No. 20-1531

IN THE

Supreme Court of the United States

THE NORTH AMERICAN COAL CORPORATION,
Petitioner,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY AND MICHAEL REGAN, ADMINISTRATOR OF THE U.S. ENVIRONMENTAL PROTECTION AGENCY,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE D.C. CIRCUIT

BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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BATEMAN & SLADE, INC. STONEHAM, MASSACHUSETTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Regulations, Etc.

Other

INTEREST OF AMICUS CURIAE[1]

The New England Legal Foundation (NELF) is a nonprofit, nonpartisan, public-interest law firm incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England and the nation, protecting the free-enterprise system, and defending individual economic rights and the rights of private property. In fulfillment of its mission, NELF has filed numerous amicus briefs in this Court in a great variety of cases.

NELF appears as an amicus in this case because NELF believes that it presents an issue of singular national importance. As set out in the Petition of the North American Coal Corporation (Pet.), as well as the petition filed by the State of West Virginia and others in No. 20-1530, the decision below sanctions a vast and improper expansion of the power of the Environmental Protection Agency (EPA). The decision, drawing deeply from a well of statutory silence while slighting the plain language of the actual text, goes beyond the Clean Power Plan of 2015, which itself amounted to agency overreach

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[1] Pursuant to Supreme Court Rule 37.6, NELF states that no party or counsel for a party authored this brief in whole or in part and no person or entity, other than NELF, made any monetary contribution to its preparation or submission.

Pursuant to Supreme Court Rule 37.2(a), NELF has given timely 10 day notice to all counsel of record at that time, and obtained the consent of all counsel of record at that time. On May 24, 2021 Petitioner filed a blanket consent to the filing of amicus briefs, and by letter dated May 25, 2021, the Acting Solicitor General granted her consent.

writ large. NELF urges this Court to grant certiorari to correct the circuit court's decision, so that the agency's power may be placed on a sound statutory footing.

NELF has therefore filed this brief to assist the Court in deciding whether to grant certiorari in this important case.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The decision below would recognize agency powers extending far beyond those allotted to EPA by Congress. Those powers would have enormously disruptive effects on the nation's economy and on the allocation of powers between the federal government and the States. The Executive Branch should not be permitted to take shortcuts around Congress.

The decision below permits EPA to use a variety of off-site, non-technological measures to reduce pollution emissions, although those measure are not authorized by statute and are in fact prohibited by statute, as the EPA itself recognized long ago.

REASONS FOR GRANTING THE PETITION

I. The Question Presented Is One Of Urgent National Importance.

The Court should grant certiorari because compelling reasons exist to conclude that Congress did not give EPA the unprecedented powers that EPA claims and that the circuit court majority has in effect ratified. If uncorrected, the decision below will have profound ramifications on the national economy at the regional, industrial, and consumer levels, and will disturb both the federal/state balance

and the constitutional delegation of powers. Delay will only compound the harms. Compliance with the erroneous decision will be enormously costly and disruptive, with much of the cost being paid upfront and unrecoverable if this Court hands down a decision on these important issues only years from now.

In 2015 the White House announced the imminent release of the Clean Power Plan (CPP), which it hailed as an "historic step in the Obama Administration's fight against climate change." Fact Sheet: President Obama to Announce Historic Carbon Pollution Standards for Power Plans (August 3, 2015).[2] The announcement declared that, compared to earlier ways of setting "state targets" for pollution reduction, the CPP "better reflects the way the electricity grid works." *Id.*

The CPP, embodied in 80 Fed. Reg. 64,662 (Oct. 23, 2015), was the fruit of a challenge President Obama had made to the Congress two years earlier.

> [I]f Congress won't act soon to protect future generations [from climate change], I will. . . . I will direct my Cabinet to come up with executive actions we can take, now and in the future, to reduce pollution, prepare our communities for the consequences of climate change, and speed the transition to more sustainable sources of energy.

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[2] Available at https://obamawhitehouse.archives.gov/the-press-office/2015/08/03/fact-sheet-president-obama-announce-historic-carbon-pollution-standards%20 (last accessed May 31, 2021).

Remarks by the President in the State of the Union Address (February 12, 2013).[3]

Apparently, Congress did not "act soon" enough, or perhaps Congress did not have to act at all, for in short order EPA made the discovery that in a modest subsection of a federal statute Congress had long ago delegated to it precisely the power the Executive Branch now wanted.

Only a few years ago this Court wrote of such opportunistic discoveries:

> We are not willing to stand on the dock and wave goodbye as EPA embarks on this multiyear voyage of discovery. We reaffirm the core administrative-law principle that an agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate.

Utility Air Regulatory Group v. E.P.A., 573 U.S. 302, 328 (2014). For the same reason this case is not about "the way the electricity grid works." It is about the way the United States Government works.

