

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

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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**  
**BRIEF FOR PETITIONER THE NORTH  
AMERICAN COAL CORPORATION**

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**QUESTION PRESENTED**

Whether 42 U.S.C. § 7411(d), which authorizes the EPA to impose standards “for any existing source” based on limits “achievable through the application of the best system of emission reduction” that has been “adequately demonstrated,” grants the EPA authority not only to impose standards based on technology and methods that can be applied at and achieved by that existing source, but also allows the agency to develop industry-wide systems like cap-and-trade regimes.

**PARTIES TO THE PROCEEDING AND  
RULE 29.6 DISCLOSURE STATEMENT**

The D.C. Circuit consolidated numerous cases under Case No. 19-1140. Respondents in the D.C. Circuit proceeding below were the Environmental Protection Agency and its Administrator.\*

Petitioners and intervenors in the D.C. Circuit proceedings below were as follows.

No. 19-1140: Petitioners were American Lung Association and American Public Health Association.

Intervenor for petitioners was: State of Nevada.

Intervenor for respondents were: AEP Generating Company, AEP Generation Resources Inc., America's Power, Appalachian Power Company, Chamber of Commerce of the United States of America, Indiana Michigan Power Company, Kentucky Power Company, Murray Energy Corporation, National Mining Association, National Rural Electric Cooperative Association, Public Service Company of Oklahoma, Southwestern Electric Power Company, Westmoreland Mining Holdings LLC, Wheeling Power Company, Basin Electric Power Cooperative, Phil Bryant, Governor of the State of Mississippi, Georgia Power Company, Indiana Energy Association, Indiana Utility Group, Mississippi Public Service Commission, Nevada Gold Mines LLC, Nevada Gold Energy LLC, Powersouth Energy Cooperative, the States of Alabama, Alaska, Arkansas, Georgia, Indiana, Kansas, Kentucky, by and through Governor Matthew

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\* During the pendency of the proceedings below, the Administrator of the EPA was Andrew Wheeler. The current officeholder is Michael Regan, who is automatically substituted as a party.

G. Bevin, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, Utah, West Virginia, and Wyoming.

No. 19-1179: Petitioner was The North American Coal Corporation (Petitioner here).

Intervenors for respondents were: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., City and County of Denver Colorado, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, District of Columbia, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

No. 19-1165: Petitioners were the States of New York, California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Rhode Island, Vermont, Washington, Wisconsin, District of Columbia, Commonwealths of Massachusetts, Pennsylvania, and Virginia, People of the State of Michigan, City of Boulder, City of Chicago, City of Los

Angeles, City of New York, City of Philadelphia, and City of South Miami.

No. 19-1166: Petitioners were Appalachian Mountain Club, Center for Biological Diversity, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club.

Intervenors for respondents were: Indiana Energy Association and Indiana Utility Group.

No. 19-1173: Petitioner was Chesapeake Bay Foundation, Inc.

Intervenors for respondents were: International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers, AFL-CIO, International Brotherhood of Electrical Workers, AFL-CIO, and United Mine Workers of America, AFL-CIO.

No. 19-1175: Petitioners were Robinson Enterprises, Inc., Nuckles Oil Company, Inc., doing business as Merit Oil Company, Construction Industry Air Quality Coalition, Liberty Packing Company, LLC, Dalton Trucking, Inc., Norman R. Brown, Joanne Brown, Competitive Enterprise Institute, and Texas Public Policy Foundation.

Intervenors for respondents were: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., City and County of Denver Colorado, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Clean Air

Council, Clean Wisconsin, Conservation Law Foundation, District of Columbia, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

No. 19-1176: Petitioner was Westmoreland Mining Holdings LLC.

Intervenors for respondents were: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., City and County of Denver Colorado, City of Boulder, City of Chicago, City of Los Angeles, City of New York, City of Philadelphia, City of South Miami, Clean Air Council, Clean Wisconsin, Conservation Law Foundation, District of Columbia, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, Sierra Club, the Commonwealths of Massachusetts, Pennsylvania, and Virginia, and the States of California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Maine, Maryland, Michigan, Minnesota, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, Rhode Island, Vermont, and Washington.

No. 19-1177: Petitioner was City and County of Denver Colorado.

No. 19-1185: Petitioner was Biogenic CO2 Coalition.

Intervenors for respondents were: American Lung Association, American Public Health Association, Appalachian Mountain Club, Center for Biological Diversity, Chesapeake Bay Foundation, Inc., Clean Air Council, Clean Wisconsin, Conservation Law Foundation, Environmental Defense Fund, Environmental Law and Policy Center, Minnesota Center for Environmental Advocacy, Natural Resources Defense Council, and Sierra Club.

No. 19-1186: Petitioner was Advanced Energy Economy.

No. 19-1187: Petitioners were American Clean Power Association and Solar Energy Industries Association.

No. 19-1188: Petitioners were Consolidated Edison, Inc., Exelon Corporation, National Grid USA, New York Power Authority, Power Companies Climate Coalition, Public Service Enterprise Group Incorporated, and Sacramento Municipal Utility District.

Pursuant to Supreme Court Rule 29.6, The North American Coal Corporation is a wholly-owned subsidiary of NACCO Industries, Inc. NACCO Industries, Inc., is a publicly-traded corporation that owns more than 10% of the stock of The North American Coal Corporation. No other publicly-held corporation owns more than 10% of the stock of The North American Coal Corporation.

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## INTRODUCTION

Tucked away in a dusty corner of Title 42, § 111(d) of the Clean Air Act received little attention for the first 40 years of its existence. And why would it? The provision is by its nature both ancillary and marginal. When the EPA sets performance standards for *new* sources of air pollution, this subsection allows it to direct states to adopt performance standards for some *existing* sources of the same type. Those standards must reflect emission limitations that the agency finds are actually “achievable” through the “best system of emission reduction” that has been “adequately demonstrated” for that “source.” The EPA’s long-held understanding was that those standards must be *performable by* the source, using controls *applicable to* that source—like a filter on a smokestack. Indeed, invoking that power just a handful of times since 1970, the EPA used it to mandate control technologies like scrubbers to reduce fluoride emissions from phosphate fertilizer plants, and evaporator systems to limit sulfur emissions from kraft pulp mills.

All of that changed in 2015. Eager to find ways to bypass Congress and combat climate change with a pen and a phone, the EPA “discovered” that 42 U.S.C. § 7411(d) is far broader. The “best system” of emission reduction, it now claimed, can transcend measures at the source level and extend to systemic, industry-wide policies—even those that would require existing sources to close or to subsidize their competitors. On that view, this provision is revolutionary. Instead of a gap-filler that lets the EPA ensure efficient operations through modern technology, it is a blank check for the agency to mandate any nationwide “system” it can devise.

That extraordinary interpretation was the premise for the EPA's 2015 "Clean Power Plan" (CPP), a sweeping top-down overhaul of the nation's electric power generation grid. The CPP rested on the EPA's determination that the "best system" for reducing greenhouse gas emissions from existing coal- and gas-fired power plants was *to use them less*. These plants could reduce emissions by "shifting" generation to other sources, *e.g.*, by investing in renewable energy or acquiring "credits" from those lower-emitting sources. Section 7411(d) was thus used to justify the imposition of a national cap-and-trade regime that Congress not only had never enacted, but had repeatedly rejected.

Faced with this unprecedented rule, this Court took equally unprecedented action, by staying the CPP even before the D.C. Circuit reviewed it on the merits. Soon after, the EPA took the hint and went back to the drawing board, so that litigation never proceeded to the merits. Instead, the agency repealed the CPP on the basis that it exceeded the EPA's statutory authority. Returning to its traditional understanding, the EPA explained that § 7411(d) directs standards "for any existing source," based on the best achievable "system of emission reduction" that can be applied *at and by* that source. But the agency cannot formulate a "system of emission reduction" for an industry as a whole, demanding that electricity providers reduce emissions by "shifting" generation beyond their own boundaries. The "best system," in short, must be *source-based*, not *industry-wide*. Accordingly, the EPA promulgated a new rule, the Affordable Clean Energy plan (ACE Rule), which developed achievable emission standards for coal and gas plants, based on measures that a coal or gas plant itself could actually adopt.

In the decision below, however, a D.C. Circuit panel vacated the EPA's repeal and replacement of the CPP. The majority held that the statute is capacious enough to empower the EPA to refashion an industry. So five years after this Court *stayed* the CPP because it so clearly exceeded the EPA's authority, the D.C. Circuit held that the EPA has *precisely that authority*.

This Court should reverse. Using ordinary tools of statutory construction, the panel below was wrong to find ambiguity here. Particularly when the statutory definitions are plugged into § 7411(d), it is clear that the EPA is limited to "achievable" emission reduction measures "for" an "existing" source, not any "system" that calls on the facility's owner to replace it.

But even if the court were correct that this statute *could* be read to authorize any national climate change policies that the EPA finds "best," the major questions doctrine forecloses that construction. This Court has long refused to discover, in mouseholes far larger than this, vast delegations of power for agencies to resolve major economic and political questions. That canon reflects not only common sense about congressional action, but deeper constitutional values touching the separation of powers. Major policy choices affecting the national economy should not be made by unelected agency officials—and this Court should certainly not construe *ambiguity* to authorize otherwise. That rules out the D.C. Circuit's limitless interpretation of the statute. How to combat climate change on a national level is a serious issue that tees up hard policy choices. This Court should reverse to ensure that those momentous trade-offs are made by Congress, as the Constitution contemplates.

