

No. 20-1530 (Consolidated Case
Nos. 20-1531, 20-1780, 20-1778)

In the Supreme Court of the United States

STATE OF NORTH DAKOTA
Petitioner,

v.

UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY, ET AL.,
Respondents.

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

**MOTION OF PETITIONER NORTH DAKOTA
FOR DIVIDED ARGUMENT AND
ENLARGEMENT OF ARGUMENT TIME**

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Pursuant to Rules 21, 28.3, and 28.4 of this Court, Petitioner State of North Dakota moves for an allocation of ten (10) minutes of Petitioners' total argument time and for an enlargement of argument time by ten (10) minutes in combined Case No. 20-1530 (Combined with Case Nos. 20-1531; 20-1778; and 20-1780). This division and enlargement of argument time will ensure that the Court receives the benefit of and has a full opportunity to consider and explore the distinct question and argument presented solely by North Dakota's petition and merits briefing. Because North Dakota's argument is distinct and unique from the other three Petitioners, requiring one attorney to represent all Petitioners in a single oral argument would prejudice Petitioner North Dakota and could lead to unnecessary confusion.

North Dakota conferred with the other three Petitioners on a division of oral argument time and was unable to reach a consensus agreement on North Dakota's role in oral argument. North Dakota can represent that Petitioner West Virginia et al. (Case No 20-1530) ("West Virginia et al. Petitioners"), Petitioner the North American Coal Corporation (Case No. 20-1531) ("Petitioner NACCO"), and Petitioner Westmoreland Mining Holdings LLC (Case Nos. 20-1778) ("Petitioner Westmoreland") (collectively "Industry Petitioners") indicated they do not oppose the relief requested in North Dakota's Motion. Federal Respondents, the State and Municipal Respondents,

the Non-Governmental Organization and Trade Association Respondents, and the Power Company Respondents indicated they do not oppose North Dakota's Motion, as long as the Court gives argument time to as many counsel for Respondents as for Petitioners.

In support of granting North Dakota ten minutes of argument time and enlarging argument by ten minutes, Petitioner North Dakota states:

1. These cases present challenges to the United States Court of Appeals for the D.C. Circuit's judgment entered on January 19, 2021 (JA.53-255), which is reported at 985 F.3d 914. The D.C. Circuit's judgement invalidated the *Repeal of the Clean Power Plan; Emissions Guidelines for Greenhouse Gas Emissions From Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520 (July 8, 2019) (the "ACE Rule"), JA.1729-2030, which repealed the regulations entitled *Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662 (Oct. 23, 2015) (the "Clean Power Plan" or "CPP"), JA.867-1669, and replaced the CPP with new regulations in the ACE Rule.

2. North Dakota advances a distinct question for review and legal arguments related thereto such that the Court would benefit from North Dakota participating in

oral argument. Specifically, North Dakota is the sole Petitioner whose question presented focuses only on the States' authority and rights under the unambiguous provisions of Section 111(d) of the Clean Air Act ("CAA"), 42 U.S. Code § 7411(d), questioning whether EPA can promulgate regulations for existing sources that "deprive States of all implementation and decision-making power in creating their Section 111(d) plans." The other three Petitioners' questions presented focus foremost on "major question" doctrine issues, such as whether EPA can: "reshap[e] the nation's electricity grids" (West Virginia et al. Petitioners, Case No. 20-1530); "develop industry-wide systems like cap-and-trade regimes" (Petitioner NACCO, Case No. 20-1531); and "decide such matters of vast economic and political significance as whether and how to restructure the nation's energy system" (Petitioner Westmoreland, Case No. 20-1778).

