No. 20-1780

In the Supreme Court of the United States

NORTH DAKOTA,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* LIGNITE ENERGY COUNCIL IN SUPPORT OF PETITIONER

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Lignite Energy Council ("LEC") moves the Court for leave to file an amicus brief in support of petitioner the State of North Dakota. Pursuant to Supreme Court Rule 37.2, counsel for LEC notified all 82 parties in this docket and requested their consent to file. Of those, 64 consented; 18 have not responded. None have withheld consent. Despite diligent efforts, counsel for LEC has been unable to contact the nonresponsive parties.

As noted on the Court's docket, North Dakota has granted blanket consent for all amicus filings. Counsel for LEC additionally notes that the EPA has consented to the filing of another amicus brief submitted in this case by the South Texas Electric Cooperative, *et al.*

LEC's amicus brief will be helpful to the Court in its resolution of the petition. LEC provides a perspective not presented by North Dakota's petition or other amici. In particular, LEC will explain that the D.C. Circuit's decision threatens North Dakota state policies specifically designed to encourage the efficient and affordable generation of power from lignite. LEC explains that the D.C. Circuit's decision impermissibly grants the EPA authority to interfere with those policy decisions in a manner that is directly inconstant with the Clean Air Act.

LEC respectfully requests that the Court grant its motion for leave to file the attached amicus brief in support of petitioner.

Respectfully submitted,

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STATEMENT OF INTEREST[1]

The Lignite Energy Council (LEC) is a regional, non-profit organization whose primary mission is to promote the continued development and use of lignite coal as an energy resource. The LEC's membership includes: (1) producers of lignite coal who have an ownership interest in and who mine lignite; (2) users of lignite who operate lignite-fueled electric generating plants and the nation's only commercial scale "synfuels" plant that converts lignite into pipeline-quality natural gas; and (3) suppliers of goods and services to the lignite-coal industry.

Lignite is a type or "rank" of coal distinct from other ranks. Due to its characteristics, its principle use is as fuel for power plants, and lignite-fueled power plants are often mine-mouth plants, meaning that its economic value is almost entirely undermined when the power plants using the fuel are no longer allowed to. LEC's members have invested substantial amounts in the operation of lignite-fueled power plants, lignite coal mines supplying those plants, and businesses that supply goods and services to lignite owners and users based on the express statutory provisions governing EPA, which establish the limits to its authority. The lignite mines and reserves, together with the right to mine additional reserves,

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[1] Amicus has timely notified counsel for all parties of its intent to file this brief. Sup. Ct. Rules 37.2. No party or counsel for a party authored this brief in whole or in part, and no person or entity, other than LEC, made any monetary contribution to its preparation or submission. Sup. Ct. Rule 37.6.

have substantial economic value that will be significantly impaired if EPA regulations infer authority outside those express statutory provisions.

SUMMARY OF ARGUMENT

The Court should grant North Dakota's petition for certiorari because it makes a compelling and timely case for this Court to place limits on the vast authority EPA is granted by the D.C. Circuit's decision. The immediate impacts of and uncertainty created by the grant of this authority warrant this Court's action to grant the North Dakota petition and reverse the D.C. Circuit's decision.

Of most concern to LEC is the manner in which the D.C. Circuit allows EPA to ignore this Court's Major Questions Doctrine, which curtails the type of wide-ranging and impactful powers the D.C. Circuit would allow EPA to infer from specific and limited language in Section 111(d) of the Clean Air Act, 42 U.S.C. § 7411(d) ("Section 111(d)"). By doing so, the D.C. Circuit decision empowers EPA to repeat the sin committed in the Clean Power Plan—to convert EPA's statutorily recognized role as environmental regulatory into a roving commission as energy policymaker without any explicit statutory authority to do so.

LEC is also disturbed by the manner in which the D.C. Circuit would allow EPA to flip the roles of the state and federal government under Section 111(d) and, in so doing, convert the cooperative federalism

embodied in the Clean Air Act into a top-down coercive federalism regime that subjugates North Dakota and every other state to be a pawn, rather than a partner, of the federal government.

ARGUMENT

I. THE COURT SHOULD GRANT THE PETITION.

The risk of EPA as energy policymaker creates immediate generation planning impacts on LEC's members because the D.C. Circuit's decision grants EPA authority to force generation shifting from coal to renewable sources, regardless of the useful life of those coal facilities, their economic value to LEC's members, or the critical role they play within the North Dakota electric grid to ensure reliability and resilience. North Dakota Pet. for Cert. at 5.

