

In The
Supreme Court of the United States

STATE OF WEST VIRGINIA, et al.,
Petitioners,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

THE NORTH AMERICAN COAL CORPORATION,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

WESTMORELAND MINING HOLDINGS LLC,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

NORTH DAKOTA,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

**On Writs Of Certiorari To The United States Court
Of Appeals For The District Of Columbia Circuit**

**REPLY BRIEF OF RESPONDENT BASIN ELECTRIC
POWER COOPERATIVE IN SUPPORT OF PETITIONERS**

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INTRODUCTION

In granting certiorari, the Court was unpersuaded by petition-stage arguments made by the Environmental Protection Agency (“EPA”) and other Respondents alleging that review is premature and that “[P]etitioners will face no burdens from any Section 7411(d) regulation unless and until EPA promulgates a new rule.” EPA Opp. Br. at 16; *see also* States Opp. Br. at 14-15. Nonetheless, Respondents renew their arguments by claiming none of the Petitioners are entitled to this Court’s review. *E.g.*, EPA Br. at 17-18; NGO Br. at 24-29. But Respondents are mistaken. This Court has jurisdiction for all the reasons described in Petitioners’ respective briefs.

In addition, Respondent in Support of Petitioners Basin Electric Power Cooperative (“Basin Electric”) has standing because it is injured by the D.C. Circuit’s decision to set aside the Affordable Clean Energy Rule (“ACE Rule”) and invalidate EPA’s repeal of the Clean Power Plan (“CPP”). Basin Electric’s injuries will be redressed by reversal of the circuit court’s decision. Therefore, Basin Electric has a “direct stake in the outcome” of this appeal. *Diamond v. Charles*, 476 U.S. 54, 62 (1986); *see also Dir. v. Perini N. River Assocs.*, 459 U.S. 297, 302-05 (1983) (holding a respondent in support’s standing can be sufficient to allow the Court’s consideration of the merits).

Moreover, review by this Court will define the proper scope of EPA’s authority in regulating Basin Electric’s and other utilities’ coal-fired power plants

under Section 111(d), 42 U.S.C. § 7411(d). Those necessary parameters are critical to prevent EPA from *again* exceeding its statutory authority by adopting a rule that unlawfully forces generation shifting. Simply put, shutting down fossil-fuel-fired generation facilities to shift towards cleaner energy sources is not yet a viable option. Even the largest wind projects offer less megawatt capacity than coal- and natural gas-fired sources. And the Nation's three separate transmission grids can't yet support rapid integration of renewable energy. Basin Electric's dispatch priority must still ensure that it can meet customers' growing energy demands, taking into account generation capacity and reliability. Basin Electric, therefore, requires the ability to rely on an all-of-the-above energy strategy. A ruling from this Court that reinstates the ACE Rule will protect Basin Electric's interests in managing its existing fleet to ensure customer demand while transitioning to greater renewable energy generation.

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ARGUMENT

I. THE COURT HAS JURISDICTION TO RESOLVE PETITIONERS' APPEAL.

A. The Court of Appeals' Vacatur of the ACE Rule and CPP Repeal Harms Petitioners and Respondent in Support Basin Electric Power Cooperative.

The CPP imposed myriad irreparable injuries on the Petitioners and Basin Electric, which the Court

recognized when it granted an unprecedented stay of the rule. *West Virginia v. EPA*, 577 U.S. 1126 (2016) (No. 15A773). The ACE Rule remedied those injuries by correcting EPA’s unlawfully broad interpretation of Section 111(d) and defining the best system of emission reduction (“BSER”) for power plants as source-specific measures. JA.89-94.

The D.C. Circuit’s decision not only vacated the relief afforded by the ACE Rule and overturned the repeal of the CPP, JA.213-15, but condoned (and even encouraged) the broad application of unlawful BSER measures imposed by the CPP. JA.108, 115, 118. That EPA has obtained a partial stay of the mandate pending future rulemaking does not eliminate the harms to Petitioners and Basin Electric, or their need for appellate review. This Court’s appellate jurisdiction depends on whether the party seeking review is harmed by the “judgment.” *See ASARCO Inc. v. Kadish*, 490 U.S. 605, 612, 617-18 (1989). The circuit court’s judgment overturning the ACE Rule and reinstating the CPP remains in place. And, going forward, the sheer breadth of its decision unlawfully grants EPA unbounded authority to adopt a rule that (a) requires forced generation shifting as BSER and (b) favors reduced utilization or total shut-down of fossil-fuel-fired electric generation sources—authority that Congress did not grant to EPA. *See State Petitioners’ Br.* at 31-38.