## OPINIONS BELOW

The D.C. Circuit’s decision (JA.53) is reported at 985 F.3d 914.

## JURISDICTION

The D.C. Circuit issued its decision on January 19, 2021. JA.53. This Court granted a timely petition for writ of certiorari on October 29, 2021, and has jurisdiction under 28 U.S.C. § 1254(1).

## PROVISIONS INVOLVED

The core statutory provisions at issue are 42 U.S.C. § 7411(a)–(d), reprinted at Pet.App.204a.

## STATEMENT

### A. Statutory Background.

“The Clean Air Act establishes a series of regulatory programs to control air pollution from stationary sources (such as refineries and factories).” *Michigan v. EPA*, 576 U.S. 743, 747 (2015). Each program has its own unique target and regulatory structure.

The program at issue here is set forth in 42 U.S.C. § 7411. Titled “Standards of performance for new stationary sources,” 42 U.S.C. § 7411, that provision “directs the EPA ... to list ‘categories of stationary sources’ that ‘[it believes] ... caus[e], or contribut[e] significantly to, air pollution.’” *Am. Elec. Power Co. v. Connecticut*, 564 U.S. 410, 424 (2011). After listing such a category of sources, the EPA must set rules establishing federal standards of performance for emissions from new sources in that category. 42 U.S.C. § 7411(b)(1)(B). “[N]ew source[s]” are those that are built after the relevant regulation is proposed. *Id.* § 7411(a)(2).

Although § 7411 is focused (as its title suggests) on *new* sources, an ancillary subsection ((d)) addresses *existing* sources. In parallel to the definition of a “new” source, an “existing” source is any “building, structure, facility, or installation which emits or may emit any air pollutant,” and which is built *before* the regulation is proposed. *Id.* § 7411(a)(3), (6).

After the EPA publishes “standards of performance” for *new* sources—and assuming the pollutant at issue is one of the rare few not already subject to regulation under certain other programs in the Act—it must “prescribe regulations” calling for states to establish “standards of performance for any existing source” of that type. *Id.* § 7411(d). A “standard of performance” is one that “reflects the degree of emission limitation achievable through the application of the best system of emission reduction” that the EPA “determines has been adequately demonstrated,” while considering cost, health and environmental impact, and energy needs. *Id.* § 7411(a)(1).

This is a multi-step process. The EPA first issues an “emission guideline that reflects the application of the best system of emission reduction (considering the cost of such reduction) that has been adequately demonstrated for designated facilities.” 40 C.F.R. § 60.22. States then develop and impose a “standard of performance” based on the achievable emission reductions identified by the EPA “for any existing source” in the category. 42 U.S.C. § 7411(d)(1). Thus, while the states ultimately impose the standards, those standards are necessarily based on and defined by the “system” from which the EPA derives its guideline. If a state fails to impose a plan, the EPA can do so directly. *Id.* § 7411(d)(2).

## B. The Clean Power Plan.

In *Massachusetts v. EPA*, this Court held that carbon dioxide and other greenhouse gases could fit within the Clean Air Act’s general definition as air pollutants. 549 U.S. 497, 511 (2007). In 2009, the EPA issued an “endangerment finding,” concluding that a mix of six greenhouse gases emitted by motor vehicles may “reasonably be anticipated both to endanger public health and to endanger public welfare.” Endangerment and Cause or Contribute Findings for Greenhouse Gases Under Section 202(a) of the Clean Air Act, 74 Fed. Reg. 66,496, 66,497 (Dec. 15, 2009).

Largely on the basis of that finding, the EPA in 2015 published a rule, known as the Clean Power Plan (or CPP), regulating the emission of carbon dioxide from existing power plants. JA.273.<sup>1</sup> The EPA’s stated “authority for this rule” was § 7411(d). JA.496. In the CPP, the EPA set “final emission guidelines” for states to use in establishing performance standards for those plants. JA.273. The performance rates and targets in those guidelines were derived from what the EPA had identified as the “best system of emission reduction” for existing fossil-fuel-fired plants. *Id.*

The EPA defined that “best system” as comprising three “building blocks.” JA.483–84. The first was uncontroversial: “[i]mproving heat rate at affected coal-fired” plants, through “equipment upgrades” and “improved staff training.” JA.484, 576. But the other building blocks were not technologies or systems that

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<sup>1</sup> The EPA issued a separate rule for *new* power plants. 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).

could be adopted or applied by any given plant. Rather, they were methods of “generation shifting” *across the grid*, meaning a reduction in electricity generated by the source in favor of more supply from *other* energy sources. One such “method” was moving generation from coal-fired plants to (relatively lower emitting) gas-fired plants. JA.484. The second was to shift generation from gas-fired plants to renewable sources like solar or wind. *Id.*

As noted, the EPA derived “emission performance rates” for coal and gas plants, as well as targets for each state, from those “building blocks.” JA.484. That is, the agency projected the degree to which coal- and gas-fired energy could be replaced by available renewable sources, and then used those “replacement potential” figures to set adjusted emissions rates on a regional and then state-by-state basis. JA.998; *see also* JA.950–1008. By backing into emissions rates and targets that way, *i.e.*, by assuming replacement of gas- and coal-fired generation, the EPA effectively mandated that replacement.

Remarkably, the resulting target performance rates for *existing* sources were lower than those imposed for *new* sources. *Compare* Standards of Performance for Greenhouse Gas Emissions From New, Modified, and Reconstructed Stationary Sources: Electric Utility Generating Units, 80 Fed. Reg. 64,510, 64,513 (Oct. 23, 2015), *with* JA.484. The EPA demanded, in other words, that existing plants reduce their emission rates below even the requirements for *new* such plants (themselves so stringent that new coal-fired plants are virtually never built, *see* 80 Fed. Reg. at 64,526).

Of course, nobody believed the existing plants could actually achieve those dramatically reduced emission rates just by modifying their own operations. Rather, under the EPA's regime, existing plants would acquire "rate-based emission credits" by building or investing in renewable energy sources, and those credits would then be treated as "reducing" the coal or gas plant's own emissions rate. *See* JA.601–13. This legal fiction—that an individual plant was reducing its own emissions by funding other energy sources—was an "integral part" of the EPA's "analysis." JA.606. Existing plants could also comply by reducing their own activity or closing down. *See* JA.572.

Thus, the EPA openly recognized that the standards it contemplated were, by definition, not based on measures that could actually be applied at most existing coal- and gas-fired plants on their own, like improved efficiency or carbon capture. Nor could the CPP's standards actually be *achieved* by those plants on their own. "Rather, most of the CO<sub>2</sub> controls need to come in the form of ... replacement of higher emitting generation with lower- or zero-emitting generation." JA.579–80; *see also, e.g.*, JA.583 ("[T]he magnitude of emission reductions included in the proposed rule *from generation shifting* is achievable." (emphasis added)). Put another way, the agency's plan assumed *replacing* many of the "existing" sources that the EPA had been directed to *regulate*.

Given § 7411(d)'s narrow scope, the EPA previously had used it to issue only a half-dozen rules, targeting an even smaller number of pollutants. *See* JA.1725, 1756 & n.63. Never had the agency imposed standards based on emission reduction measures not achievable by the source itself. JA.1758 & n.65.

The EPA's textual basis for this sweeping authority was not the operative language of § 7411(d), but rather a *definitional* subsection, 42 U.S.C. § 7411(a). Section 7411(d) calls for "standards of performance for any existing source," and the agency hung its hat on the definition of a "standard of performance": one that "reflects the degree of emission limitation achievable through the application of the best system of emission reduction." *Id.* § 7411(a)(1). In the phrase "best system of emission reduction," the EPA believed it had found a concept "sufficiently broad," JA.543, to include not only technologies and systems that individual sources could adopt to improve their own operations, but also sector-wide "generation shifting" between sources. The EPA interpreted "system" to encompass any "set of measures that work together to reduce emissions," *id.*, regardless of whether they could be used at or achieved "inside the fence" of any source.

### **C. This Court's Stay Order.**

Given the novelty of its reading of the Act and the dramatic forecasts of its effect on the power industry, the CPP unsurprisingly sparked immediate challenge. Consistent with the Clean Air Act's judicial-review provision, 42 U.S.C. § 7607(b)(1), a group of states and private parties filed petitions for review in the D.C. Circuit. *See, e.g., West Virginia v. EPA*, No. 15-1363 (D.C. Cir. Oct. 23, 2015). They also unsuccessfully sought a stay of the CPP in that court, pending judicial review. *Id.*, Doc. No. 1594951. The challengers then sought a stay in this Court. *See West Virginia v. EPA*, 136 S. Ct. 1000 (2016).

Reportedly for the first time ever,<sup>2</sup> this Court stayed a regulation before a lower court reviewed it. *Id.* In granting that relief, a majority of Justices necessarily concluded that there was at least: “(1) ‘a reasonable probability’ that th[e] Court w[ould] grant certiorari, (2) ‘a fair prospect’ that the Court w[ould] then reverse the decision below, and (3) ‘a likelihood that irreparable harm [will] result from the denial of a stay.’” *Maryland v. King*, 567 U.S. 1301, 1302 (2012) (Roberts, C.J., in chambers).

#### **D. The Affordable Clean Energy Rule.**

Following the stay, the EPA reassessed its position; the litigation “was held in abeyance and ultimately dismissed.” JA.88. Rather than defend the CPP, the EPA took the hint and replaced it.

