appear to assume that any consideration by EPA of "outside-the-fenceline measures" (W.Va. Br. 42) will necessarily "tie the States' hands" (N.D. Br. 36) in setting source-specific performance standards, but there is no such inherent connection. To the contrary, multi-entity measures like trading and averaging schemes are widely acknowledged to reduce the costs of complying with emission limits and thus to provide additional, not fewer, options to States and regulated sources.[12] (J.A.430-439, 609-610.)

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[12] Petitioners are incorrect in arguing (W.Va. Br. 29) that the Clean Power Plan violated Section 7411(d)(1) by preventing States

(*continues on next page*)

Petitioners' complaint that the Clean Power Plan's emission targets were "reverse-engineered" to force the States to facilitate "shifting generation" (W.Va. Br. 29-30) is irrelevant to the issue before the Court because the Clean Power Plan is not the rule under review and will not be enforced by EPA. Given that EPA is in the midst of considering a new rule for existing power plants, it is at best premature to assume that the agency will replicate the Clean Power Plan's specific approach in any future rulemaking. *See EME Homer City*, 572 U.S. at 524 (recognizing that a "State may bring a particularized, as-applied challenge" if EPA's guidelines in fact prove unduly restrictive).

Petitioners' complaint is also wrong. The Clean Power Plan provided States and sources with several forms of "compliance headroom" and set emission guidelines "not at the maximum possible degree of stringency but at a reasonable degree of stringency." (J.A.531-532, 590, 597.) EPA identified numerous methods of emission reduction besides increasing lower-polluting generation that would have been "capable of helping affected [sources] achieve compliance with standards of performance" (J.A.706), including heat-rate improvements; carbon capture and storage; fuel-switching to natural gas or biomass; waste-to-heat energy conversion; demand-side energy efficiency; and investments to reduce transmission and distribution

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from considering a source's "remaining useful life" in setting source-specific performance standards. The relevant portion of the Plan cited by petitioners said only that the *statewide* goals established by the Plan's emission guidelines could not be adjusted based on "facility-specific factors," including "remaining useful life." (J.A.1237, 1244-1246.) But States could consider such factors in establishing performance standards for "each individual existing source." (J.A.1240-1244.)

losses. (J.A.703-715.) The Clean Power Plan thus confirms that there is no inherent connection between "outside-the-fenceline measures" (W.Va. Br. 42) and undue restrictions on state flexibility.

C. The ACE Rule's "To and At the Source" Interpretation Is Not Necessary to Ensure Appropriate Limitations on EPA's Regulatory Authority.

1. Petitioners repeatedly argue that, by rejecting the ACE Rule's "to and at the source" interpretation, the court of appeals necessarily vested EPA with "power to impose an indefinite series of transformative measures on practically every industrial facility, office building, community center, and home across the Nation." (Westmoreland Br. 29.) They are mistaken. This argument depends on taking out of context the court's observation that Section 7411(a)(1) "impose[s] no limits on the types of measures the EPA may consider." (J.A.108.) That statement was made to explain that the phrase "best system of emission reduction" does not limit EPA to considering only measures that can be implemented "to and at the source." But the court elsewhere plainly and correctly recognized that other "substantial and explicit constraints on the EPA's selection of a best system of emission reduction" would preclude the dire scenarios posited by petitioners. (J.A.146.) Those textually grounded constraints—none invoked by the Rule as a basis to repeal the Clean Power Plan—provide ample safeguards against the exercise of unconstrained power conjured by petitioners. *See UARG*, 573 U.S. at 331 (identifying "important limitations" in the statute "that may work to mitigate petitioners' concerns about 'unbounded' regulatory authority").

To begin with, as EPA acknowledged when it issued the Clean Power Plan, the fact that States must ultimately establish standards of performance "for existing sources," 42 U.S.C. § 7411(d)(1), imposes "significant constraints on the types of measures that may be included" (J.A.733-734). For example, the best system must "assure emission reductions from the affected sources" themselves, thus precluding EPA from relying on measures that address CO_2 pollution in some other way, like "the planting of forests to sequester CO_2" (J.A.803) or requiring sources to "invest[] in electric cars" (Westmoreland Br. 28; *see* J.A.806-807). Likewise, the measures must be of a type that regulated sources can implement (J.A.543, 804), thus precluding measures such as demand-side regulations that "target[] consumer-oriented behavior" (J.A.813-815) or prohibitions on the "import or export of carbon-intensive goods" (W.Va. Br. 19).[13]

