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

IN THE

Supreme Court of the United States

WEST VIRGINIA, ET AL.

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

THE NORTH AMERICAN COAL CORPORATION

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

WESTMORELAND MINING HOLDINGS LLC

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

NORTH DAKOTA

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF FOR PETITIONER THE NORTH AMERICAN COAL CORPORATION

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INTRODUCTION

The State, NGO, and Power Company Respondents all seem to have forgotten how we got here. The D.C. Circuit granted *their* petitions to vacate the ACE Rule. Respondents filed those petitions because they stood to benefit from the reinstatement of the CPP or a new rulemaking under a more robust vision of the EPA's authority. To justify that relief, these Respondents charged that the EPA fundamentally misunderstood the scope of its power and, as a result, had not considered sweeping supra-source measures to reduce emissions on an industry-wide basis. The D.C. Circuit adopted that reading of the statute and thus set aside the ACE Rule, including its repeal of the CPP. And that paved the way for the EPA, now back in these Respondents' corner, to declare its intent to write new rules, on a clean slate, free of the source-specific constraint it had previously identified in the Act and embedded in its regulations.

Having prevailed, Respondents now downplay the judgment below, denying the injuries that it inflicts on Petitioners. To avoid the merits, they complain that the scope of the EPA's authority is too "hypothetical" or "abstract" to resolve. And Senator Whitehouse goes so far as to accuse Petitioners of ginning up litigation to circumvent democracy. But it was *Respondents* who sought vacatur of the ACE Rule. That relief harms Petitioners (who may thus appeal it) for the very same reasons as it benefits Respondents (who had standing to seek it). And the "abstract" question presented is the one *Respondents* put to the court below. Judicial review is not a one-way ratchet for the administrative state. Whether the D.C. Circuit correctly construed the Act is now for this Court to decide.

And that is not a particularly difficult question. All agree that § 7411 directs the EPA to identify the "best system of emission reduction." The dispute is over the *frame* for that analysis. As Petitioners see it, the statutory frame is the "existing source"—the facility that emits the pollutant and to which the standards of performance apply. As a matter of text and structure, it follows that the EPA must find the "best system of emission reduction" *for that source*: measures that an individual facility can take to reduce emissions from its operations. But the D.C. Circuit reasoned that the EPA can zoom out from the source and adopt a "best system" to reduce greenhouse gases for the industry. That would empower the EPA to impose limits that could *only* be met through systemic changes in power generation, forced subsidization of renewable energy, and assorted other climate-change measures that have no real nexus to the plant supposedly being regulated.

Even Respondents do not claim the Clean Air Act *unambiguously* supports this broader frame. That is dispositive, because the EPA's transformational role under the panel's reading cannot be inferred from ambiguity. The court's elevation of the EPA—from making technical findings about which methods best limit emissions from a plant, to large-scale policy judgments balancing the economy against climate change—runs head-long into the major-questions doctrine. And even on its own terms, the Act's text and structure foreclose Respondents' construction. Telling a coal plant to shut down in favor of a wind farm is not a "performance" standard reflecting "achievable" limits "for" the plant any more than terminating a worker's employment is a "performance" plan based on "achievable" expectations "for" the employee.

ARGUMENT

I. THE CLEAN AIR ACT CANNOT BEAR THE PANEL'S OVERREACHING INTERPRETATION.

The D.C. Circuit transformed the EPA's cabined power to ensure that each existing source operates as cleanly as practicable into a sweeping authority to reduce overall emissions by shifting power generation, shutting down plants, compelling subsidization of competitors, and imposing measures that operate well beyond the level of any single source. That is a fundamentally different *type* of authority, too broad to be inferred from mere ambiguity. Yet not even Respondents claim that the Act unambiguously vested the EPA with that authority. In fact, its text and structure point unambiguously the other way.