In its 2019 ACE Rule, the EPA explained that the CPP “read the statutory term ‘best system of emission reduction’ so broadly as to encompass measures the EPA had never before envisioned in promulgating performance standards under [§ 7411].” JA.1741. “This was the first time the EPA interpreted the [best system of emission reduction] to authorize measures wholly outside a particular source.” JA.1758.

The EPA now concluded that the statute could not bear this interpretation. For one, the text was clear: “Congress expressly limited the universe of systems of emission reduction from which the EPA may choose ... to those systems whose ‘application’ to an ‘existing source’ will yield an ‘achievable’ ‘degree of emission limitation.’” JA.1745. For another, the EPA “believe[d] that [the major questions] doctrine should

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<sup>2</sup> Courtney Scobie, *Supreme Court Stays EPA’s Clean Power Plan*, AM. BAR ASS’N PRAC. POINTS (Feb. 17, 2016).

apply ... and that its application confirm[ed]” a narrow reading. JA.1770. After all, “[a]t the time the CPP was promulgated, its generation-shifting scheme was projected to have billions of dollars of impact,” and it “would have affected every electricity customer (*i.e.*, all Americans)” and “disturbed the state-federal and intra-federal jurisdictional scheme.” JA.1770–71. Such vast power cannot be inferred without a clearer statement vesting it in the agency. *See id.*

The EPA thus “conclude[d] that the interpretation relied upon in the CPP ignored or misinterpreted critical statutory elements and rules of statutory construction,” and repealed it. JA.1759. In its place, the EPA promulgated standards and limits that could be applied at and achieved by a source itself.

#### **E. Procedural History.**

Numerous states, activist groups, and industry participants challenged various aspects of the rule in the D.C. Circuit. Most objected to repeal of the CPP, arguing that § 7411 *does* authorize the EPA to require generation shifting, ergo the repeal was unlawfully premised on a flawed narrower view. Petitioner here, the North American Coal Corporation, was also a party below, but supported repeal of the CPP.

The D.C. Circuit agreed with the challengers. The majority believed the definitional phrase “best system of emission reduction” could include category-wide systems, as opposed to those applicable to particular sources. JA.108–10. The court also dismissed the major questions doctrine, concluding it did not apply because regulating greenhouse gases was in “the EPA’s wheelhouse.” JA.137. In the court’s view, this doctrine was particularly misplaced because the Clean

Air Act imposed “its own limits” on the agency, Congress had preserved “the States’ independent role” in the process, and the EPA had “tied its own hands” through other regulatory requirements. JA.139, 143 n.9, 149. Incredibly, the majority did not even *mention* this Court’s stay of the CPP.

Judge Walker dissented. “Hardly any party,” he observed, “makes a serious and sustained argument that § [7411(d)] includes a clear statement unambiguously authorizing the EPA to consider off-site solutions like generation shifting.” JA.217. “And because the rule implicates ‘decisions of vast economic and political significance,’ Congress’s failure to clearly authorize the rule means the EPA lacked the authority to promulgate it.” *Id.*

After the decision, the EPA secured a partial stay of the mandate as to repeal of the CPP, so the agency could consider a new rule consistent with the decision. JA.256–72. This Court granted certiorari.

### **SUMMARY OF ARGUMENT**

The question presented is whether the EPA was right in the CPP (when it asserted the power to adopt guidelines based on any “system” it concludes is “best” for the industry as a whole), or in the later ACE Rule (when it concluded that the guidelines must reflect measures that are applicable to and achievable by an individual source itself). The D.C. Circuit held that the agency got it right the first time, and that the repeal of the CPP therefore reflected legal error by the EPA about the scope of its authority. This Court should reverse and hold that the ACE Rule correctly adopted a limiting principle firmly grounded in Clean Air Act’s text, structure, and history.

I. Even if the statute on its face were ambiguous, the major questions doctrine forecloses the expansive interpretation that the D.C. Circuit embraced. Under that doctrine, courts refuse to construe ambiguity as delegating to agencies vast power over major economic or political decisions. Such interpretations are less plausible as a matter of legislative practice, and test the limits of Congress's power to delegate legislative authority as a matter of constitutional structure.

This case is a perfect example, because the D.C. Circuit's construction allows the EPA to restructure every carbon-emitting industry, yielding the agency an extravagant level of control over economic activity across the nation. The Clean Air Act would, on this reading, empower the EPA to set emission standards based on any "system" it believes is "best" for solving the global problem of climate change. Such an expansive delegation of such enormous power cannot fairly be inferred from mere ambiguity.

II. In all events, § 7411(d) is unambiguous. Its text calls for emission standards "for any existing source," not for the industry or nation as a whole. And layering on the statutory definitions confirms that such source-specific performance standards must be "achievable" through the "application" to that source of an emission reduction system, not jerry-rigged on the premise that sources will cease to exist or fictionally "reduce" their emissions rate by acquiring credits from others. Only by decoupling statutory definitions from the operative provision was the D.C. Circuit able to shed § 7411(d)'s obvious source-specific focus. That is indefensible as a matter of statutory construction. The court's error also makes a hash of the statutory scheme, and reverses over forty years of agency practice.

## ARGUMENT

The EPA’s longstanding construction of § 7411(d)—abandoned only briefly to prop up the revolutionary CPP—calls on the agency to undertake a source-level inquiry into what emissions reductions are actually “achievable,” and to derive performance standards from those achievable limits. Under that intuitive understanding, the EPA can mandate that gas power plants use the most up-to-date equipment to avoid gas leaks, or direct coal plants to use modern heat transfer technology to improve efficiency and reduce emissions. In short, the EPA can ensure that existing sources *operate as cleanly and efficiently as feasible*—but it cannot simply ban those sources into obsolescence. That would fight the premise of imposing “achievable” standards of “performance” on “existing” sources.

By contrast, the D.C. Circuit interpreted the statute to allow the EPA to devise a “best system of emission reduction” at a far higher level of generality. Under this account, the agency need not concern itself with what measures any particular source could actually adopt or what emission reductions it could actually achieve by modernizing or upgrading its operations. Instead, the EPA can pick and choose the sources it prefers—and regulate the rest out of existence by “shifting” their production through tradeable credits and similar artifices. Indeed, the EPA’s authority is nearly unlimited: It can impose a carbon tax, cap-and-trade regime, or any other policy it wants—any could qualify as the “best system” to reduce emissions. Section 7411 is thereby transformed from a narrow and rarely-used means of keeping older facilities up-to-date into an open-ended mandate for the EPA to “solve” climate change however it sees fit.

Importantly, even the D.C. Circuit majority did not claim that § 7411 *must* be read that expansively. It instead held that the statute does not *unambiguously foreclose* the revolutionary interpretation. It then reasoned that the EPA acted arbitrarily by refusing to consider adopting it. The Court should reverse for two reasons.

*First*, even accepting the D.C. Circuit’s premise that the statute is otherwise ambiguous, that ambiguity is resolved by the major questions doctrine. That tool of construction, informed by constitutional principles, requires rejecting the interpretation under which Congress has broadly delegated to executive agencies the vast power to decide matters of great economic or political significance. Akin to the rule of lenity or the federalism clear-statement rule, the major questions doctrine safeguards constitutional values by resolving statutory ambiguity in favor of a particular outcome—here, that major policy decisions are made by elected legislators, not outsourced to agency officials and staff.

*Second*, traditional tools of statutory construction compel the same result. The panel went out of its way to find ambiguity in a text that has none. Section 7411 allows the EPA to direct states to impose a “standard of performance” that is “achievable” by “application” of the “best system of emission reduction” “for” “any existing source.” On its face and in ordinary parlance, this requires the “best system” to be *performable by* the existing source on its own and within its own boundaries—it does not allow the EPA to declare it “best” to reshape an entire industry by instructing coal plant owners to build wind farms. Nor can the radical interpretation below be reconciled with the statutory structure or history.

In short, whether there is no ambiguity in the first place or whether the major questions doctrine resolves that ambiguity, the decision below is wrong about the scope of the statute. This Court should thus reverse and remand to sustain the repeal of the CPP.

**I. THE MAJOR QUESTIONS DOCTRINE FORECLOSES THE D.C. CIRCUIT’S INTERPRETATION.**

Courts often will construe statutory ambiguity as a silent delegation to the agency charged with enforcing that statutory scheme, to make a “reasonable choice within a gap left open by Congress.” *Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 866 (1984). But not always. Sometimes another canon of construction supersedes that deference. When the statute carries criminal penalties, for example, the rule of lenity requires resolving ambiguity in favor of the defendant. *Leocal v. Ashcroft*, 543 U.S. 1, 11 n.8 (2004). Or if one interpretation threatens to disturb the balance of powers between the federal government and the states, courts do not allow agencies to adopt that interpretation without a clear statement. See *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng’rs*, 531 U.S. 159, 172 (2001).

This case implicates a similar rule, dubbed by some the major questions doctrine. It embodies the commonsense presumption—backed by constitutional concerns about delegation of legislative power—that Congress does not use statutory ambiguity to confer authority on agencies over especially significant or far-reaching matters. Applying that rule resolves any ambiguity the court below purported to have found in § 7411(d), and so the EPA in the ACE Rule was *not* mistaken about the scope of its legal authority.

### **A. Congress Must Clearly Confer Authority To Resolve Major Questions.**

The major questions doctrine is effectively a clear-statement rule, under which Congress must “speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014) (*UARG*). It rests on two foundations: a descriptive presumption about how Congress writes laws, and a substantive guardrail for the separation of powers.

