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

In the Supreme Court of the United States

WEST VIRGINIA, ET AL.,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
Respondents.

On Writs of Certiorari
to the United States Court of Appeals for the
District of Columbia Circuit

BRIEF OF *AMICI CURIAE* SOUTH TEXAS ELECTRIC COOPERATIVE, INC., BUCKEYE POWER, INC., ASSOCIATED ELECTRIC COOPERATIVE, INC., ARIZONA ELECTRIC POWER COOPERATIVE, INC., EAST KENTUCKY POWER COOPERATIVE, INC., MINNKOTA POWER COOPERATIVE, AND THE NATIONAL RURAL ELECTRIC COOPERATIVE ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

This case concerns the ability of the States to exercise their statutory authority under the Clean Air Act ("CAA" or "the Act"). Section 7411(d) of the Act requires the United States Environmental Protection Agency ("EPA") to develop guidelines for the States to follow in creating their own plans to establish "standards of performance" for controlling air emissions from any individual "existing source." Section 7411(d) makes clear that EPA's guidelines "shall permit" States, in developing their plans, to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." The plain text of section 7411(d) thus instructs that the States, not EPA, serve as the primary regulatory authorities and decision makers in setting standards of performance for "existing sources," such as the coal-fired plants owned and operated by Amici. The D.C. Circuit disregarded this plain text, eroding State discretion.

South Texas Electric Cooperative, Inc. ("STEC"), Buckeye Power, Inc. ("BPI"), Associated Electric Cooperative, Inc. ("AECI"), Arizona Electric Power Cooperative, Inc. ("AEPC"), East Kentucky Power Cooperative, Inc. ("EKPC"), Minnkota Power

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[1] All parties have consented to the filing of this amicus. Sup. Ct. Rule 37.3(a). No party or counsel for a party authored this brief in whole or in part, and no person or entity, other than Amici, made any monetary contribution to its preparation or submission. Sup. Ct. Rule 37.6.

Cooperative ("MPC"), and the National Rural Electric Cooperative Association ("NRECA") (collectively "Amici") appear as *Amici Curiae* in support of Petitioners in these consolidated cases to express their deep concern with the decision below—and in particular its departure from statutory text and removal of authority granted to the States. Amici are (or as to NRECA, represent) not-for-profit generation and transmission cooperatives whose missions are to provide the infrastructure and services to deliver reliable and economical electric power to their members across a large swath of the United States.

The following offers background on the signatories to this brief and their interests in this appeal.

STEC was formed in 1944. Using a variety of energy sources, including wind, lignite, natural gas, diesel fuel, and hydroelectric, STEC provides wholesale electric services to its member distribution cooperatives, comprised of multiple cooperatives in the South Texas area. These rural distribution cooperatives serve over 241,000 members in forty-seven South Texas counties.

BPI, Ohio's generation and transmission cooperative, similarly provides power to 24 Ohio-based electric cooperatives and the Michigan-based Midwest Energy & Communications. Formed in 1959, BPI is focused on providing reliable, affordable electricity to member cooperatives, who then distribute it to nearly 400,000 homes and businesses in the State of Ohio. Owned and governed by the

cooperatives it serves, BPI is dedicated to providing its member cooperatives with affordable and responsibly produced power by balancing affordability, reliability, and environmental responsibility. Included in that mix is coal, natural gas, solar, hydropower, biomass, and other small-scale renewable energy generation.

AECI, founded in 1961, is a three-tiered cooperative that provides wholesale electric services to six electric cooperative members. These cooperatives, in turn, supply 51 local electric cooperatives in Missouri, Iowa, and Oklahoma, serving about 910,000 member homes, farms, and businesses. AECI delivers affordable and reliable power to its members through a blend of generation that includes coal, natural gas, wind, and hydropower.

Also formed in 1961, AEPC is a member-owned, not-for-profit electric generation and transmission cooperative providing power to meet its members' energy needs in Arizona, California, and New Mexico. AEPC strives to provide safe, reliable, and affordable power to electric cooperatives across the Southwest.

EKPC was formed in 1941. Although initially sidelined by World War II, by 1954, EKPC brought light to the countryside, dramatically improving the lives of rural citizens. EKPC's first power lines brought a new freedom and a better way of life to Kentucky families. EKPC is owned by and provides power to sixteen member cooperatives. Like the other Amici herein, EKPC generates power using a mix of

resources, including coal, natural gas, fuel oil, solar, methane gas, and hydropower.