A. This Case Concerns the Proper Frame for the EPA's Derivation of Emission Limits.

1. Throughout their briefing, Respondents pretend that the issue before the Court is whether a *state* may authorize sources to *satisfy* a standard of performance through "outside-the-fenceline" measures (like trading emission credits, planting trees, or investing in solar farms). SG.Br.26-30; NY.Br.28-31; Power.Br.25. But the question presented is distinct and antecedent: whether the *EPA* may rely on those measures to *derive* emission limits that the standards then reflect. That threshold question (how the limits may be set) does not control the subsequent one (how states may comply). *Cf. Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 469-71 (2001) (while the EPA may not consider costs "in formulating the standards," states may do so "in choosing the means" to "implement the standards"). And only the EPA's authority is at issue here.

Section 7411 contemplates two regulatory steps. *First*, the EPA identifies the "best system of emission reduction" and calculates the "degree of emission limitation achievable" through its "application." 42 U.S.C. § 7411(a)(1). *Second*, the states must establish "standards of performance" that "reflect[]" that degree of limitation, and provide for "implementation and enforcement" of those standards. *Id.* § 7411(a)(1), (d). This case concerns the first step: In identifying a best system, is the EPA limited to reductions "achievable" *by the source*, through "application" *to the source*? The D.C. Circuit said no; it ruled that the EPA's system can include a broader set of higher-level measures.

Reversing that decision would not, however, resolve whether the states' "implementation" plans for those source-level standards may authorize industry-level measures to show *compliance*. Respondents' contrary argument, in the words of their *amici*, "confuses the standard with the means of compliance." Fmr.Power. Execs.Br.17. Just because the standards must be *achievable* using source-level measures does not mean they must be *achieved* using source-level measures. "The statute says nothing about the measures that sources may use to comply with the standards." JA.133. Nor does that issue trigger federalism and major-questions canons. And, historically, the Clean Air Mercury Rule based its limits on available technology while allowing states to satisfy those limits using trading. SG.Br.38; NACCO.Br.47-48.

In all events, the question of compliance measures is not before this Court. While the D.C. Circuit did vacate a *different* part of the ACE Rule that limited state discretion over compliance measures (JA.131-35), no Petitioner sought review of that ruling.

2. Respondents also attempt to sow confusion about Petitioners' position by taking too literally the "fence-line" shorthand and by treating generation-shifting as a distinct issue. *E.g.*, SG.Br.27, 38. They are over-complicating things. Petitioners' point is that the EPA must identify a "best system" at the source level, meaning measures that can be taken *by that source* to reduce emissions *from that source's normal operations*.

That means generation-shifting is beyond the EPA's scope, since those measures expand the frame beyond the source and challenge the premise that the source will continue to operate. It also means the EPA cannot just latch onto sources as an excuse to regulate their owners—*e.g.*, by requiring them to grow trees or invest in wind energy. None of that reduces emissions *from the source*. That missing nexus shows these are not genuine attempts to regulate a source's performance. *Cf. Ala. Ass'n of Realtors v. HHS*, 141 S. Ct. 2485, 2488-89 (2021) (CDC cannot regulate evictions based on "downstream connection" to disease). The CPP was full of such artifices, built on the faulty premise that the analytical frame exceeds any given source.

In describing this dichotomy, "inside-the-fence" is useful but inexact shorthand. Emission reductions from using pre-cleaned fuel are achievable by the source and thus fair game even if the cleaning occurs elsewhere. SG.Br.38. And greenhouse gas reductions from demolishing a plant and growing a forest instead are beyond the EPA's power, even if it happens on-site. What matters is whether the limits are achievable by reducing emissions from the source during normal operations. If so, the EPA can demand standards that reflect those best practices. If not, it is up to Congress to authorize more aggressive regulatory action.

B. Expanding the EPA's Frame to the Entire Economy Requires Unambiguous Text.

Like the D.C. Circuit, Respondents do not claim the Act *unambiguously* authorizes the EPA to set targets based on a "system" of industry-wide transformations rather than source-level modifications. But Congress must "speak clearly when authorizing an agency to exercise powers of 'vast economic and political significance.'" *Ala. Ass'n*, 141 S. Ct. at 2489. Just as OSHA needed a clear statement to leave the "everyday exercise" of workplace-safety regulation to "regulate the hazards of daily life," *NFIB v. DOL*, 142 S. Ct. 661, 665 (2022), the EPA needs one to convert technical review of particular emission-control measures into reconfiguration of the entire power supply.