1. Although the label is more recent, the major questions doctrine itself traces back at least 20 years in this Court’s jurisprudence, if not further. In *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000), the Court considered the FDA’s novel effort to regulate cigarettes as medical devices. The Court explained that, notwithstanding *Chevron* deference, in some cases there is “reason to hesitate before concluding that Congress has intended ... an implicit delegation” to the agency. *Id.* at 159. And the FDA’s new assertion of “jurisdiction to regulate an industry constituting a significant portion of the American economy” was a perfect example. *Id.* “Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion.” *Id.* at 160; *see also Indus. Union Dep’t, AFL–CIO v. Am. Petroleum Inst.*, 448 U.S. 607, 645 (1980) (plurality opinion) (finding it would be “unreasonable to assume that Congress intended to give the Secretary the unprecedented power over American industry that would result from the Government’s view of” his delegated authority, at least in “the absence of a clear mandate in the Act”).

In the Clean Air Act context, this Court applied the same rule in *UARG*. There, the Court considered two provisions that require permits to construct or operate any facility that is a major source of “air pollutants.” 573 U.S. at 308–09. The EPA defined “air pollutant” to include greenhouse gases. This Court rebuffed that reading, however, since it amounted to “an enormous and transformative expansion in EPA’s regulatory authority without clear congressional authorization.” *Id.* at 324. The Court outlined the practical impacts of the EPA’s interpretation: It would “require permits for the construction and modification of tens of thousands, and the operation of millions, of small sources”—an “extravagant statutory power over the national economy.” *Id.* And that in turn made the construction impermissible. The Court greets “with a measure of skepticism” an agency’s claim to have found “in a long-extant statute an unheralded power to regulate a ‘significant portion of the American economy.’” *Id.*

Most recently, the Court invoked that skepticism to effectuate an injunction against the CDC’s eviction moratorium. *Ala. Ass’n of Realtors v. Dep’t of Health & Human Servs.*, 141 S. Ct. 2485 (2021). The agency cited its authority under the Public Health Service Act “to prevent the introduction, transmission, or spread of communicable diseases.” 42 U.S.C. § 264(a). This Court held that “[e]ven if the text were ambiguous, the sheer scope of the CDC’s claimed authority ... would counsel against the Government’s interpretation.” 141 S. Ct. at 2489. Reaching potentially millions of tenants, the moratorium’s “economic impact” was projected to be “nearly \$50 billion.” *Id.* Even more important, it was “hard to see what measures” the CDC’s interpretation “would place outside [its] reach.”

*Id.* Without a clear statement, the Court refused to embrace the agency’s self-serving “claim of expansive authority.” *Id.*

As then-Judge Kavanaugh once summarized, “[i]f an agency wants to exercise expansive regulatory authority over some major social or economic activity ... an ambiguous grant of statutory authority is not enough.” *U.S. Telecom Ass’n v. FCC*, 855 F.3d 381, 421 (D.C. Cir. 2017) (Kavanaugh, J., dissenting from the denial of rehearing en banc); *see also King v. Burwell*, 576 U.S. 473, 485 (2015) (refusing to defer to IRS on question that “involv[ed] billions of dollars in spending each year and affect[ed] the price of health insurance for millions of people”); *Gonzales v. Oregon*, 546 U.S. 243, 267–68 (2006) (requiring more than “implicit delegation” to support “broad and unusual authority” to define legitimate medical practice).

2. The major questions doctrine stems from two main sources. The first is a commonsense assumption about legislative practice. As a general rule, Congress “does not ... hide elephants in mouseholes,” meaning that it does not grant transformative power in “vague terms or ancillary provisions.” *Whitman v. Am. Trucking Ass’ns*, 531 U.S. 457, 468 (2001). In major questions cases, the issue is whether Congress gave *someone else* power to resolve critical issues within the traditional legislative wheelhouse. It is “unlikely” that Congress would do so through “cryptic” phrasing, *Brown & Williamson*, 529 U.S. at 160, or “implicit delegation,” *Gonzales*, 546 U.S. at 268. Rather, Congress “surely” would “do[] so expressly.” *King*, 576 U.S. at 486. Conversely, if Congress has *not* “sp[oken] clearly,” *UARG*, 573 U.S. at 324, the Court assumes it did not intend to hand over control.

The second, deeper rationale for the major questions canon relates to constitutional avoidance. Where “a serious doubt of constitutionality is raised” about a federal statute, “this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.” *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Major questions cases raise such concerns. The Constitution “vest[s]” “[a]ll legislative Powers ... in a Congress of the United States.” U.S. Const. art. I, § 1. In light of that vesting clause and the separation-of-powers principles it serves, Congress may not delegate “powers which are strictly and exclusively legislative.” *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 20 (1825) (Marshall, C.J.).

Of course, current doctrine does allow Congress to “delegate power under broad general directives” so long as it “lay[s] down ... an intelligible principle” to guide the delegee. *Mistretta v. United States*, 488 U.S. 361, 372 (1989). But even then, “the degree of agency discretion that is acceptable varies according to the scope of the power,” meaning Congress “must provide substantial guidance” when it tries to give an agency power to issue rules “that affect the entire national economy.” *Whitman*, 531 U.S. at 475. And five Justices have recently noted that serious questions remain about whether delegations of true legislative authority fit within our constitutional scheme. See, e.g., *Gundy v. United States*, 139 S. Ct. 2116, 2131–43 (2019) (Gorsuch, J., joined by Roberts, C.J., and Thomas, J., dissenting); *id.* at 2130–31 (Alito, J., concurring in the judgment) (expressing “support” for reconsidering cases allowing “agencies to adopt important rules pursuant to extraordinarily capacious standards”); *Paul v. United States*, 140 S. Ct. 342, 342

(2019) (Kavanaugh, J., respecting denial of certiorari) (referring to “important points” in Justice Gorsuch’s *Gundy* opinion). Cf. Amy Coney Barrett, *Suspension and Delegation*, 99 CORNELL L. REV. 251, 318 (2014) (describing “notoriously lax” non-delegation test).

The major questions doctrine avoids those weighty constitutional questions by hewing to a presumption in favor of narrower delegations. If a statute authorizes agency action, but is ambiguous regarding whether the agency is bounded in a material way or assumes final say on momentous economic, social, or political issues, the Court *must*—under the canon of avoidance—adopt the former interpretation if “fairly possible.” *Crowell*, 285 U.S. at 62. And that approach is consistent with the traditional understanding of the separation of powers. As this Court put it long ago, there must be a line that “separates those important subjects, which must be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act ... to fill up the details.” *Wayman*, 23 U.S. (10 Wheat.) at 43; see also Ilan Wurman, *Nondelegation at the Founding*, 130 Yale L.J. 1490, 1497 (2021) (“Overall, the picture the Founding-era history paints is one of a nondelegation doctrine whereby Congress could not delegate to the Executive decisions over ‘important subjects’”).

Thus, just as the rule of lenity functions to protect due process and the federalism clear-statement rule works to preserve the Constitution’s vertical division of powers, the major questions doctrine reflects a horizontal “separation of powers-based presumption.” *U.S. Telecom*, 855 F.3d at 417, 419 (Kavanaugh, J., dissenting from the denial of rehearing en banc). It

serves the “constitutional rule that Congress may not divest itself of its legislative power by transferring that power to an executive agency.” *Gundy*, 139 S. Ct. at 2141–42 (Gorsuch, J., dissenting).

### **B. The D.C. Circuit’s Construction Runs Afoul of the Major Questions Doctrine.**

The statutory dispute over the meaning of § 7411(d) implicates the major questions doctrine. That is so because the interpretation offered by the D.C. Circuit gives the EPA unfettered control over not only the nation’s power grid, but the entire economy. If that is not a major question, nothing is. Yet not even the D.C. Circuit claimed the statute *compelled* that sweeping approach, only that the text was not “unambiguous” enough to foreclose it. *See* JA.102–03, 107, 118. That flips the presumption of the major questions doctrine. The expansive interpretation is impermissible *unless* the statute is clear. Accordingly, even if the D.C. Circuit’s reading were otherwise permissible—which it is not, *infra* Part II—that is still not enough.

1. To recap, this is the interpretation the EPA first adopted and then abandoned, and the court below held was within the agency’s grasp: Section 7411(d) allows the EPA to set guidelines tethered to emission limits that cannot actually be achieved by any given existing source but are instead derived from a “system” that transcends that source and requires actions beyond its boundaries. JA.108–09. What that means is the EPA can effectively impose *any* measures it wants to reduce greenhouse gas emissions. Whatever policies it comes up with are the “best system” for emission reduction, and the resulting reductions can be baked into binding EPA guidelines that states must implement.

Unpacking the statutory text as glossed by the D.C. Circuit, the EPA must prescribe regulations under which the states establish “standards of performance for any existing source.” 42 U.S.C. § 7411(d). But according to the panel, the preposition “for” does not imply that the standards must apply “‘at’ and ‘to’” the source; to the contrary, “[e]missions trading” can be “a way ‘for’ a source to meet a standard.” JA.107. The standards, in turn, must be based on “the degree of emission limitation achievable through the application of the best system of emission reduction which ... the [EPA] determines has been adequately demonstrated.” 42 U.S.C. § 7411(a)(1). But again, the lower court reads “best system” as *any plan to reduce emissions*, even one targeting “the source category” as a whole (*e.g.*, power plants) or “emissions” generally (*e.g.*, greenhouse gases), rather than a given existing source. JA.115.