North Dakota has repeatedly enacted legislation declaring it to be an essential government function and public purpose for the state to assist with the development of lignite resources within the state. *See e.g.,* N.D. CENT. CODE §§ 54-17.5-01, 57-06-17.1, 57-39.2-04.11. Pursuant to and consistent with these statutory directives, LEC works in partnership with the State of North Dakota through programs focused on enabling, developing, promoting, and enhancing both the present and the future use of lignite.

These programs include the "North Dakota Lignite Research, Development and Marketing Program" and the "Enhance Preserve and Protect Project." Very recently, the North Dakota Legislature,

once again, explicitly endorsed the importance of the current and future use of lignite to the state with the passage of House Bill 1452 during the 2021 Legislative Session which created the "Clean and Sustainable Energy Authority" and defined "sustainable" to mean "a technology or concept that allows the use of a natural resource to be maintained or enhanced through increased efficiency and life cycle benefits while either increasing or not adversely impacting energy security, affordability, reliability, resilience, or national security."

These programs provide grants and funding to promote the development of new lignite-fueled Electric Generating Units ("EGUs") in the future and of cleaner ways to utilize lignite in both new and existing EGUs, including reducing emissions of CO2. One way North Dakota encourages the commercial development of lignite deposits within the state is with the Advanced Energy Technology program. Through this program, the state offers financial support to commercialize transformational lignite development, such as by sharing the cost of the early development phase of new and more advanced lignite-based energy conversion facilities.

As a result of many of these state priorities and programs, as well as the affordability, reliability, and resilience of the power produced by lignite and coal, North Dakota relies on coal-based generation for approximately 65% of its electricity, and lignite powers a majority of the state's existing EGUs.

Against that backdrop, it is important to emphasize that electric generation resource planning decisions are happening now and the vast authority the D.C. Circuit decision cedes to EPA is impacting decision-making now. Power companies and electric cooperatives, as well as the coal producers and support facilities that supply them, must plan for the generation-shifting powers created by the D.C Circuit decision. This could lead to significant and permanent retirement decisions being made long before EPA actually fills in the amount on the blank check of authority the D.C Circuit has given it.

We have seen this movie before. The legal failings of the CPP and the irreparable harm that it would have inflicted led the Court to stay the CPP and should motivate it to stop the rerun of the CPP show now. The issues the Court will resolve by placing appropriate limits on the amount of authority that can be inferred from Section 111(d) of the Clean Air Act are ripe for review and warrant immediate attention.

II. THE COURT SHOULD REVERSE THE D.C. CIRCUIT'S DECISION.

The Major Questions Doctrine, the express terms of Section 111 of the Clean Air Act, and the cooperative federalism principles embodied therein, warrant reversal of the D.C. Circuit's decision.

A. This Situation Was Tailor-Made for Application of the Major Questions Doctrine.

While it is difficult to rank which legal failing of the CPP was the most egregious, among the most obvious was the grab of energy policymaking authority attempted by EPA (and now sanctioned by the D.C. Circuit) through the re-definition of one phrase in the Clean Air Act—"Best System of Emission Reduction (BSER)." Breaking from explicit statutory text and 45 years of regulatory and judicial precedent, the EPA redefined the word "system" to mean the entire electricity grid such that it could derive a mandatory emission standard based, not on what was achievable inside the fence of a facility, but instead on its own assumptions of what could be built elsewhere in the bulk power system to offset a facility's emissions.[2]

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[2] The scope of authority the D.C. Circuit would cede to EPA under Section 111(d) of the Clean Air Act does not just impact North Dakota's coal and power producers. The legal precedent in question here is a serious concern to other energy producers important to North Dakota and other energy-producing states. The newly expansive definition of BSER permitted by the D.C. Circuit decision would pave the way for inferred authority to regulate greenhouse gas (GHG) emission regulations across the vast interconnected pipeline networks that link the exploration, production, transportation, and refining components of the oil and gas industry. This pipeline system could easily be viewed as just as much a "system" as the electric grid—which was how EPA rationalized requiring reductions "outside the fence" of power plants in the CPP. What is to stop EPA from imposing GHG

This "outside the fence" approach, while acceptable as a method of flexible compliance with an emission standard, has never been accepted as a means to derive mandatory limits applicable to states or individual facilities, let alone seize control of wholesale energy markets. Because the EPA made its own assumptions about the power grid in deriving the emission standard in the CPP, it was able to impose its own policy preferences about what type of electric generation could and should be built in the grid (primarily renewables) and made it impossible for traditional fossil fuel-fired plants (coal and simple-cycle natural gas) to meet the standard it derived without a massive transfer of wealth from fossil energy owners to renewable developers.