1. Respondents try to avoid the major-questions doctrine by protesting that it is too soon to evaluate the consequences of the D.C. Circuit's interpretation. The Court cannot use the CPP to assess its impact, because "market-based forces" supposedly effectuated the same reductions anyway. SG.Br.2, 47. Nor can the Court "speculat[e]" about whether the EPA might go "too far" in a future rulemaking (NY.Br.41), without risking an "advisory opinion[]" (Power.Br.20).

These objections all ignore that the D.C. Circuit set aside the repeal of the CPP on the ground that the Act "does not unambiguously bar a system of emission reduction that includes generation shifting." JA.118. This case thus hinges on the scope of the power Congress conferred on the EPA, not the validity of any particular exercise of that power. Resolving the former issue directly implicates the major-questions doctrine, which demands clear statutory support when

agencies make "unprecedented" claims to "expansive" authority. *Ala. Ass'n*, 141 S. Ct. at 2489. Indeed, Respondents' litigation strategy has teed up the major-questions doctrine more directly than usual, precisely because their theory (and thus the decision below) turns on the scope of the EPA's authority in general, not the validity of any regulatory measure in particular.

2. Respondents next argue that the major-questions doctrine is not implicated by the parties' dispute here, because even inside-the-fenceline measures may have major consequences, while some outside-the-fenceline measures could prove trivial. SG.Br.46.

This too misses the point. To repeat, the doctrine targets claims of expansive authority generally, not just specific ways it has been deployed. *See Ala. Ass'n*, 141 S. Ct. at 2489 (asking "what measures" would be "outside the CDC's reach" under its "claim of expansive authority"); *NFIB*, 142 S. Ct. at 665 (asking whether OSHA's position would "significantly expand [its] regulatory authority"). It is always true that an agency might exercise its conceded power aggressively or its claimed power modestly. But the question is whether the broader interpretation would expand the agency's sphere of delegated authority in a politically or economically significant way. Here, what matters is that the EPA's attempt to stray beyond individual smokestacks toward regulation of the power grid (and beyond) is a step carrying great political and economic import, even if the agency might not press the limits of that power in each case, and even if exercise of its legitimate authority has real-world impact as well.

Critically, Respondents are wrong to suggest there is no material difference between an agency limited to source-specific solutions and one empowered to halt global warming by any means necessary. By zooming out, the D.C. Circuit fundamentally transformed the EPA's role. Instead of making technical judgments about the costs and benefits of installing a particular kind of scrubber in a particular plant, the agency must decide whether, from the viewpoint of the Nation as a whole, certain kinds of power generation should be curtailed or eliminated due to the risks of climate change—not to mention the regulatory options to limit the *demand* for electricity. These are tremendously important, politically freighted questions—like the propriety of a nationwide vaccine mandate—that fall well outside the agency's "sphere of expertise." *NFIB*, 142 S. Ct. at 665. If Congress wants to hand them off to the agency, it must (at minimum) do so clearly.

Relatedly, the EPA plays games by downplaying its role as "intermediate" or "interstitial." SG.Br.36, 45. True, the agency does not *directly* order adoption of its best system—unless states fail to get with the program, 42 U.S.C. § 7411(d)(2). But while states otherwise retain discretion over compliance measures, *see supra* at 3-4, the EPA's "system" *sets the floor* by defining the required reductions that states and their sources must meet. Unless the system is premised on source-level measures and the reductions "achievable" by their application to a source, some sources will have to scale back or close. As the CPP thus admitted, its limits could be achieved only through generation-shifting among owners of multiple sources. JA.579-80. In practical effect, then, a supra-source system *does* mandate supra-source compliance measures.

3. Respondents also insist the Act already "guard[s] against … transformative consequences." SG.Br.49. The EPA must "account" for "cost[s]," "nonair quality health," "energy requirements," and "environmental impact" in determining whether its best system "has been adequately demonstrated." 42 U.S.C. § 7411(a). But those considerations do not in any way close the new regulatory horizons opened by the decision below.