In practice, what this means is that the lower court’s interpretation authorizes the EPA to develop any “best system” it wants to reduce emissions, whether on an industry-wide or even a national scale. That system need not be tied in any real way to the source being regulated; indeed, the “system” could simply be to shut down the source, force it to transform into something else, or compel it to subsidize competitors. The EPA would then calculate the emission reductions flowing from that “system,” and direct states to translate them into standards of performance for the existing sources (whether they are achievable by those sources or not). While not mandating the EPA’s “best system” directly, this scheme would effectively force states to adopt any policy measures the agency wanted.

If that interpretation is right, there is no real limit to how the EPA could regulate the power industry (just to start). The agency could declare a cap-and-trade regime the “best system” for emission reduction, and thereby effectively compel states to adopt such a framework in order to set performance standards. The agency could announce that the “best system” for gas-fired plants is to reduce their operations to two hours per day, adopting guidelines based on the emission reductions such a mandate would effectuate. Or the agency could cancel coal entirely, deeming that the “best system” and forcing states to match the emission reductions that flow from replacing this energy source with new or subsidized wind farms.

These are not just hypotheticals. Whatever the EPA’s future plans may hold, the way the agency used the expansive understanding of § 7411(d) in the CPP is a powerful illustration of its “limit[less]” scope. JA.108. The CPP’s “best system” would have forced disfavored sources to scale back production, subsidize lesser-emitting plants, or close shop entirely. In other words, it would have wrought massive changes in one of the most important sectors of the economy. See JA.606–07, 771–72. No wonder friends and foes alike noted its breathtaking significance. It was “the biggest, most important step we’ve ever taken to combat climate change” according to President Obama, Joby Warrick, *White House Set to Adopt Sweeping Curbs on Carbon Pollution*, WASH. POST (Aug. 1, 2015), and the cause of impending “double digit increases in wholesale electricity costs” according to the National Mining Association, National Mining Association, *EPA’s Clean Power Plan: An Economic Impact Analysis*, at 4 (2015).

Nor is the practical significance of this statutory dispute limited to the energy industry. Rather, the lower court's interpretation gives the EPA near-*carte-blanche* authority to mandate a comprehensive national response to climate change, "one of the most hotly debated issues of the day," *Nat'l Rev., Inc. v. Mann*, 140 S. Ct. 344, 347 (2019) (Alito, J., dissenting from the denial of certiorari). After all, power plants are far from the only "stationary source" of greenhouse gases; every building that emits the gases, including residential homes and run-of-the-mill commercial facilities, qualifies as a "source" subject to conceivable regulation under § 7411(d).

Consider, then, what the D.C. Circuit's reading of the Act would allow the EPA to do to *other* parts of the economy. Factories emit carbon dioxide; the agency could conclude that the "best system" for reducing those emissions is to drastically limit manufacturing. Our homes emit greenhouse gases when we heat or cool them; the EPA could determine that the "best system" for reduction of those emissions would be to prohibit gas hookups to residences or "shift" heating from gas furnaces to solar-powered units. Gas stations also emit; the agency could announce that the "best system" to deal with that problem is to impose a gas tax, the proceeds of which are used to subsidize electric cars. These may sound like fanciful hypotheticals (for now), but so was the prospect that the CDC would "mandate free grocery delivery to the homes of the sick," or compel "telecommunications companies to provide free high-speed Internet service to facilitate remote work." *Ala. Ass'n*, 141 S. Ct. at 2489. These examples illustrate the untenable breadth of the D.C. Circuit's theory, and that breadth dooms it.

In short, if the EPA can adopt any “common plan” to reduce emissions, nothing constrains its authority to cap economic activity, demand that certain operations close down, mandate carbon taxes or cap-and-trade regimes, or take any number of other courses of action to reduce greenhouse gas emissions systemically on a national basis. If the agency is not limited to source-level and source-achievable systems, the next Clean Power Plan could be the “Green New Deal”—complete with emissions standards predicated on eco-friendly home-thermostat mandates, solar panel installation, or mandatory composting. And all without the need for any vote by elected representatives in Congress.

These are clearly “decisions of vast ‘economic and political significance,’” and the Court should therefore expect that Congress “speak clearly” before construing the Clean Air Act as handing those powers to the EPA. *UARG*, 573 U.S. at 324. As in *Alabama Association*, the “sheer scope” of the EPA’s supposed authority is reason enough to reject it. 141 S. Ct. at 2489.

2. The major questions doctrine is especially apt in this case, because—much as in *Brown & Williamson*—“Congress considered and rejected bills” calling for even less-far-reaching schemes. 529 U.S. at 144.

For example, Congress did not enact the American Clean Energy and Security Act, H.R. 2454, 111th Cong. (2009), which would have created a cap-and-trade regime to limit greenhouse gases and imposed renewable energy mandates on retail electricity providers. Congress likewise failed to pass the Save Our Climate Act, H.R. 3242, 112th Cong. (2011), which would have imposed an excise tax based on the amount of carbon dioxide produced by burning fossil fuels. Nor

did Congress adopt the American Renewable Energy and Efficiency Act, H.R. 5301, 113th Cong. (2014), which sought to cut emissions by imposing a complex renewable energy credit scheme on retail electricity suppliers. *See* JA.221 n.19 (Walker, J., dissenting). No matter: Per the decision below, the EPA can do all of this and more—unilaterally.

That historical evidence proves that at least one of the two theoretical grounds for the major questions doctrine is at play here. Perhaps Congress’s rejection of these bills means they do not command legislative support, bolstering the presumption that Congress did not intend to delegate the matter to the EPA. *Accord* S.J. Res. 24, 114th Cong. (2015) (disapproving of CPP). Or perhaps Congress did not enact these bills because they are politically toxic, and prefers to sit back and let an agency impose these policies by fiat. *Cf. Gundy*, 139 S. Ct. at 2135 (Gorsuch, J., dissenting) (noting that legislators often “face rational incentives to pass problems to the executive branch”). The latter is, of course, exactly why the non-delegation doctrine is so important and in need of protection.

3. The D.C. Circuit tried to dodge the major questions doctrine by minimizing its scope in general and the significance of the court’s interpretation of § 7411 in particular. Neither maneuver works.

*First*, the court claimed the doctrine does not apply because the EPA has authority to regulate greenhouse gases as “air pollutants” under the Clean Air Act, and *had to* address them once it found that they “pose[] [a threat] to human health and welfare.” JA137–38. Because “each critical element of the Agency’s regulatory authority on this very subject has long been

recognized,” the major questions canon supposedly did not apply. JA.136. The court distinguished this Court’s precedents by observing that they involved only “*whether* the agency had authority to regulate” or “*whom* the EPA was attempting to regulate,” not *how*. JA.138, 140 (emphasis added).

But there is no principled distinction between *whether* and *whom*, on the one hand, and *how* on the other. To the contrary, it is precisely because the EPA *does* have authority over all greenhouse-gas sources that “how” becomes the critical constraint on agency power. All the justifications for the major questions doctrine apply just as forcefully to this inquiry.

Nor has this Court applied the doctrine as inflexibly as the panel suggested. In *UARG*, there was no doubt the EPA had authority over “any air pollutant” and “the Act require[d] permits for major emitters.” 573 U.S. at 316. Yet the Court still reasoned that Congress must “speak [more] clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *Id.* at 323–24. In *King*, Congress had expressly empowered Treasury to adopt regulations for health-insurance subsidies, 26 U.S.C. § 36B(h)(1), yet the Court nonetheless held that Congress would not have implicitly “assign[ed]” to the agency the specific question at hand, bearing on “billions of dollars” of subsidies and “affecting the price of health insurance for millions of people.” 576 U.S. at 485–86. And in *Alabama Association*, the CDC’s power to adopt some “measures ... preventing the interstate spread of disease” did not empower it “to take whatever measures it deems necessary.” 141 S. Ct. at 2488. That the agency has *some* power relating to the subject matter is only the beginning of the story.

So too here. The EPA surely has many significant roles to play in protecting the environment in general and regulating carbon emissions in particular. Still, Congress would not have silently given the agency the power to so radically restructure American life in doing so. The source-specific reading embraced in the ACE Rule respects that need for a limiting principle, but the D.C. Circuit's interpretation flouts it.

*Second*, the D.C. Circuit tried to downplay the significance of its interpretation by citing supposed limits on the EPA's power. Specifically, the EPA must "take into account such factors as available technology and the cost of compliance." JA.139 (citing 42 U.S.C. § 7411(a)(1)). But these supposed constraints are illusory for a host of reasons.

To start, it takes considerable chutzpah for the D.C. Circuit to suggest that taking "available technology" into account can serve as a brake on the EPA's power. *In this very case*, that court held that the "best system" under § 7411(d) *need not* be limited to technology that can be implemented at and applied to existing sources. *See* JA.120 (contrasting § 7411(d) with 42 U.S.C. § 7651f(b)(2), which refers to "taking into account available technology").

Cost fares no better as a limiting principle. Per the EPA itself, the CPP was projected to "cost billions of dollars and eliminate thousands of jobs." JA.226 (Walker, J., dissenting). Those massive figures were neither a deterrent to the agency nor a successful basis for judicial review. In fact, the panel scoffed at the billion-dollar cost, calling it "not atypical for Clean Air Act rulemakings." JA.149.