As discussed in the Petition at 23-33 and in this brief, *see infra* pp. 6-11, the statute in question (42 U.S.C. §7411) cannot serve EPA as a navigational chart to any point in the compass to which EPA now wishes to journey. The statute lacks entirely the clear language needed to delegate to the agency the broad economic and policy-making powers at stake in this case. Hence, the decision of circuit court

[3] Available at https://obamawhitehouse.archives.gov/the-press-office/2013/02/12/remarks-president-state-union-address (last accessed May 19, 2021).

majority must rely largely on reading the delegation of broad powers into statutory silence, while ignoring key words that delimit and particularize the meaning of the laws as Congress actually wrote them.

Lacking an accurate textual compass, the decision concludes that Congress "always understood" that the "best system of emission reduction," §7411(a)(1), might go beyond the technology used at the sites of the individual emission sources and extend to grid-wide economic regulation. *American Lung Ass'n v. E.P.A.*, 985 F.3d 914, 954 (D.C. Cir. 2021). Nowhere does the circuit court explain why Congress "always" failed, year after year for decades, to provide one syllable of written guidance about how one agency of the federal government was to manage the huge power the circuit court now finds was "always" present in the law. *See*, e.g., The Promise of the Clean Power Plan: A Conversation with Gina McCarthy (Aug. 11, 2015) at 3 (CPP creates "markets that EPA will help manage").[4]

In all that time, we are to believe, no state thought to act through its congressional delegation to protect its unique regional or economic interests in light of these expansive agency powers. *See*, e.g., *American Lung*, 985 F.3d at 998 (noting small states try to block climate change bills inimical to interests) (Walker, J., concurring in part, concurring in judgment in part, and dissenting in part) and Petition in No. 20-1530 at 22 (states petitioning in

[4] Available at https://hbsp.harvard.edu/product/PH8015-PDF-ENG (last accessed May 31, 2021). Gina McCarthy was the head of EPA under President Obama.

companion case to this one). And no industry ever once sought from Congress any limitation on or even clarification of the carte blanche that is §7411 as the circuit court essentially conceives it. *See* Pet. at 13 (under a plan like CPP "the EPA can pick and choose the sources it prefers—and essentially regulate the rest out of existence"). As everywhere else in its decision, the circuit court appears entirely comfortable with this kind of legislative silence too. This Court should not be.

II. The Decision Of The Circuit Court Is Wrong.[5]

The circuit court decided that the words "best system of emission reduction" allow EPA to make generation shifting, for example, an "element" of any such "system," *see* 80 Fed. Reg. at 64,745 ("element" of generation shifting constitutes two of three "building blocks" for determining best system of emission reduction). *American Lung*, 985 F.3d at 944-46. That ruling was error. Petitioner is correct — the statutes clearly contemplate that emission reduction should take place at the locus of the individual emission sources and not be spread out across the "exceptionally complex, interconnected" electrical grid, *id*. at 932, as the circuit court erroneously held.

[5] Amicus concurs with Petitioner's contention that the decision below violates both the major questions doctrine and the federalism clear statement rule. *See* Pet. at 30-33. In this portion of its brief in support of Petitioner, Amicus has chosen to focus on other interpretive errors made by the circuit court in its reading of the statutes.

Section 7401 sets forth the "Congressional findings and declaration of purpose" for Subchapter I, Part A (Air Quality and Emissions Limitations), under which §7411 is codified in Chapter 85 of Title 42. The expression of congressional intent found in §7401 is therefore highly relevant to a correct understanding of §7411.

Among other findings, in §7401 Congress made specific findings about where and by whom it believed that emissions should best be controlled. As to where, it stated that both air pollution prevention and air pollution control should take place specifically "at its source":

> The Congress finds—
>
> …
>
> (3) that air pollution prevention (that is, the reduction or elimination, through any measures, of the amount of pollutants produced or created at the source) and air pollution control at its source is [*sic*] the primary responsibility of States and local governments;

§7401(a)(3).

Especially noteworthy is that, whatever "measures" may be adopted under Subchapter I, Congress requires the pollution to be controlled "at its source." *Id.* By the circuit court's own concession, "at" is "site-specific." *American Lung*, 985 F.3d at 950.

This case is about an agency pronouncement entitled "Carbon Pollution Emission Guidelines." 80 Fed. Reg. at 64,662. The circuit court's decision on the powers claimed in that document cannot be reconciled with what §7401(a)(3) says about the

"measures" permitted to be taken against pollution emissions. The circuit court affirms those agency powers in large part by construing the phrase "best system of emission reduction" expansively. Using the same word "measures" found in §7401(a)(3), the circuit court asserts EPA's great "degree of leeway in choice of control measures" used to determine the "best system" to reduce pollution emissions. *American Lung*, 985 F.3d at 942. In the circuit court's view, that "leeway" extends to EPA's being permitted to choose to base its emission guidelines on a "system" two of whose "building blocks" involve off-site generation shifting. *Supra* p. 6. In other words, the circuit court reached its conclusion by sanctioning the use of "control measures" that do *not* specifically "control [pollution] at its source," as required by §7401(a)(3).