3. The foundation of North Dakota's question presented and argument is that Section 111(d) is *unambiguous* and mandates that standards of performance for air emissions from power plants are established by the States. This contrasts with the major question doctrine emphasized by the other petitioners, based largely on the argument that the D.C. Circuit incorrectly endorsed massive regulatory over-reach by EPA in the face of statutory *ambiguity*. Compare Petitioner North Dakota Br. at 29-

52 (Arguing that the plain text of the CAA mandates a reversal of the D.C. Circuit’s opinion and a reinstatement of the ACE Rule), *with* West Virginia et al Petitioners Br. at 14-31 (Leading with a discussion of “statutory ambiguity” in the context of the major questions doctrine); Petitioner NACCO Br. at 16-33 (Leading with a discussion of statutory ambiguity in the context of the major questions doctrine, and only arguing Section 111(d) is unambiguous in the alternative.); Petitioner Westmoreland Br. at 20-41 (Leading with a major questions doctrine discussion and discussing questions of vast economic and political significance).

4. North Dakota’s arguments proceed from the premise that CAA section 111(d) is *unambiguous* in granting states the right to set standards of performance for existing sources, whereas the other three Petitioners’ “major question” oriented arguments necessarily presume that the CAA is *ambiguous*. *Compare Chevron v. N.R.D.C.*, 467 U.S. 837, 842-843 (1984) (“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”) *with Gundy v. United States*, 139 S. Ct. 2116, 2141 (2019) (“Under our precedents, an agency can fill in statutory gaps where ‘statutory circumstances’ indicate that Congress meant to grant it such powers. But we don't follow that rule when the statutory gap concerns a question of deep economic and

political significance that is central to the statutory scheme.”) (internal quotations omitted).

5. Given the differences in the questions presented and arguments by North Dakota and those of the other three Petitioners, the Court would benefit from separate presentations in a divided and enlarged argument. The Court would be aided in resolving this case by granting North Dakota a division of ten (10) minutes of argument time to better explore North Dakota’s distinct and unique argument that the unambiguous language of Section 111(d) of the Clean Air Act compels reversal of the D.C. Circuit’s decision and reinstatement of the ACE Rule. This Court has granted divided argument in consolidated cases where unique arguments pertain to parties on the same side of a case. *E.g.*, *Rosen v. Dai*, 141 S.Ct. 1234 (Jan. 19, 2021) (mem.) (granting divided argument in consolidated cases presenting different evidentiary records in removal proceedings); *Abbott v. Perez*, 138 S. Ct. 1544 (2018) (mem.) (granting divided argument in consolidated cases presenting different claims of racial gerrymandering); *Turner v. United States*, 37 S. Ct. 1248 (2017) (mem.) (granting divided argument in consolidated cases presenting distinct *Brady* claims); *Zigler v. Abbasi*, 137 S. Ct. 615 (2017) (mem.) (granting divided argument in consolidated cases presenting distinct *Bivens* claims); *Kansas v. Gleason*, 135 S. Ct. 2917 (2015) (mem.)

(granting divided argument in consolidated cases presenting different sentencing issues); *David v. Washington*, 546 U.S. 1213 (2006) (mem.) (granting divided argument in consolidated cases presenting distinct Confrontation Clause claims); *Rapanos v. United States* 546 U.S. 1000 (2005) (mem.) (granting divided argument in consolidated cases presenting factually distinct positions concerning application of the Clean Water Act). The Court should do the same here.

6. Further, this case presents complex questions of extraordinary public importance which have garnered the attention of a large group of both Petitioners and Respondents which merits an enlargement of argument time by ten minutes. The Court has granted four separate petitions for certiorari challenging the D.C. Circuit's decision with differing questions presented – including North Dakota's distinct question. At the merits stage, groups representing a broad range of interests have submitted briefs urging this Court to address the D.C. Circuit's decision, all recognizing the importance of the case. Reflecting the complexity and importance of the issues at stake in this matter, oral argument at the D.C. Circuit spanned seven hours. Given the extraordinary public importance of the case, an enlargement of argument time would allow the Court to receive the benefit of not only North Dakota's unique question presented and legal arguments, but all other Petitioners and Respondents.

7. However, if the Court is not inclined to enlarge argument time, North Dakota still requests that it be granted 10 minutes of argument time.

For the foregoing reasons, the participation of the State of North Dakota in oral argument is likely to be of material assistance to the Court. Petitioner North Dakota respectfully requests that the Court grant North Dakota ten (10) minutes of argument time and enlarge argument time by ten (10) minutes.

Respectfully submitted January 18, 2022

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