Additional constraints come from Section 7411's direction that the best system of emission reduction be "adequately demonstrated." That requirement obligates EPA to examine "the history of the effectiveness of the controls or other measures, or other indications of their effectiveness." (J.A.804.) And proof of adequate demonstration must be tailored to "the nature of the regulated industry and the nature of the pollutant" at issue (J.A.804), thus precluding EPA from adopting a one-size-fits-all approach to all sectors under its juris-

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[13] West Virginia is wrong to claim that the decision below "instructs EPA to consider demand-side (that is, consumer-focused) measures as an option." (W.Va. Br. 19.) The footnote cited by West Virginia (J.A.143 n.9) says no such thing. And in the next footnote, the court of appeals correctly explained that *States* could rely on demand-side measures to comply with EPA's guidelines. (J.A.144 n.10.)

diction. In the Clean Power Plan, for example, EPA found that measures that reduced CO_2 emissions through the activities of multiple entities, rather than from the actions of individual sources acting alone, were effective at addressing the harms from CO_2 because a distinct feature of that pollutant was that it principally caused global harms not dependent on the origin of the pollution. (J.A.530-531, 565-566, 607-608.) Similarly, EPA found that the measures it considered were adequately demonstrated based on "characteristics [that] are unique to the utility power sector" (J.A.805-806), including the fungibility of electricity on the grid and the industry's extensive experience with (and indeed preference for) trading schemes over technologies like carbon capture that would be "substantially more expensive or substantially less effective at reducing emissions." (J.A.733.) Because these characteristics are not the same across pollutants and industries, there is no basis for petitioners' concern that the Clean Power Plan's approach would necessarily be "adequately demonstrated" for non-greenhouse-gas pollutants, or for non-utility sectors such as factories, homes, or hospitals (W.Va. Br. 19; Westmoreland Br. 28; NACCO Br. 25-26).[14]

Section 7411(a)(1) also identifies three specific factors that EPA must consider in determining the best

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[14] Confirming this point, two months ago EPA issued proposed rules under Section 7411 to limit emissions of methane—another greenhouse gas—from new and existing oil and gas facilities. *See* Oil and Natural Gas Sector Climate Review, 86 Fed. Reg. 63,110 (Nov. 15, 2021). Reflecting the differences between the electric grid and oil and gas production, EPA determined that the best system of emission reduction included technologies and measures that are implemented at the level of each individual source, without coordination with other sources. *See id.* at 63,121-22, tbl. 3.

system: the cost of achieving emission reductions, nonair quality health and environmental impacts, and energy requirements. EPA has interpreted these provisions to require consideration of cost and energy requirements both on an individual source level and on the sector level (J.A.808), and to preclude EPA from imposing "unreasonable technological or financial burdens on industry" (J.A.140). Petitioners suggest that these factors would not meaningfully limit EPA's discretion (*e.g.*, W.Va. Br. 19), but that argument is pure speculation: the court below said nothing that would diminish the importance of these factors, and this Court has previously recognized that cost considerations can constrain EPA's regulatory decision-making, *see Michigan v. EPA*, 576 U.S. 743, 753 (2015).

Finally, the Act authorizes courts to set aside any Section 7411 regulation that is arbitrary and capricious, or that is an abuse of EPA's discretion. *See* 42 U.S.C. § 7607(b)(1), (d)(9)(A). Arbitrary-and-capricious review following promulgation of a specific rule and based on a complete rulemaking record provides the appropriate mechanism for testing whether EPA has appropriately considered factors such as cost or energy needs, or impacts such as the impairment of the electric grid's reliability. *See In re Murray Energy Corp.*, 788 F.3d 330, 335 (D.C. Cir. 2015). Such review would also provide the appropriate forum for petitioners' concerns (W.Va. Br. 8; Westmoreland Br. 14) that EPA may regulate based on hidden, pretextual reasons outside of its statutory authority—e.g., to shut down an industry rather than to reduce emissions. *See Department of Commerce v. New York*, 139 S. Ct. 2551, 2575-76 (2019).

2. Petitioners also err in assuming that the decision below endorsed the Clean Power Plan in its entirety and the measures that it adopted to reduce power-plant

CO_2 emissions. The court of appeals did no such thing. It was reviewing not the Clean Power Plan itself, but the ACE Rule's repeal of that earlier regulation. And because judicial review of agency action is limited to "the grounds invoked by the agency," *SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947), the court considered only whether the Rule's particular interpretation of "best system of emission reduction"—the sole basis for the Rule's repeal of the Plan—was compelled by the statute (J.A.102).