Nor do they meaningfully limit the EPA's exercise of power more generally. "[B]est" is in the eye of the beholder; it is hard to see how a minimally competent EPA could be overturned for failing to "account" for these factors. If doing so led administrators to forego certain measures in the past (SG.Br.49), that was agency discretion, not statutory compulsion. Indeed, Respondents' reassurances are belied by their silence about most of the hypotheticals—like carbon taxes, electric-car subsidies, and demand-side regulation of electricity use. Respondents and their *amici* believe that, without drastic emission cuts, climate change will cause "catastrophic" harm and fatal "'disasters,'" "flooding" cities, causing "tens of thousands of deaths per year," subjecting "millions" to "health" problems, and perhaps triggering "political crises" or "state failure." NGO.Br.11; Scientists.Br.5, 27-30, 33; Nat'l. Park.Br.8; Medical.Br.5. Against all this calamity, "cost" and "energy requirements" would lose every day of the week. And while the EPA denies that it could regulate "homes" under § 7411, the D.C. Circuit upheld such a standard last year, observing that while "wood stoves" keep many "American homes" warm, their emissions threaten "grave health consequences" to "major portions of the population." *Hearth, Patio & Barbecue Ass'n v. EPA*, 11 F.4th 791, 795-96 (2021).

4. Finally, Respondents claim that, unlike the novel assertions of agency power that have triggered the major-questions doctrine elsewhere, the D.C. Circuit's interpretation is "supported by historical precedent." SG.Br.49. Their examples prove otherwise.

The Regional Greenhouse Gas Initiative is a "cooperative effort" among *states* to reduce emissions; it says nothing about the *EPA*'s power. The Acid Rain Program at least involves federal legislation, but it proves Congress speaks specifically when it envisions drastic industry-wide measures such as capping sulfur dioxide emissions and creating a system of tradeable credits. NACCO.Br.42-43. The contrast between that solid statutory foundation and the EPA's present attempt to discover world-altering power in dictionary definitions of the word "system" is striking.

That leaves the Clean Air Mercury Rule. That rule merely illustrates, however, that even though *the EPA* must stay "inside the fence" when setting achievable emission limits, *states* may venture beyond it when authorizing compliance measures in "implementation" plans. *See supra* at 3-4. In any event, this single (and vacated) agency action from nearly twenty years ago hardly establishes that the CPP and its ilk fall within the EPA's wheelhouse. If OSHA's long history of "fire [and] sanitation regulation[s]" could not ward off the doctrine when it tried to pass a vaccine mandate targeting "the hazards of daily life," *NFIB*, 142 S. Ct. at 665, then the Clean Air Mercury Rule's source-achievable metrics surely cannot support the EPA's desire to refashion the Nation's daily supply (and use) of electricity without clear congressional support.

C. The Act's Text and Structure Limit the EPA's Frame to the Individual Source.

Canons aside, the statute itself compels the same conclusion. With the statutory definitions inserted, § 7411(d) requires performance standards "which reflec[t] the degree of emission limitation achievable through the application of the best system of emission reduction for any building, structure, facility, or installation." By any fair reading, that contemplates a technical EPA determination about the measures a particular facility could take to reduce emissions from its own operations—*i.e.*, filters on smokestacks, not fundamental transformation of how Americans power their lives. Respondents offer only a grab-bag of debater's points in response.

1. Respondents begin with a divide-and-conquer approach, urging this Court to treat (a)(1)'s definition of "standard of performance" and (d)(1)'s use of that term as entirely independent. They place great weight on the word "system" in (a)(1), while dismissing the operative text in (d)(1) as bearing only on the "*States*, not EPA." SG.Br.31-33; *see also* Power.Br.27-29, 45. This is the statutory-interpretation equivalent of missing the forest for its trees—and then, ironically, using the trees as license to regulate the forest.