The D.C. Circuit’s decision, therefore, is erroneous and deprives Petitioners and Basin Electric of the protections afforded by the ACE Rule. As such, Petitioners and Basin Electric are harmed by the decision and

have standing to support this Court’s review of the merits. *See Diamond*, 476 U.S. at 62; *Perini N. River Assocs.*, 459 U.S. at 302-05.

B. A Decision By this Court Will Provide Meaningful Relief.

By concluding that Congress imposed “no limits” on EPA’s authority to select BSER for power plants, JA.108, the D.C. Circuit’s decision removed the guardrails as EPA navigates a new rulemaking under Section 111(d). As a result, EPA is embarking on its rulemaking journey anew, with a blessing from the circuit court to adopt a CPP-like rule that regulates greenhouse gas emissions from regulated stationary sources through measures far removed from individual sources themselves.

EPA’s assertion that “the contours of such a rule are uncertain” is unconvincing, particularly where EPA argues—on the same page—that the ACE Rule’s reading of Section 111(d) as allowing only source-specific measures as BSER was “erroneous.” EPA Br. at 11; *see also id.* at 13 (“Section 7411 does not categorically exclude generation shifting as a component of the BSER for existing power plants.”).

Indeed, President Biden’s aggressive climate change agenda, and goals of achieving a 50-52 percent reduction from 2005 levels in economy-wide net greenhouse gas pollution by 2030 and net-zero emissions

economy-wide by 2050,¹ portend the promulgation of a rule even *more aggressive* than the CPP. But an EPA with an aggressive climate agenda that has limitless authority under Section 111(d) threatens the power industry's natural shift towards renewable energy sources.

Currently, Basin Electric and other electricity generating utilities rely on increasingly diverse asset portfolios to generate and dispatch electricity in a reliable and cost-effective manner. *See* Basin Electric Br. at 19-26. And, while it is true that electricity generators, including Basin Electric, dispatch lower cost energy first when meeting customer demands, *see* EPA Br. at 40-41; Power Company Br. at 37; Grid Experts Br. at 15-16, it does not follow that electricity generators will simply choose to underutilize or shut down fossil-fueled energy sources because environmental regulations make them more costly to operate, *see* EPA Br. at 39-40; Power Company Br. at 37-38; Grid Experts Br. at 17-18.

Rather, Basin Electric's dispatch priority must still ensure that it can meet customers' growing energy demands, considering generation capacity and

¹ See The White House, *FACT SHEET: President Biden Sets 2030 Greenhouse Gas Pollution Reduction Target Aimed at Creating Good-Paying Union Jobs and Securing U.S. Leadership on Clean Energy Technologies* (Apr. 22, 2021), <https://www.whitehouse.gov/briefing-room/statements-releases/2021/04/22/fact-sheet-president-biden-sets-2030-greenhouse-gas-pollution-reduction-target-aimed-at-creating-good-paying-union-jobs-and-securing-u-s-leadership-on-clean-energy-technologies/>.

reliability, Basin Electric Br. 22-24, as well as the very limited ability to transfer energy across regional grids, *id.* at 5-10. Shutting down fossil-fuel-fired generation facilities in order to shift towards cleaner energy sources isn't yet an available option. From a reliability perspective, Basin Electric's largest wind projects offer less megawatt capacity than coal- and natural gas-fired resources, *id.* at 23, and even as dispatched, the Nation's transmission grids can't currently support rapid integration of renewable energy as a source of baseload generation, *id.* at 16-19.

In any event, EPA's and other Respondents' arguments that natural generation shifting within the energy markets supports consideration of forced generation shifting as BSER misses the point. *See* EPA Br. at 39-41; Power Company Br. at 37-38; Grid Experts Br. at 20-23. For example, EPA argues that "[e]ven the most conventional emission-reduction measures are likely to have generating-shifting *effects*" and, as a result, Section 111 "does not categorically exclude generation shifting as a component of BSER for existing power plants." *See* EPA Br. at 13 (emphasis supplied). But EPA's conclusion does not logically follow from its premise. Even if certain environmental regulations incidentally lead electricity generators to shift dispatch orders to prioritize least-cost resources, this effect does not empower EPA to implement forced generation shifting under the guise of regulating emissions. The scope of EPA's regulatory authority is necessarily defined by the *text* of Section 111, *see* State Petitioners' Br. at 31-38, not the *effects* of emissions regulations.

A ruling from this Court that reverses the D.C. Circuit's decision, revives the ACE Rule, and defines the proper scope of EPA's authority under Section 111(d) as consistent with the ACE Rule is critical. A new regulation imposing EPA's preferred BSER of forced generation shifting, which is based on a flawed understanding of the Nation's electric grid and how utilities like Basin Electric dispatch energy to meet customer demands, could threaten our country's energy supply and the continued diversification towards renewal energy sources.

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CONCLUSION

The judgment of the D.C. Circuit should be reversed.

Respectfully submitted,

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