The court did not consider (because the ACE Rule itself did not determine) whether any of the other statutory constraints identified above might provide a basis for repealing the Clean Power Plan. And the court did not pass on the validity of other features of the Clean Power Plan that made it unique compared to prior power-plant or Section 7411(d) regulations. For example, as some petitioners point out (NACCO Br. 8), the Clean Power Plan was distinct in basing its best system in part on increased generation from nonemitting facilities, like renewables, that are not regulated under Section 7411, rather than limiting its scope to sources within EPA's regulatory jurisdiction. (J.A.657, 666-671.) In accordance with that choice, the Plan set the stringency of its emission guidelines based in part on "modeling projections" about the construction of *new* renewable facilities—including "additional deployment that would be motivated" by the Plan's emission standards (J.A.953)—rather than basing stringency solely on the operations of existing sources. (J.A.946, 953-958.)

These features of the Plan are the appropriate targets of petitioners' repeated complaints that the Plan would have required sources to "subsidize competitors in the renewable-energy industry" (W.Va.

Br. 1) or compelled "States to shift from fossil fuel-fired plants to new renewable resources" (Nat'l Mining Ass'n Br. 43). But the court of appeals did not consider or endorse these features of the Plan. Instead, it simply rejected the ACE Rule's broad conclusion that EPA could not consider *any* measures that went beyond a single source standing alone—including measures that would have been limited to regulated industries, to existing sources, or even to each individual operator's own portfolio of power plants. Nothing in the court's rejection of the Rule's statutory interpretation would preclude a future court from considering in the first instance whether these other features are consistent with EPA's statutory authority, assuming that they are part of a future rule.

II. This Case Does Not Present Concerns About Major Questions or Non-Delegation.

A. EPA's Consideration of Measures Beyond Those That Can Be Implemented "To and At" a Particular Source Does Not Implicate Any Major Question.

1. Petitioners claim that EPA's selection of the best system of emission reduction in a future regulation would "sidestep[] Congress to decide major questions . . . that Congress ought to be the one to decide." (Westmoreland Br. 2.) But this argument ignores the fact that Congress has already expressed its position on "each critical element of the Agency's regulatory authority" relevant to this case. (J.A.136.) Congress defined "air pollutant" in the Act in a manner that encompassed CO_2 emissions. *Massachusetts*, 549 U.S. at 528-29. Congress empowered EPA to regulate "greenhouse gas emissions from fossil-fuel fired powerplants"

specifically. *AEP*, 564 U.S. at 425. And "Congress delegated to EPA the decision whether *and how* to regulate carbon-dioxide emissions from powerplants." *Id.* at 426 (emphasis added).

The Act also contains "clear Congressional authorization," *UARG*, 573 U.S. at 324, regarding who should make the specific regulatory determination at issue here: the selection of the best system of emission reduction. Congress provided that the best system is one that "*the Administrator* determines has been adequately demonstrated." § 7411(a)(1) (emphasis added). It chose to provide specific criteria for EPA to consider in deciding on the best system, including cost, effectiveness, and energy requirements. See *supra* at 35-36. And, for existing sources, Congress carved out an important role for the States to issue source-specific performance standards under EPA's guidelines. § 7411(d)(1). Through these provisions, Congress made clear that it was not reserving for itself the complex and technical question of how best to reduce emissions of a particular pollutant from a particular sector, but rather was "entrust[ing] such complex balancing to EPA in the first instance, in combination with state regulators," *AEP*, 564 U.S. at 427.

This case thus does not resemble those in which a federal agency has acted outside of its assigned lane to make decisions of "vast economic and political significance," *Alabama Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2485, 2489 (2021) (quotation marks omitted), without any statutory basis to believe that Congress intended to delegate such decision-making authority to it. In each of these cases, this Court found that the agency had committed a category error in deeming itself to have authority to regulate in a particular area at all—such as the FDA's assertion of

jurisdiction over tobacco, a substance that it had never sought to regulate before, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000); the Centers for Disease Control and Prevention's attempt to directly regulate "the landlord-tenant relationship," a domain outside its statutory authority to "prevent[] the interstate spread of disease by identifying, isolating, and destroying the disease itself," *Alabama Ass'n of Realtors*, 141 S. Ct. at 2488-89; or the Occupational Safety and Health Administration's recent attempt to issue "a general public health measure" rather than one tied more closely to the agency's express authority to regulate "'occupational' hazards and the safety and health of 'employees,'" *National Fed'n of Indep. Bus. v. Department of Labor, OSHA*, No. 21A244, 2022 WL 120952, at *3 (U.S. Jan. 13, 2022) (per curiam) (*NFIB*).