It makes no sense to read the word "system"—or the rest of the (a)(1) definition—in isolation. Rather, "as EPA acknowledged when it issued the [CPP], 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'" in the agency's chosen "system." NY.Br.34 (quoting JA.733-

34). The EPA also recognized that "read in context," (a)(1)'s use of "*achievable*" and *"application*" limited the agency's range to tools "implementable by the sources themselves." JA.737. While the CPP sought to evade these strictures by collapsing the distinction between "source[s]" and their "owner[s]," even it rejected the notion that a best system "includes anything whatsoever that reduces emissions." JA.737 & n.472. Respondents, like the D.C. Circuit, now appear to have bulldozed even these guardrails.

2. Respondents ultimately contend the EPA may zoom out and adopt any measure that operates "across the board" and "in the aggregate." SG.Br.35-36; *see also* Power.Br.43 (arguing that "application" of best system is "to the source category"). Again, not even the CPP went that far, because this approach is so out-of-step with the statutory structure and focus.

The CPP reasoned that because its "standards must apply to the affected sources" under § 7411(d), it could not require "actions taken by affected sources that do not result in emission reductions from the affected sources" themselves. JA.803. Telling source owners to engage in "the planting of forests to sequester CO_2," for instance, was out of bounds. *Id.* But the EPA and most of its allies have evidently abandoned that limit today. Rather, the agency's current view is "[i]f one source achieves compliance by reducing its emissions and another by purchasing allowances, the 'system' is still being applied to both" and hence permissible. SG.Br.35. Replace "purchasing allowances" with "planting trees," "erecting solar panels," or "donating to the Sierra Club" and the point is the same.

This theory is at war with the statutory text and structure. Respondents never explain how a standard premised on a plant's closure could be a "performance" standard "for" that source—any more than a plan directing a disabled student to drop out could be an "educational" plan "for" (or "achievable" by) him. Nor do they grapple with the fact that the EPA's authority over *sources* does not extend to commandeering their *owners* to engage in unrelated climate mitigation. Nor do they supply a reason why Congress would have bothered to distinguish new from existing sources if the EPA had unfettered power to regulate plants from either category into oblivion. NACCO.Br.34, 40-42.

Respondents instead observe that the EPA looks at factors like "'cost'" and "'energy requirements'" on a broader scale. SG.Br.36; NY.Br.26. But even if that were so, it does not suggest that the EPA can *also* set the "'degree of emission limitation achievable'" at the highest level of generality, and thereby decree which industries live or die. SG.Br.36. These factors come into play in deciding whether a particular "system" has been "adequately demonstrated," which is distinct from whether an emission "standard" is "achievable." *Essex Chem. Corp. v. Ruckelshaus*, 486 F.2d 427, 433 (D.C. Cir. 1973). Only "[a]fter" the EPA has identified "emission levels that are 'achievable'" by the source can it then consider, "on the grand scale," whether a given system "represents the best balance of economic, environmental, and energy considerations." *Sierra Club v. Costle*, 657 F.2d 298, 330 (D.C. Cir. 1981). For example, the ACE Rule accepted natural-gas co-firing as "feasible," yet declined to incorporate that measure due to doubts that it could be "implemented on a nationwide scale at [a] reasonable cost." JA.1839-40.

In a similar vein, Respondents contend that since any standard will have "some generation-shifting effect," there is no basis for distinguishing measures that "will predictably cause some generation shifting" from ones adopted "because of" such effects. SG.Br.39-40; *see also* Power.Br.41. But that "mistakes what" a standard "*regulates* for its incidental *effects*." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 412 n.10 (2010) (plurality). Virtually any emission standard will also have some effect on the economy, but no one thinks that means the EPA can use § 7411 to set monetary policy. Here as elsewhere, it matters whether the government takes "a particular course of action … 'because of,' not merely 'in spite of,' its adverse effects." *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979).

And "statutory language" (SG.Br.40) does back up this commonsense distinction. Only the most Machiavellian of bureaucrats would describe an emission limit *aimed* at shutting down a disfavored plant as a "performance" standard "for" the source—just as only the most conniving of bosses would say a project *designed* to get rid of an unwanted subordinate was a "performance" plan "for" that employee.

3. With § 7411 against them, Respondents quickly move on, scouring other provisions for "limiting language" to contrast with the operative text here—or, contradictorily, for "more specific" language showing that Congress was comfortable with industry-wide schemes elsewhere. SG.Br.33, 36; *see also, e.g.*, Power.Br.30-35. While this grand tour through the Clean Air Act may be of interest to environmental-law aficionados, it offers no support for Respondents' interpretation.