The D.C. Circuit’s attempt to rely on technology and cost as limiting principles—like its reliance on the EPA’s duty to consider “health,” “environmental impacts,” and “energy requirements,” JA.139—also suffers from a more fundamental flaw. These are competing factors that must be balanced. And when an agency engages in “value-laden decisionmaking and the weighing of incommensurables under conditions of uncertainty,” courts are reluctant to engage in “second-guessing” of its “weighing of risks and benefits.” *Dep’t of Com. v. New York*, 139 S. Ct. 2551, 2571 (2019). Under the D.C. Circuit’s approach, then, the EPA could get away with virtually anything it wants to do as part of its control over our emissions-based economy. It is hard to imagine a court vacating a regulation on the ground that its compliance costs outweigh the dangers of climate change, particularly when many believe the latter portends “catastrophic, civilization-ending consequences.” Al Gore, Opinion, *The Climate Crisis Is the Battle of Our Time, and We Can Win*, N.Y. TIMES (Sept. 20, 2019).

*Third*, casting a true red herring, the D.C. Circuit reasoned that, “[o]nce the EPA identifies a best system that meets [the statute’s requirements] and calculates the degree of emission limitation it allows,” states may “set their own standards of performance for their existing pollution sources.” JA.143; *see also id.* (noting that states have “discretion in achieving” the EPA’s “emission limitations”). The court apparently thought that, because of that limited state role in translating the EPA’s guidelines into standards of performance for particular sources, the statutory dispute here does not “entail[] resolution of a major question.” JA.144.

That is disingenuous. It is true that, after the EPA adopts “emission guideline[s] that reflect[] the ... best system of emission reduction,” 40 C.F.R. § 60.22, it is the states that set standards of performance based on those reduction figures, 42 U.S.C. § 7411(d)(1); *see also id.* § 7411(d)(2) (authorizing the EPA to impose a plan if a state fails to do so). But the fact that EPA policies are effectuated through state-adopted standards does not minimize the significance of the agency’s power. The EPA-selected “best system” dictates the degree of reductions the state must satisfy; those measures are baked in. That is why no one disputes, for example, that the performance rates for coal and gas plants under the CPP were so stringent that, as a practical matter, they could *only* be satisfied through reducing production, subsidizing renewable energy in exchange for credits, or shutting down. JA.771–72. Given how they could force states to transform their grids, calling these mere “guidelines” is a misnomer. In effect, they are mandates.

*Last* (and least), the D.C. Circuit highlighted *self-imposed* limits on the EPA’s power. According to the court, the EPA “tied its own hands” by requiring that the best system “reduce emissions” rather than “captur[e]” them after release, and (in the final rule, as opposed to the proposal) by “target[ing] supply-side activities” in lieu of seeking to influence consumer demand. JA.143 n.9; *see also* JA.327 (noting that final rule omitted proposed fourth building block targeting demand-side). In a similar vein, respondents argued in opposing certiorari that the D.C. Circuit’s decision does not *mandate* the CPP’s broad reading of the statute, but merely makes it *available* to the EPA. SG.BIO.19; States.BIO.23; Power.BIO.15.

To all of this, the response is the same: So what? Congress must “speak clearly if it wishes to assign to an agency decisions of vast ‘economic and political significance.’” *UARG*, 573 U.S. at 324. Whether *the agency* has (yet) chosen to press the limits of its supposed power is beside the point; what matters is whether *Congress* clearly conferred that authority in the first place. Just as an agency cannot “cure an unconstitutionally standardless delegation of power by declining to exercise some of that power,” *Whitman*, 531 U.S. at 473, it cannot evade the major questions doctrine by promising to decide major questions responsibly. And that is especially true here, where the agency has studiously declined to say just what it plans to do with its enormous powers—other than to ominously suggest that it “looks to craft” even more “aggressive rule[s] to curb climate pollution from the power sector.” Maxine Joselow & Niina H. Farah, *Will the Supreme Court Take on EPA’s Climate Rule?*, E&E News (Aug. 10, 2021); *see also* The White House, *Executive Order on Tackling the Climate Crisis at Home and Abroad* (Jan. 27, 2021) (proclaiming that the world faces “a profound climate crisis,” with only a “narrow moment to pursue action at home and abroad in order to avoid the most catastrophic impacts”).

\* \* \*

The D.C. Circuit empowered the EPA not only to tweak the operations of existing emission sources, but to radically restructure the country’s power supply—and American life more generally. But in the absence of a clear delegation, critical questions about how to regulate greenhouse gases on a systemic, national level must be returned for decisionmaking to where they constitutionally reside: the U.S. Congress.

## II. TEXT, STRUCTURE, AND HISTORY FORECLOSE THE D.C. CIRCUIT’S INTERPRETATION.

Major questions aside, § 7411 cannot bear the D.C. Circuit’s boundless interpretation. Courts exhaust all “traditional tools” of statutory construction before concluding that ambiguity exists. *Chevron*, 467 U.S. at 843 n.9. Even on its face, the text of the statute here makes clear in multiple ways that the standards of performance for existing sources must be *applicable to* and *achievable by* such a source, not notional targets that are reverse-engineered from a bureaucrat’s system-wide rejiggering of an industry. The Clean Air Act’s structure and history drive that conclusion home. For this reason too, this Court must reverse.

### A. The Statutory Text Requires the EPA to Base Its Standards on Limits Applicable to and Achievable by Existing Sources.

Whether read in isolation or with the aid of statutory definitions, nothing about § 7411(d) confers extraordinary authority on the EPA to restructure every carbon-emitting industry in the country. To the contrary, the statute presupposes that the standards of performance for each existing source will be targets that each source itself can actually hope to “perform” (while continuing to “exist”).

1. Starting with the text of § 7411(d), four features showcase the source-specific focus and design of the statutory scheme.

*First*, the text requires performance standards “for any existing *source*,” in the singular. That language describes standards that operate at the level of an individual source. Had Congress wanted standards to operate across multiple sources or entire categories of

sources, it could have said that. Indeed, Congress could have used the phrase “category of sources,” which it deployed elsewhere in § 7411, to show that standards should be derived from, applied to, and achievable by the category of sources in the aggregate. See 42 U.S.C. § 7411(b)(1), (f)(1), (f)(2)(C); cf. *Romag Fasteners, Inc. v. Fossil, Inc.*, 140 S. Ct. 1492, 1495 (2020) (refusing to “read into statutes words that aren’t there,” especially “when Congress ... included the term in question elsewhere in the very same statutory provision”).

*Second*, Congress also expressly provided that the standards are “for” the “existing source”—*not* “for” the “owner or operator” of the source, which is a separate defined term. See 42 U.S.C. § 7411(a)(5) (defining “owner or operator” as “any person who owns, leases, operates, controls, or supervises a stationary source”). Had Congress wanted to authorize generation shifting or emission-credit trading, it would have been more natural to regulate *owners or operators* (who can comply by buying credits or building new plants), as opposed to *sources* (which are physical structures). Buildings, unlike their proprietors, are not in the habit of investing in wind farms or trading “credits” through commercial transactions. Indeed, the EPA confessed to this misalignment of terms, when it admitted in the CPP that its guidelines were based on systems that must be “implemented—‘applied’— ... as a practical matter, by actions taken by the owners or operators.” JA.543 (brackets omitted); see also JA.594–95 (explaining that source “owner/operator” can “invest” in renewable sources or “purchase” the “CO<sub>2</sub>-reducing” credits to comply with the standards). That is a poor fit with the statutory language.

*Third*, § 7411(d) refers to an “*existing* source.” That terminology presupposes that the source will *continue to exist* and operate, and thus is inconsistent with an interpretation of the scheme that allows the agency to effectively direct the closure of the source. Devising a standard based on shifting the source’s generation elsewhere, thereby rendering it obsolete, defeats the purpose of separately regulating “existing” sources as such. Indeed, it is implausible that Congress meant for the EPA to exercise *more* rigorous control over existing sources, which engender reliance interests, than new ones. Yet that is the strange consequence of the D.C. Circuit’s construction. *See* JA.122 (reasoning that new sources can be regulated through technology mandates but EPA maintains “wider range of ways to reduce emissions” from “existing sources”); *infra* at 46.

*Finally*, in a similar vein, Congress used the phrase “standard of *performance*,” which implies that the existing source can, in fact, “perform” to the standard. But no such performance at the source-level is needed or even contemplated under the D.C. Circuit’s reading. A source that diminishes its capacity or shuts down is not “performing” anything. Nor is an existing source “performing” to a standard, in any ordinary sense of the word, when its owner invests in renewable energy to acquire rate credits. So here, too, § 7411(d)’s scope is properly read as limited to measures “perform[able]” *by a source*, on its own terms and within its own fence-line. To be sure, “standard of performance” is itself a defined term, as discussed below, but the term itself retains meaning. *See Solid Waste Agency*, 531 U.S. at 171–72 (although defined by the statute, “navigable waters” retains meaning).

2. Digging deeper, the statutory definitions of the various phrases in § 7411(d) confirm that the EPA's authority is limited to defining emissions standards achievable by a given source through modifications to that source's own technology or operations.