For the same reason, the circuit court was mistaken when it concluded that "Congress consistently avoided imposing any such technological, at-the-source limitation on the measures that EPA might include in the 'best system' for reducing emissions from existing-source categories" under §7411(d). *American Lung*, 985 F.3d at 954. Section 7401(a)(3), of course, says otherwise.

The court attempted to bolster its conclusion by observing that "the regulators closest to the issue never before saw what the EPA now [i.e., when defending its repeal of the CPP,] insists is obvious on the face of Section 7411." *Id.* In other words, according to the court, previous EPA regulators supposedly never even entertained, much less actually held, the "myopic[]" view of circumscribed agency powers asserted by EPA in its recent repeal

of the CPP. *See id.* But that observation of the circuit court is wrong too.

At least as long ago as 1975 EPA was on record as understanding that §7411(d) dealt with exactly such at-the-source technological measures as the Petitioner now argues for. In 40 Fed. Reg. 53,340 (November 17, 1975), which deals with "State Plans for the Control of Certain Pollutants From Existing Facilities," EPA discussed the grounds on which it might approve or disapprove a state plan. 40 Fed. Reg. at 53,342. In the course of its explanation, it laid out its understanding of the approach Congress wanted taken to implementing §7411(d), the subsection most at issue here.

First, EPA reviewed the legislative history of §7411(d), which began as a Senate bill intended to address pollutants which are neither criteria pollutants nor hazardous pollutants, i.e., they belonged to the same category of pollutants already dealt with in §7411. *Id.* at 53,342. A conference committee rewrote the Senate bill as part of §7411, "which in effect requires maximum feasible control of pollutants from new stationary sources through technology-based standards." *Id.*

From its review EPA drew four conclusions, the fourth of which is most pertinent here.

> (4) Under the circumstances, EPA believes, the conferees decided (a) that control of such pollutants on some basis was necessary; (b) that, given the relative lack of information on their health and welfare effects, a technology-based approach (similar to that for new sources) would be more feasible than one involving an attempt to set standards tied specifically to protection of health; and (c) that the technology-

> based approach (making allowances for the costs of controlling existing sources) was a reasonable means of attacking the problem until more definitive information became known, particularly because the States would be free under section 116 of the Act to adopt more stringent standardse [*sic*] if they believed additional control was desirable. In short, EPA believes the conferees chose to rewrite section 114 [of the Senate bill] as part of [§7411] largely because they intended the technology-based approach of that section to extend (making allowances for the costs of controlling existing sources) to action under [§7411(d)]. In this view, it was unnecessary (although it might have been desirable) to specify explicit substantive criteria in [§7411(d)] because *the intent to require a technology-based approach could be inferred from placement of the provision [section 114 of the Senate bill] in [§7411].*

Id. (emphasis added).

EPA concluded with the following observations:

> Requiring a technology based approach . . . would not only shift the criteria for decision-making to more solid ground (the availability and costs of control technology) but would also take advantage of the information and expertise available to EPA from its assessment of techniques for the control of the same pollutants from the same types of sources under [§7411(b)], as well as its power to compel submission of information about such techniques under section 114 of the Act (42 U.S.C. 1857c-9).

Id. at 53,343.

Not surprisingly, therefore, in the 1975 amended regulations found in the same document, EPA expressly described systems of emission reduction as being systems applied *to* the existing sources of emissions. More specifically, in language distinctly echoing the description of "the best system" given in §7411(a)(1), EPA stated that it would issue to the states "[g]uideline documents" that would provide:

> (2) A description of systems of emission reduction which, in the judgment of the Administrator, have been adequately demonstrated.
> (3) Information on the degree of emission reduction which is achievable with each system, together with information on the costs and environmental effects of *applying each system to designated [i.e., existing] facilities*.

Id. at 53,346 (to be codified as C.F.R. §60.22) (emphasis added). *See also id*. at 53,346 (to be codified as 40 C.F.R. §60.21(d), defining "Designated facility").

The wording of 40 C.F.R. §60.22, quoted above, seems to have been in effect continuously until the interpretative revolution effected by the Clean Power Plan in 2015. As such, it remained an abiding marker of EPA's 1975 longtime policy that §7411(d) took a "technology-based approach" to emission reduction systems, one that is to be applied to existing emissions sources *in situ*. It provides an "at the source" reading which is consistent with the congressional mandate found in §7401(a)(3) but inconsistent with the CPP and the circuit court's radically expansive views of agency powers.

CONCLUSION

For the reasons given above, this Court should grant the petition for certiorari.

Respectfully submitted,
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