As for "limiting language," the bulk of examples involve specific technological solutions, such as "the retrofit application of the best system of continuous emission reduction." SG.Br.32-33. But nobody says § 7411 confines the EPA to *technological* measures; it can also consider methods, materials, and more. NACCO.Br.43. The flaw in the D.C. Circuit's reading is that it would permit standards that a source cannot itself achieve in any of those ways. *Id.*

Respondents also contend that § 7412(d) lists hazardous-pollutant measures that are "restricted … to source-specific controls." Power.Br.35. That is not accurate, though, as § 7412(d) authorizes measures "including, but not limited to" these source-specific tools. This provision therefore cuts the other way, as Congress in § 7411 "declined to use an expansive or illustrative term such as 'including.'" *Bloate v. United States*, 559 U.S. 196, 207 (2010).

Doing a complete reversal in the inference they seek to draw, Respondents next point out that the National Ambient Air Quality Standards Program *allows* states to include "marketable permits" or "auctions" in their compliance plans. 42 U.S.C. § 7410(a)(2)(A); SG.Br. 31; NY.Br.26-27. All that shows is that Congress knows how to provide that *states* may use such tools. It does not suggest Congress empowered *the EPA* to dragoon states into adopting these measures under § 7411—which contains no analogous language and is focused on the *source* rather than the *pollutant*.

So too for Congress's creation of a cap-and-trade program to eliminate acid rain. Respondents' only explanation for the absence of similar language in § 7411 is that Congress "directly instituted a federal

trading system" to combat acid rain, whereas the EPA's selection of a "best system" here is just "an intermediate step." SG.Br.36-37. But there is no meaningful difference between directly mandating a cap-and-trade program and setting limits that states can meet only by doing so. *See supra* at 8.

To the extent Respondents' discussion of § 7411's neighbors is relevant at all, it is in failing to identify a single example of the EPA using its authority under § 7410 or § 7412 to set a standard that a source could not achieve by itself. That is telling, because § 7411(d) serves as a regulatory backstop for the rare pollutant not already covered by these programs. The idea that Congress gave the EPA *more* power in this gap-filling provision is something that could survive only in a bureaucrat's imagination.

II. THIS CASE REMAINS JUSTICIABLE.

Given their weakness on the merits, Respondents opposed certiorari by contending that a partial stay of the mandate meant there was no longer a live controversy. The Court granted review, implicitly rejecting those arguments. Respondents nonetheless return with the same muddle of standing, mootness, and ripeness objections.

None of those doctrines obstructs merits review. Petitioners have standing to *challenge* the judgment for the same reasons Respondents had standing to *seek* it: Revival of the CPP would have winners and losers. A temporary stay of that relief does not moot the case. And at minimum, the orders below impose harm by inviting the EPA to issue more burdensome rules on a blank slate. Having secured that relief, Respondents cannot now deny its significance.

A. Reinstating the CPP Harms Petitioners.

When states and industry first challenged the CPP (resulting in this Court's stay), nobody doubted their standing. After all, the CPP imposed legal duties on states, and its strict emission targets threatened the existence of the already-struggling coal industry. The judgment below vacates repeal of the CPP, imbuing it anew with the force of law. Petitioners therefore are again threatened with straightforward, tangible harm from the judgment below.

Respondents argue that things have changed. *First*, the NGO Respondents claim that the CPP is null as a practical matter because its targets have already been satisfied. *Second*, the EPA suggests it has shielded the judgment from review by obtaining an order partially staying the mandate pending a new rulemaking in the future. The first theory is factually mistaken, while the second is legally misguided.

1. The NGOs are simply wrong that the CPP's goals have been fully satisfied. The *aggregate* decline in power-sector emissions projected under the CPP may have already occurred, but many *states*—including West Virginia and North Dakota—remain above their CPP targets and are not projected to meet them by 2030. JA.1696 (map); JA.1662-63 (CPP targets); U.S. Energy Info. Admin., *Electricity: State Electricity Profiles*, https://www.eia.gov/electricity/state/ (2020 emission data). Overturning the CPP repeal thus imposes concrete burdens on these states, and in turn on the coal industry from reductions in demand. And the fact that the CPP deadlines to submit state plans have passed (NGO.Br.28) only exacerbates the harm by making state compliance impossible.