The Court has made clear that EPA has no discretion to act beyond the power delegated to it by Congress. *Util. Air Regul. Grp. v. E.P.A.* ("*UARG*"), 573 U.S. 302, 315 (2014). This Court has "typically greet[ed]. . . with a measure of skepticism" situations "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *UARG*, 573 U.S. at 324. And the Court expects "Congress to speak clearly

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emissions on individual operators in the upstream sector based on assumed reductions that could be achieved from other operators, or even downstream refineries, because they are all connected to the same pipeline? This economy-wide regulatory authority is no more contemplated than what EPA argued for in the CPP, yet is certainly within its reach based on the vast authority the D.C. Circuit decision cedes EPA by inference.

if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* (quoting *F.D.A. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)).

Based on the aforementioned importance of the lignite industry to North Dakota and LEC's members and the CPP's forced premature retirement of a significant component of North Dakota's lignite industry, the D.C. Circuit's blank check to EPA certainly exceeds the threshold of "economic and political significance" established by this Court. And Section 111(d) certainly qualifies as a "long-extant statute" that comes woefully short of "speaking clearly" about the unprecedented federal energy policymaking that the D.C. Circuit would allow it to confer upon EPA by inference.

The Court should apply the Major Questions Doctrine and, like the *UARG* decision, keep EPA tethered to the authority expressly granted to it by Congress and reverse the D.C. Circuit decision to do otherwise.

B. The D.C. Circuit's Decision Would Allow EPA to Once Again Make Pawns Out of Its Cooperative Federalism Partners.

One of the most troubling legal failings of the CPP from a state point of view was the manner in which it shifted power from the states to the federal government, in direct conflict with express terms of Section 111 and the cooperative federalism

compromise that is built into that and several other sections of the Clean Air Act (and most federal environmental statutes).

Among the many state-specific considerations that EPA "shall permit" under Section 111(d), each state is to utilize is "the remaining useful life of the existing source to which such standard applies." *Id.* The D.C. Circuit jumped right over these plain terms in concluding that the EPA has authority to "reach past the States and directly promulgate standards of performance" to States' existing sources under the CPP. North Dakota Pet. for Cert. at 6. As a result, the D.C. Circuit's decision permits the EPA to impose standards on existing sources, irrespective of their useful life or other considerations EPA is mandated to allow states to consider (and that it must consider itself if it were to impose its own direct federal plan).

Like EPA when defending the CPP before this Court issued its stay, the D.C. Circuit decision waves the banner of "flexibility" in attempting to explain away the coercive nature of the CPP's federally mandated emission budgets. The flaw in this claim, of course, was that state carbon budgets were set at unreasonably low levels such that states were functionally forced to implement the assumptions EPA made when they derived the budgets to begin with. For many states, EPA's assumptions were completely unrealistic, including the construction of unprecedented levels of renewable energy.

This approach—to mandate budgets based on unrealistic assumptions and then claiming that states can "flexibly" comply—amounts to coercion, not the cooperative federalism structure established by Congress. As one state environmental agency official appropriately pointed out, EPA was treating states more like "pawns" than "partners."

The CPP did not abide by the express statutory command to allow state-specific considerations to be governed by state decision-makers implementing the guidelines promulgated by EPA. In fact, the CPP effectively commandeered the states, in violation of the Tenth Amendment, to impose the EPA's chosen carbon standards—irrespective of the States' preferred (and more economically sensible) power sources. *See e.g.*, *New York v. United States*, 505 U.S. 144, 188 (1992). Neither North Dakota nor any other energy producing state can be stripped of its ability to control its energy destiny in the brazen way attempted by the CPP and permitted by the D.C. Circuit's decision.

CONCLUSION

The D.C. Circuit's sanction of the extra-statutory "outside the fence" approach in the CPP stopped EPA from returning back to the approach that made American environmental regulation great—partnering with states to control pollution with technology, not ideology. It is through the development and deployment of technology, once

commercially demonstrated, that the United States has made its air and water safe while remaining globally competitive. The D.C. Circuit decision illegally expands EPA's authority and allows it to regress back to imposing ideological policy preferences that pick winners and losers from the top down with vast economic consequences for LEC's members and the citizens of energy producing states across the country.

The Court should stop this regression and grant the petition for certiorari and reverse the D.C. Circuit decision.

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