In these cases, the Court determined that the agencies had made an error of kind, not just degree, because they had strayed outside of the core regulatory functions that Congress had assigned to them. This Court thus did not rely solely on the impact of the rule in question, but rather identified specific statutory lines that Congress had drawn but the agencies had disregarded. *See, e.g.*, *id.* at *3-4 (describing "the text of the agency's Organic Act"); *UARG*, 573 U.S. at 325 (rejecting EPA's decision to "rewrit[e] unambiguous statutory terms"); *Brown & Williamson*, 529 U.S. at 141 (FDA's regulation of tobacco would be "incompatible with" other provisions). And this Court found that the agencies, by exceeding their regulatory roles, had removed an essential predicate for both congressional delegation and judicial deference to agency action: namely, the presumption that the agency is acting in a field where it has unique experience and expertise that

neither Congress nor the judiciary shares. *See NFIB*, 2022 WL 120952, *id.* at *3 (noting that OSHA had acted outside its "sphere of expertise"); *cf. Gonzales v. Oregon*, 546 U.S. 243, 269 (2006) (noting "Attorney General's lack of expertise in this area"). The agencies were thus not just acting outside of their statutory authority, but doing so in ways that this Court found undermined the premise for delegating authority to them in the first instance.

Here, by contrast, there is no dispute that Congress has made the choice of what EPA may regulate (CO_2 emissions), whom it may regulate (existing power plants), and how it should do so (partnering with the States to establish performance standards based on EPA's determination of the best system of emission reduction). There is also no dispute that EPA has experience and expertise in studying the harms of greenhouse-gas pollution and evaluating the best means of reducing that pollution from stationary sources. *See AEP*, 564 U.S. at 428-29. And far from being an "ancillary" or "marginal" provision (W.Va. Br. i; NACCO Br. 1), Section 7411(d) is the "most relevant" provision of a statute that "speaks directly" to regulating CO_2 emissions from existing power plants. *AEP*, 564 U.S. at 424. Congress, not EPA, has thus made the major policy choices here.

2. Petitioners thus cannot credibly argue that EPA decides a major question outside of its delegated authority whenever it regulates CO_2 emissions from existing power plants or determines the best system of emission reduction for such sources. And their concern that EPA might go too far in the future and resolve "major questions" by issuing a "transformative" rule (Westmoreland Br. 26; *see also* W.Va. Br. 19; NACCO Br. 25-26) improperly depends on speculation about

"contingent future events that may not occur as anticipated, or indeed may not occur at all." *Trump v. New York*, 141 S. Ct. 530, 535 (2020) (per curiam) (quotation marks omitted).

Petitioners' concerns are necessarily speculative because, as the United States and NGO Respondents point out (NGO Resp. Br. 23-32), no extant EPA rule concretely affects them: EPA has already announced that it will not implement the Clean Power Plan (see *supra* at 14-15), and it is in the process of promulgating a new rule in place of the vacated ACE Rule. There is thus no EPA rule on the books that this Court can consider to evaluate petitioners' claims about practical impacts on States and the power sector. But the details matter when it comes to assessing whether a rule exceeds an agency's authority. This Court recently confirmed as much when it stayed a broad COVID-19 rule issued by OSHA but acknowledged that narrower, "targeted regulations" would be "plainly permissible." *NFIB*, 2022 WL 120952, at *4. Thus, until EPA completes its current rulemaking, it is entirely speculative whether EPA will rely on "outside the fenceline" measures at all—let alone in the particular way that the Clean Power Plan did—or what the impact of its selected measures may be on States and sources. (W.Va. Br. 24-25.) It is also uncertain how EPA (or a reviewing court) will apply the statutory constraints discussed above (see Point I.C), including the requirement that the best system of emission reduction be "adequately demonstrated" and the mandate that EPA consider costs and "our Nation's energy needs," *AEP*, 564 U.S. at 427—constraints that would directly bear on the impact of any Section 7411 rule. Given these uncertainties, petitioners' demand that this Court prejudge hypothetical exercises of EPA's rulemaking

authority seeks an advisory ruling of the type that this Court has steadfastly refused to issue. *See Carney v. Adams*, 141 S. Ct. 493, 498 (2020).