Had the CPP truly become obsolete, Respondents could not and would not have sued to revive it. Rather, per the Power Company Respondents, replacing CPP with the ACE Rule "increas[ed] the competitiveness of coal-fired units," thereby putting "additional pressure on" coal's "competi[tors]." C.A.Power.Br.6. That is still true, and it is why Petitioners may seek to renew that state of affairs through reversal.

2. The EPA does not dispute that overturning the CPP's repeal would harm Petitioners, but claims that its motion to stay the mandate precludes them from challenging that relief. Such "maneuvers designed to insulate a decision from review by this Court," however, "must be viewed with a critical eye." *Knox v. SEIU*, 567 U.S. 298, 305 (2012). The EPA cites nothing suggesting that a *stay* can defeat jurisdiction. Both the law and common sense dictate otherwise.

As the EPA notes (SG.Br.15), appellate jurisdiction turns on whether the lower court's "judgment" harms the party seeking review. *ASARCO Inc. v. Kadish*, 490 U.S. 605, 612, 618 (1989); *see also Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 333 (1980) (framing inquiry as whether party seeking review is "aggrieved by the judgment"). Here, the D.C. Circuit's *judgment* vacated the ACE Rule, including its "embedded repeal of the [CPP]." JA.215. Petitioners are therefore "asking for typical appellate relief"—that this Court "reverse" the decision below and "undo what it has done." *Chafin v. Chafin*, 568 U.S. 165, 173 (2013); *see also Nw. Fuel Co. v. Brock*, 139 U.S. 216, 219 (1891) (courts always retain "[j]urisdiction to correct what ha[s] been done").

The panel's later order that partially suspended its mandate as to CPP repeal pending a new rulemaking (JA.270) does not alter the adverse "judgment" under review. If a panel's issuance of the mandate, which changes the facts on the ground, could not defeat jurisdiction, *United States v. Villamonte-Marquez*, 462 U.S. 579, 581 n.2 (1983), then surely a temporary preservation of the status quo cannot either.

While the EPA suggest that the stay "mooted" this matter (SG.Br.17), a "case becomes moot only when it is impossible for a court to grant 'any effectual relief whatever' to the prevailing party." *Knox*, 567 U.S. at 307. Here, reversal would prevent resuscitation of the CPP. The EPA's intent to promulgate a new rule may make that resuscitation "uncertain" to occur, but "uncertainty does not typically render cases moot." *Chafin*, 568 U.S. at 175. That must be the law, since if the Court were to dismiss and the EPA chose to stick with the CPP after all, the stay would expire, the CPP would return, and Petitioners would lack recourse.

Moreover, now that the EPA supports the judgment below, its stay motion amounts to "voluntary cessation of a challenged practice," which "does not deprive a federal court of its power to determine the legality of the practice." *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982). Nor does the EPA's *intent* to replace the CPP with some cousin, likely on the same statutory understanding, moot Petitioners' challenge to the judgment reviving it. Even a proposed rule that "would rescind" the one under review cannot moot a case, since the challenged rule, even if stayed, "remains on the books." *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 627 n.5 (2018). The EPA's mere *promise* to issue a new rule surely cannot suffice.

Perhaps recognizing that the stay does not truly eliminate the harms to Petitioners from the judgment, the EPA proposes in the alternative to partially vacate the panel's holding. But this offer only exposes the flaws in the EPA's theory. On its view, a stay defeats standing, which in turn compels vacatur. So *staying* a judgment ends up *wiping it out*. That bootstrapping cannot be right.

B. Invalidation of the ACE Rule Also Harms Petitioners.

Even if there were no chance of the CPP returning to law, Petitioners would still have standing to challenge the D.C. Circuit's vacatur of the ACE Rule. That vacatur imposes independent harm by giving the EPA a blank slate to write a new rule consonant with the broader power conferred by the court below.