To start, take the statutory definition of "source" and insert that into the operative provision, § 7411(d). That yields the following: The EPA must prescribe regulations to establish a "standard[] of performance for any existing [building, structure, facility, or installation]." 42 U.S.C. § 7411(a)(2), (3), (6), (d). That only underscores the individualized nature of what is being regulated: the unitary source. The standard of performance is not "for" an industry, or a category of buildings, or a pollutant, or even, as noted above, "for" owners and operators. It is "for" an existing "building, structure, facility, or installation." That indicates a standard that can be applied to, and achieved by, any particular structure or facility.

And that indication is bolstered by the definition of "standard of performance," even though it is the latter definition upon which the D.C. Circuit heavily relied for its open-ended account of the EPA's authority. A "standard of performance" is one "which reflects the degree of emission limitation achievable through the application of the best system of emission reduction." *Id.* § 7411(a)(1). Substituting in that defined term, layered onto the above definition of "source," the full provision thus directs "*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 for any building, structure, facility, or installation.*"

The definition of “standard of performance,” which in isolation lacks a referent, fits into § 7411(d) like a glove. With the full benefit of the defined phrases, the statute makes clear that the “best system of emission reduction”—the benchmark from which the EPA must derive its guidelines—is “for” a given “building.” That is, the standards of performance must reflect the best system of emission reduction *for any existing building*, based on what is “achievable” *for that source*. There is no way to read this language as allowing guidelines based on category-wide credit trading or generation shifting, which are not the “best system” of emission reduction “for” any “existing source” but are instead higher-order policies that operate above the source level and outside the source boundaries. Far from burnishing the D.C. Circuit’s reading, the definitional provisions destroy it.

3. The D.C. Circuit offered two textual grounds for its contrary reading. Neither holds up.

a. The lower court’s key move was to assert that the definition of “standard of performance”—which it believed was “the root of the EPA’s authority”—was not constrained by “the source-specific language” of § 7411(d). JA.106. From that premise, the court concluded that the phrase “best system of emission reduction” was so broad that it allowed a “standard of performance” to be derived from a macro-analysis of an entire industry, an aggregate national “system.” JA.108–10. Thus, so long as the EPA considered “cost, any nonair quality health and environmental impacts, and energy requirements,” the D.C. Circuit believed there were “no limits” on the “measures” the agency could treat as the “best system” of emission reduction under § 7411(a)(1). JA.108.

The problem is that reading a definitional provision in isolation as a grant of authority makes no sense—not as a general matter, and certainly not here. Again, § 7411(a)(1) defines a “standard of performance” as one “which reflects the degree of emission limitation achievable through the application of the best system of emission reduction.” Looking at those words alone raises more questions than answers: The degree of emission reduction must be “achievable” *by what?* The best system of emission reduction must be “appli[ed]” *to whom?* Without a referent, these phrases have no meaning. *Cf. Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 368 (2018) (rejecting argument that “statutory definition of critical habitat is complete in itself,” because that definition “tells us what makes habitat ‘critical,’ not what makes it ‘habitat’”).

As explained, plugging the statutory definition into § 7411(d) reveals the necessary referent: the “source.” The degree of emission limitation that is baked into the standard must be “achievable” by *the source*. The best system of emission reduction must be “appli[ed]” to *the source*. And those reductions are contemplated “for” *the source*. Section 7411(d) focuses on the source as the object of regulation, and § 7411(a)’s definitions necessarily adopt that focus when they are imported into that operative provision.

Even if the definition in the abstract could support the D.C. Circuit’s reading, when a statutorily defined term appears in the Clean Air Act’s “operative provisions,” this Court has held that it must often be “given” a “narrower, context-appropriate meaning.” *UARG*, 573 U.S. at 316; *see id.* at 320 (defined term “‘may take on distinct characters from association with distinct statutory objects’”). And that approach

is “particularly” warranted if there is any “dissonance” between “the ordinary meaning of a defined term” and “the reach of the definition.” *Bond v. United States*, 572 U.S. 844, 861 (2014). That cautionary note applies here, as there is no way to read the phrase “standard of *performance*” for a source to include shutting down that source or compelling it to subsidize others.

Even the EPA never maintained that § 7411(a)(1) gives it freestanding power unbounded by § 7411(d)’s source-specific language. To the contrary, the agency acknowledged in the CPP that any “system” required by its standards of performance “must be limited to measures that can be implemented—‘applied’—by the sources themselves.” JA.543 (brackets omitted); *see* JA.737 (“When read in context, the phrase ‘system of emission reduction’” requires that the systems be “implementable by the sources themselves”). To circumvent this problem, the EPA equated “the sources themselves” with “actions taken by the owners or operators of the sources,” JA.543, and reasoned that even offsite activities or commercial investments by owners can qualify as measures taken by the sources, JA.729–30. As explained, all of that is indefensible in its own right. *See supra* Part II.A.1. But at no point did the agency go so far as the panel did, to dispense with § 7411(d)’s “source-specific language” entirely.

**b.** When the D.C. Circuit finally got around to the operative provision here, it seized on the word “for,” asserting that “a system of emission reduction ‘for’ a source just means that the system is ... ‘concerning’ the source,” which would permit “a broader array” of industry-wide measures, even if they are unachievable by the source on its own. JA.117.

Given this preposition’s “numerous definitions,” the meaning of “the word ‘for’” “cannot be determined in isolation, but must be drawn from the context in which it is used.” *Textron Lycoming Reciprocating Engine Div., Avco Corp. v. Auto. Workers*, 523 U.S. 653, 656–57 (1998). Here, context makes clear that a “standard of performance” “for” any “existing source” cannot be one that the source cannot hope to satisfy. *See supra* at 35. That would be like saying an educational plan “for” a disabled student could be one that presumes the student will drop out. Semantically possible, perhaps, but at war with the context.

The D.C. Circuit’s preposition games become even less persuasive when the rest of § 7411 is examined. The panel contrasted the word “to,” which it conceded “tend[s] to connote direct physical proximity or contact” and thus offers the “critical” “physical on-site connotation” it found absent from “for.” JA.117. Yet, in fact, § 7411(d) uses the preposition “to” as well. It directs the EPA to permit states, “in applying a standard of performance *to* any particular source,” to account for “the remaining useful life of the existing source *to* which such standard applies.” 42 U.S.C. § 7411(d)(1) (emphases added). That presumes that any standard will be “applie[d]” “to” a specific source. Likewise, § 7411(d) applies only if “a standard of performance ... would apply if such existing source were a new source,” and new sources are governed by performance standards “applicable *to*” those facilities. *Id.* § 7411(d)(1), (a)(2) (emphasis added). Finally, the very next subsection prohibits owners from operating sources in violation of any standard “applicable *to* such source.” *Id.* § 7411(e) (emphasis added). The panel, however, never mentioned any of these phrases.

### **B. The Statutory Structure Confirms the Limited Scope of the EPA’s Authority.**

Context and structure confirm the plain reading of § 7411. Construing that provision to allow the EPA to decide which type of sources live or die “would be inconsistent with—in fact, would overthrow—the Act’s structure and design.” *UARG*, 573 U.S. at 321.

1. For starters, § 7411 is bifurcated into two distinct schemes—the primary one for *new* sources, and an ancillary one for certain *existing* sources. Congress was aware that existing sources implicate reliance interests and therefore must be approached differently from new sources. So, while § 7411(d)’s “cooperative federalism” approach gives the states the first crack at setting standards for existing sources, § 7411(b) cuts them out of the picture when it comes to new ones. Moreover, § 7411(d)(1) allows state plans to account for “the remaining useful life of the existing source.” And the EPA has long understood that in considering “the cost of achieving” emissions reductions, reliance interests make existing sources different. *See State Plans for the Control of Certain Pollutants From Existing Facilities*, 40 Fed. Reg. 53,340, 53,344 (Nov. 17, 1975) (explaining that cost considerations are “inherently different” for existing sources, as “physical limitations may make installation of particular control systems impossible or unreasonably expensive”).

But this division makes sense only if the existing sources *continue to exist*. Congress’s decision to single out “existing” sources for distinct regulation—and allow states to account for “the remaining useful life” of each one—implies that Congress presupposed their continued existence. It was authorizing the agency to

ensure that they would operate as efficiently as practicable—not to shut them down if it saw fit. Nothing in § 7411 suggests Congress wanted the builder of a power plant to spend a fortune complying with the EPA’s stringent standards for new sources, only to see that plant shuttered when the agency later decides to weigh the balance differently.

Had Congress intended to grant the EPA the authority to restructure industries, ban sources, favor others, and generally pick and choose *which* sources would continue operating, there would have been no reason to distinguish new from existing sources—all would be subsumed by the agency’s far-reaching authority to develop whatever “best system” it saw fit for reducing emissions on a national level. The panel’s interpretation therefore assumes that Congress not only hid an elephant in a mousehole, it then unleashed it to trample down the rest of the statutory scheme.

2. Moving beyond § 7411 to the Clean Air Act more generally, Congress’s other statutory programs also undermine any reading that would grant the EPA power to institute industry-wide “systems” like cap-and-trade regimes. Congress *did* confer that authority elsewhere—using very different language.

For instance, in Title IV, 42 U.S.C. §§ 7651–7651o, and Title VI, 42 U.S.C. §§ 7671–7671q, of the Clean Air Act, Congress specifically provided for the sort of detailed, industry-wide systems that the CPP tried to impose on power plants. Title IV (aimed at acid rain) sets emission caps for new and existing power plants (the same sources at issue here), and establishes a trading program for credits. See *Indianapolis Power & Light Co. v. EPA*, 58 F.3d 643, 644 (D.C. Cir. 1995).