Perhaps to avoid this problem, petitioners appear to assume that *any* power-plant regulation under Section 7411(d) that goes beyond measures that can be implemented "to and at" a single source will necessarily have "vast economic and political significance," *UARG*, 573 U.S. at 324 (quotation marks omitted). (*See, e.g.*, Westmoreland Br. 26.) This assumption is unfounded, as actual industry experience since the promulgation of the Clean Power Plan confirms. Petitioners predicted in 2016 filings to this Court that the Plan would inflict "massive" economic harm if allowed to go into effect. *See* Applicants' Reply in Support of Application for Immediate Stay at 28, *West Virginia v. EPA* (Feb. 9, 2016). But petitioners have been proven wrong. By 2019, industry-led trends toward low- and zero-emitting energy turned out to be so significant that, even without the Clean Power Plan ever having come into effect, the ACE Rule found that "there is likely to be no difference between a world where the Clean Power Plan is implemented and one where it is not." (J.A.1672-1673.)

In other words, the approach that the Clean Power Plan adopted—and that petitioners so heavily criticize here—would not have had the extreme effects on States and industry that petitioners predicted. This experience rebuts petitioners' assumption that dire impacts—or major questions—are necessarily implicated by EPA's consideration of emission-reduction measures that are not implemented "to and at" individual sources. Claims of impact should be based on an actual rule and a concrete record, rather than on speculative concerns about what EPA *might* do in a future rulemaking.

Cf. Department of Tax'n & Fin. of N.Y. v. Milhelm Attea & Bros., 512 U.S. 61, 69 (1994) (refusing to address argument premised "on consequences that, while possible, are by no means predictable").

Some petitioners also argue that the Clean Power Plan's approach to emission reduction was flawed not solely because of the sheer magnitude of its potential impact, but also because it amounted to a form of energy regulation that is automatically beyond EPA's purview. (Westmoreland Br. 5; W.Va. Br. 1.) Again, it is pure speculation to assume that EPA's forthcoming rulemaking will follow the Clean Power Plan or be subject to a similar characterization. But petitioners' arguments also wrongly assume that Congress intended to forbid EPA from controlling pollution in a manner that would have any significant impact on energy generation. To the contrary, because the power sector is well understood to play a significant role in creating pollution, Congress was fully aware that EPA would have to take energy into account in designing its emission regulations. For that reason, Section 7411(a)(1) expressly requires EPA to consider "energy requirements" in determining the best system of emission reduction, and this Court observed that Congress intended for the agency to consider "our Nation's energy needs" in issuing emission guidelines under Section 7411(d), *AEP*, 564 U.S. at 427. EPA does not impermissibly decide "a forbidden major question when [it] regulates as it was told to do." (J.A.153.) 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 the manner in which electricity is generated.

More broadly, petitioners' view that EPA presumptively exceeds its authority whenever it issues signifi-

cant rules under Section 7411 disregards express indications that Congress chose to have EPA consider the costs of its regulations in the first instance, based on "scientific, economic, and technological resources [that] an agency can utilize," but that neither Congress nor the courts can easily marshal. *AEP*, 564 U.S. at 428. In Section 7411(a)(1), Congress instructed EPA to determine the "best system of emission reduction" by, among other things, "taking into account the cost of achieving such reduction," including both environmental and nonenvironmental impacts. Moreover, as this Court has observed, Congress vested EPA with authority to regulate power-plant CO_2 emissions because the agency was best suited to evaluate what approaches to emission reduction would be "practical, feasible and economically viable." *AEP*, 564 U.S. at 428-29. The impact of a Section 7411 rule was thus a factor that Congress wanted EPA to consider in the exercise of its delegated expertise—not an independent, threshold barrier to rulemaking in the first instance.

3. State Petitioners' related argument that Congress has not provided a "clear statement" authorizing EPA to alter the traditional federal-state balance (W.Va. Br. 26-31) likewise provides no basis to reverse the court of appeals' decision. Again, that argument is not properly presented because it is premature and based on speculation about what EPA might do in a future rulemaking. Under the status quo, there is no EPA rule that has affected the federal-state balance at all, let alone in a way that would require a "clear statement" from Congress.