Respondents argue that the vacatur of ACE does not support standing, because *no rule* is even better for Petitioners. True, but *no rule* is not on the table. The EPA is obligated to promulgate new rules for existing plants, and it has affirmed its intent to do so. JA.264.

The question is whether Petitioners are harmed by vacatur of the ACE Rule in favor of a rule to be named later. And the answer is yes, despite any uncertainty over exactly what the EPA will do, since no future rule here could be *better* for Petitioners. The panel set aside the ACE Rule because the EPA failed to consider more aggressive limits based on "systems" above the source level. The matter was thus remanded not to backtrack from a rule Respondents already decry as toothless, but to let the EPA consider *going further*. The judgment below is thus akin to elimination of a regulatory safe harbor, which causes cognizable injury

even if the agency's future enforcement plans remain unknown. *See U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599-600 (2016).

And for what it is worth, the EPA has not hidden its agenda. The President has announced a new target—more aggressive than the CPP's—to create "a carbon pollution-free power sector by 2035." Westmoreland. Cert.Reply.3 n.4. Of course, the EPA is "at the center of delivering on this agenda." Press Release, EPA, *EPA Administrator Regan Announces New Initiatives to Support Environmental Justice and Climate Action* (Apr. 23, 2021). With new climate legislation stalled, a CPP on steroids is the only way to reach that goal.

But even if there were legitimate doubt over the EPA's plans, it is disingenuous for Respondents to claim that vacating the ACE Rule for consideration of a more aggressive approach leaves Petitioners unharmed. Respondents premised their own standing to challenge the ACE Rule on the parallel potential for a more robust replacement: "A ruling that the Act does not require repeal of the [CPP] would compel EPA … to consider measures it has found meaningfully limit CO_2." C.A.NY.Br.29. If that prospect sufficed to give New York standing to set aside ACE in the first place, it equally suffices to give Petitioners standing to set aside the decision below.

To be sure, the EPA could initiate a new rulemaking to repeal and replace the ACE Rule even absent the decision below. But the decision below makes doing so far easier. "An agency may not … disregard rules that are still on the books," and must justify a change in policy if a "prior policy has engendered serious reliance interests." *FCC v. Fox Television Stations, Inc.*, 556

U.S. 502, 515 (2009). Respondents want the decision below to stay *on the books* in order to keep ACE *off the books*, as that clears the field for a new EPA to begin its new regulatory onslaught. Once again, Petitioners suffer harm from that course for the same reason: Reversing the decision below and reviving ACE would make it harder for the EPA to flip positions and impose more burdensome regulations on the coal industry.

Tellingly, even the EPA's alternative suggestion that the Court vacate part of the holding below comes with the caveat that it "should not cause the ACE Rule to become operative," even though the panel's only basis for setting aside the ACE Rule was the legal holding that would supposedly be wiped out. SG.Br.23 n.2. This pretzel of a proposal confirms the EPA's true goal: to secure a blank slate for a new rule. And meanwhile, partial vacatur would not remedy either of Petitioners' harms from the judgment. It would not prevent the CPP from springing back into law or the EPA from bypassing the need to explain its flip-flop. In any event, because the judgment inflicts cognizable injuries on Petitioners, the Court should proceed to decide the question it granted certiorari to resolve.

Finally, none of this amounts to an unripe challenge to a future rule. This case is about the ACE Rule. The panel vacated it at Respondents' urging; Petitioners ask the Court to reverse. None of the arguments hinges on what a future rule may say. If that means the case turns on an "abstract" question about the scope of the EPA's authority, that is only because Respondents prevailed on their claim that the EPA misunderstood that statutory power. If that was not too "speculative" for the D.C. Circuit to decide, it is not too "speculative" for this Court to reverse.

And that is exactly what this Court should do. The EPA's gestures toward a potential future rule really amount to a prudential argument for delay. But delay has its own costs—for the industry, the regulator, and Congress alike. As this Court recognized by granting review, now is the time for definitive resolution.

CONCLUSION

This Court should reverse the judgment below.

FEBRUARY 2022

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