Title VI directed the EPA to phase out certain ozone-depleting substances nationally. *See Mexichem Fluor, Inc. v. EPA*, 866 F.3d 451, 454 (D.C. Cir. 2017).

The CPP invoked those programs (JA.772–81), but they contrast rather than compare with § 7411, which says nothing about cap-and-trade or phasing out any energy source. The CPP’s reliance on § 7411(d) is thus “especially questionable here, given that Congress has used express language in other” parts of the Act to grant the EPA the type of authority it believed it had uncovered there. *U.S. Forest Serv. v. Cowpasture River Pres. Ass’n*, 140 S. Ct. 1837, 1850 (2020).

3. The D.C. Circuit said not a word about these structural inconsistencies with its interpretation of § 7411. Instead, it contrasted the phrase “best system of emission reduction” with “more specific categories of emission-reduction tools” in other provisions of the Clean Air Act, like one that directs the EPA to require “the ‘best available *retrofit technology*.’” JA.120. The court inferred that § 7411(d) is broader.

That contrast is misplaced, as nobody contends that § 7411(d) limits the EPA to *technological* solutions. In fact, even the ACE Rule recognized that standards under § 7411(d) could include other “techniques” and “practices,” such as “training” programs. JA.1755–56 & nn.61–62, JA.1822. The problem with the CPP was not that it permitted an expansive set of “emission-reduction tools,” JA.120, but rather that these “tools” embraced industry-wide regimes, offsite activities, and commercial arrangements that were not achievable by an existing source in any meaningful sense. That scope is inconsistent with both the text and the structure of the statutory provision.

### **C. The History of § 7411(d) Supports the Narrower, Source-Specific Reading.**

Finally, it is worth observing that the interpretation proffered by the D.C. Circuit finds no support in the EPA's actual practices over the first 40 years of the statute's existence. To the contrary, before the CPP, the EPA's sparse invocations of § 7411(d) reflected the intuitive, source-specific understanding. That is yet another strike against the decision below, for "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate 'a significant portion of the American economy,'" courts "typically greet its announcement with a measure of skepticism." *UARG*, 573 U.S. at 324; *see also Ala. Ass'n*, 141 S. Ct. at 2489 (rejecting CDC's "claim of expansive authority" to issue an eviction moratorium based in part on its "unprecedented" nature).

1. From § 7411's enactment in 1970 until 2015, "no regulation premised on it ha[d] even begun to approach the size or scope" of the CPP, *Ala. Ass'n*, 141 S. Ct. at 2489, much less the bestiary of unbounded climate-change measures permitted by the novel interpretation blessed below.

In the ACE Rule, the EPA identified six pre-CPP rulemakings under § 7411(d), most of which date from the Carter administration. JA.1756 & n.63. The first set fluoride emissions guidelines for phosphate fertilizer plants based on controls that could be "install[ed] ... in existing facilities"—namely, "spray-crossflow packed bed (SCPB) scrubbers." Phosphate Fertilizer Plants, Final Guideline Document Availability, 42 Fed. Reg. 12,022, 12,022 (Mar. 1, 1977). The EPA followed that up with sulfuric acid

mist guidelines, likewise derived from “equipment” that could be “installed” at the relevant sources. Emission Guideline for Sulfuric Acid Mist, 42 Fed. Reg. 55,796, 55,797 (Oct. 18, 1977). The agency’s third § 7411(d) rule similarly relied on technologies that could “be purchased and installed” at kraft pulp mills, also to reduce sulfur emissions—such as “evaporator systems” or “straight recovery furnace systems.” Kraft Pulp Mills; Final Guideline Document; Availability, 44 Fed. Reg. 29,828, 29,829 (May 22, 1979). The EPA then issued fluoride emissions guidelines for aluminum plants, also derived from “recommended control technologies” that could be “applied as new retrofits to existing plants,” including “dry scrubbers” or “reduction cell hooding.” Primary Aluminum Plants; Availability of Final Guideline Document, 45 Fed. Reg. 26,294, 26,294 (Apr. 17, 1980).

Section 7411(d) then lay dormant until 1996, when the EPA dusted off this provision to issue emission guidelines for municipal solid waste landfills based on a “well-designed and well-operated gas collection system” along with “a control device capable of reducing” certain emissions “in the collected gas by 98 weight-percent.” Standards of Performance for New Stationary Sources and Guidelines for Control of Existing Sources: Municipal Solid Waste Landfills, 61 Fed. Reg. 9905, 9907 (Mar. 12, 1996). Last, the agency in 2005 promulgated the Clean Air Mercury Rule, which set mercury emissions guidelines for coal-fired plants “based on control technology available in the relevant timeframe.” Standards of Performance for New and Existing Stationary Sources: Electric Utility Steam Generating Units, 70 Fed. Reg. 28,606, 28,617 (May 18, 2005).

As these descriptions reflect, none of these six rules imposed standards that were unachievable by an existing source itself. JA.1758. Those decades of consistent understanding are telling.

The EPA has also issued around 70 “standards of performance” for *new* sources under § 7411(b)—which uses the same “best system of emission reduction” definition—and each one of them directly applied to individual sources as well. *See* JA.1756–57. Indeed, the CPP’s parallel regulation for new plants called a generation-shifting scheme “inappropriate for new sources.” 80 Fed. Reg. at 64,627. The absence of any system-wide approach in the EPA’s many dozens of “standards of performance” for new sources confirms again that no such power was ever conferred.

2. Starting with the latter point, the D.C. Circuit dismissed standards under § 7411(b) as “irrelevant” on the theory that while source-based standards may provide “the best systems for new sources,” the best “systems for reducing emissions from existing power plants” could involve “shift[ing] generation away from” disfavored ones. JA.128. But that analysis turns § 7411 on its head: Congress sought to protect existing sources from the *more* stringent requirements that would apply to new constructions. *See supra* at 41–42. Nor is there any reason why the “best system,” on the D.C. Circuit’s sweeping understanding of that phrase (which governs both new and existing sources), would exclude *a prohibition on building* new sources. The EPA’s refusal to take such action in a sphere where it has *more* leeway is powerful reason to be skeptical of its authority here. And its adoption of standards that are more demanding for existing plants than new ones is a surefire signal that something is off.

Turning to § 7411(d) itself, the D.C. Circuit invoked three prior EPA actions that it believed supported its expansive reading. One was the “Clean Power Plan” itself, JA.129, which did rest on the broad reading—but which this Court found so dubious as to stay pending review. That is *anti*-precedent.

The two other instances were the Clean Air Mercury Rule, and a Municipal Waste Combustors Rule that drew on both § 7411(d) and the EPA’s waste-management authority under 42 U.S.C. § 7429 (and is therefore not included in the list of exclusive § 7411(d) rules above). *See* Standards of Performance for New Stationary Sources and Emissions Guidelines for Existing Sources: Municipal Waste Combustors, 60 Fed. Reg. 65,387 (Dec. 19, 1995). Neither adopted or supports the lower court’s interpretation.

Both rules *allowed* states to use emissions-trading in their compliance plans. JA.126. But neither involved emission guidelines that were *derived from* such programs. Rather, the agency based its analysis on traditional source-focused controls, and merely authorized states to meet those targets using a “voluntary cap-and-trade program” if they preferred. *New Jersey v. EPA*, 517 F.3d 574, 577 (D.C. Cir. 2008) (mercury); *see also* Municipal Waste Combustors Rule, 60 Fed. Reg. at 65,390 (describing guidelines as “based on maximum achievable control technology” and noting they will require plants to “purchase and install ... equipment”). Indeed, in the Clean Air Mercury Rule, the EPA based its caps on the premise that “the technology needed to achieve the chosen cap level” would be “widely available” in time for compliance. 70 Fed. Reg. at 28,620. The trading regime for emission allowances served only to provide

flexibility to comply “with the least cost,” and states were thus “not required” to create those programs. *Id.* at 28,619. That presumably is why the agency there acknowledged that even if § 7411 “prohibited an emissions cap and allowance trading program,” the “technologies on which EPA has based its cap calculations are consistent with and permitted by” this provision. *Id.* at 28,620 n.5. *Accord* JA.1758 n.65 (so understanding the Clean Air Mercury Rule).

That is a far cry from the interpretation below, under which the EPA can derive binding guidelines by assuming targets that existing sources cannot achieve. In other words, the problem is not *allowing* states to engage in emissions-trading or the like; the problem is effectively *compelling* them to do so by baking those measures into the EPA guidelines as components of the best system of emission reduction.

In any event, of course, “[p]ast practice does not, by itself, create power.” *Medellín v. Texas*, 552 U.S. 491, 532 (2008). And these two rules should be the last candidates for some theory of “power through adverse possession,” *NLRB v. Noel Canning*, 573 U.S. 513, 613 (2014) (Scalia, J., concurring in the judgment)—as one appears never to have been subjected to judicial review, and the other did not survive it. *See id.* at 613–14 (explaining that such a theory would require “an ambiguous text” and “a *consistent* and *unchallenged* practice over a long period of time”); *New Jersey*, 517 F.3d at 583–84 (vacating Clean Air Mercury Rule on other grounds). Indeed, the first time this theory of agency authority was presented to this Court, the Court stayed the agency’s action—history the decision below left unmentioned. So even if the CPP were not the first of its kind, it should be the last.

**CONCLUSION**

This Court should reverse the judgment below and remand for reinstatement of the ACE Rule's repeal of the CPP.

DECEMBER 2021

Respectfully submitted,

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