In any event, as discussed (see *supra* at 29-33), State Petitioners are wrong to characterize the decision below as disturbing Section 7411's cooperative-federalism scheme. The decision below faithfully

followed this Court's past descriptions of the multistep federal-state process in both *AEP* and its predecessors. And this Court's cases have recognized that Congress has spoken clearly—both in Section 7411 and in the analogous cooperative-federalism regime in Section 7410—by giving EPA the authority to determine "the appropriate amount" of CO_2 regulation and to decide "how" to limit CO_2 emissions to address climate change, while reserving for the States the authority to issue source-specific performance standards consistent with federal guidelines. *See AEP*, 564 U.S. at 426-27; *Train*, 421 U.S. at 79-80.

North Dakota is mistaken in arguing (N.D. Br. 40-47) that the court of appeals' decision is inconsistent with *Alaska*, 540 U.S. 461. The statutory provision at issue in *Alaska* explicitly provided that it was up to the state permitting authority to determine the best available control technology (BACT) that is "achievable" on "a case-by-case basis." 42 U.S.C. § 7479(3). Section 7411, by contrast, tasks EPA in the first instance with determining the best system of emission reduction that it determines has been adequately demonstrated for a source category. *Id.* § 7411(a)(1). Moreover, notwithstanding the clear primacy of States in determining BACT under Section 7479, this Court rejected the argument made by Alaska—and echoed by North Dakota here—that the State "alone" made the BACT determination. 540 U.S. at 488-89. To the contrary, Section 7479 preserved a "vital role" for EPA to provide "meaningful . . . oversight" regarding state determinations. *Id.* at 489, 491. This Court specifically recognized that "an EPA surveillance role" was essential to prevent both cross-border air pollution and "'economic-environmental blackmail'" in which regulated industries favor states with "more permissive" air-quality

regulation. *Id.* at 486 (quoting H.R. Rep. No. 95-294, at 134 (1977)). These concerns likewise apply to state efforts to control greenhouse gas emissions from power plants, including those that emanate from sources in other States. (J.A.568-569.)

Finally, petitioners are incorrect that EPA is barred from taking the nature of the power grid into account on the ground that regulating electrical generation is a traditional state role. (W.Va. Br. 27.) "[V]irtually any action" a federal agency takes with respect to the power sector may affect electricity generation, but "[t]hat is of no legal consequence" provided that the agency is regulating in its proper sphere. *FERC v. Electric Power Supply Ass'n*, 577 U.S. 260, 281 (2016). 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 traditional state control. *Id.* at 279-81. And this Court has made clear that Section 7411(d) delegates to EPA, in combination with the States, the authority to regulate CO_2 emissions from the power sector, despite the inevitable effects of such pollution regulation on electricity generation. *AEP*, 564 U.S. at 424. There is no indication that Congress intended to undercut its own objectives by allowing the inherent relationship between pollution and electricity generation to disable EPA's regulatory authority.

B. Section 7411 Does Not Raise Non-Delegation Concerns.

Finally, some petitioners suggest (W.Va. Br. 44-49; Westmoreland Br. 41-44) that the court of appeals' interpretation of Section 7411 would make that statute an impermissible delegation of legislative authority to

EPA. This non-delegation argument rests on the illogical claim that the court of appeals' rejection of one atextual limitation on EPA somehow freed the agency from all textual constraints on its determination of the best system of emission reduction. The decision below threatens no such slippery slope. Instead, as discussed (see *supra* at 33-38), the court of appeals expressly recognized the multiple other statutory criteria in Section 7411(a)(1) that guide EPA's determination. (J.A.145.) These criteria "meaningfully constrain[]" the [EPA's] discretion and thus remove any non-delegation concerns. *See Touby v. United States*, 500 U.S. 160, 166 (1991).

Petitioners dismiss the limitations in Section 7411(a)(1) as ineffectual (Westmoreland Br. 42-43), but they ignore the fact that EPA has in fact relied on those limitations to reject certain emission-reduction strategies, including in the Clean Power Plan itself (e.*g.*, J.A.733-735). And the constraints in Section 7411(a)(1) (including the "adequately demonstrated" requirement and the need to consider costs, health and environmental impact, and energy requirements) are no less directive than the language in Section 7409(b)(1) ("requisite to protect the public health") that this Court upheld against a non-delegation challenge in *Whitman v. American Trucking Associations*, 531 U.S. 457, 473, 475-76 (2001). In Section 7411, as in Section 7409, "Congress has supplied an intelligible principle to guide [EPA's] use of discretion," *Gundy v. United States,* 139 S. Ct. 2116, 2123 (2019) (plurality op.).

CONCLUSION

The judgment of the court of appeals should be affirmed.

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