MPC is a not-for-profit electric generation and transmission cooperative headquartered in Grand Forks, North Dakota. Formed in 1940, Minnkota provides wholesale electric energy to eleven member-owner distribution cooperatives located in eastern North Dakota and northwestern Minnesota. These members serve nearly 137,000 consumer accounts in a 34,500 square-mile area. Minnkota also serves as operating agent for the Northern Municipal Power Agency (NMPA). NMPA supplies the electric needs of twelve associated municipals that serve more than 15,000 consumer accounts in the same geographic area as the Minnkota member-owners. The primary source of electric generation for the Minnkota member-owners is the Milton R. Young Station, a two-unit, lignite coal-fired power plant located near the town of Center, North Dakota. Minnkota's electric generation portfolio also includes energy purchased from three North Dakota wind farms and hydroelectricity.

The National Rural Electric Cooperative Association (NRECA) is the national trade association representing nearly 900 local electric cooperatives and other rural electric utilities. America's electric cooperatives are owned by the people they serve and comprise a unique segment of the electric industry. From growing regions to remote farming communities, electric cooperatives provide power for

one in eight Americans and are engines of economic development for 42 million Americans. Collectively, rural electric cooperatives own and maintain 2.6 million miles, or 42%, of the nation's electric distribution lines. NRECA members keep the lights on for more than 42 million people across 48 States and over 56% of the land mass within those States. Electric cooperatives serve all or parts of 88% of the nation's counties and 13% of the nation's electric customers, while accounting for approximately 12% of all electricity sold in the United States.

Electric cooperatives are unique because they have the responsibility to provide affordable and reliable power to a cost sensitive end-user base of rural, economically disadvantaged communities, and agricultural users. As a result, cooperatives must serve larger geographic areas with limited financial resources, as compared to investor-owned utilities. Amici all depend, in varying degrees, on coal-fired and natural gas generation sources to meet their customer and member obligations. And many either own or have entered long-term power purchase agreements with such sources—many extending decades into the future.

The D.C. Circuit's decision below threatens Amici's existing generation assets with standards of performance that will not account for their unique capabilities, force early retirement, and cause significant uncertainty and reliability challenges.

STEC, BPI, AECI, AEPC, EKPC, MPC, and all 900 member cooperatives represented by NRECA have a strong interest in ensuring the continued availability of their existing coal-fired generation capability. Amici urge the Court to reverse the D.C. Circuit's decision.

SUMMARY OF ARGUMENT

The D.C. Circuit's decision must be reversed. The decision disregards the plain text of the Clean Air Act, as well as core principles of federalism, the major questions doctrine, and the rule that the federal government may not commandeer the States. Contrary to the governing text, the decision confers upon EPA authority to dictate State energy policy and control decisions that Congress preserved for local decision makers. To take just one example, the decision allows EPA to impose emission limitations that would force the closure of efficient and viable fossil-fuel-fired plants, without regard to the useful life of those sources, the cost of replacing them, or the effectiveness of their federally preferred replacements—all of which the Act empowers States to consider. Unless this Court reverses the D.C. Circuit, the State's statutory primacy to set existing-source standards will be supplanted by federal regulations far out of the bounds set by Congress. And, the history of the Clean Power Plan ("CPP") shows this will impose tremendous expense and undue uncertainty on rural power generators such as

Amici, and ultimately on the rural (and relatively less affluent) Americans they serve.

The D.C. Circuit's erroneous decision goes to the very heart of the system of cooperative federalism embodied in the CAA. Sweeping aside the plain terms of section 7411(d), which unmistakably leave to *the States* the authority to assess and regulate existing sources (such as Amici) within their borders, the D.C. Circuit concluded instead that section 7411(d) vests *EPA* with broad authority to regulate existing sources without regard to the States' authority or their regulatory regimes. Simply put, the D.C. Circuit got it exactly backwards.

Not only did the D.C. Circuit ignore the CAA's statutory text, it also ignored the Court's "major questions doctrine" and repeated clear warnings that courts and agencies are not free to rewrite statutory terms to accommodate policy desires that lack clear congressional directive. The D.C. Circuit has given EPA vast new authority to commandeer state action based on purported ambiguity and inference.

The D.C. Circuit's expansive grant of authority to EPA contravenes this Court's consistent jurisprudence limiting administrative agencies to the powers explicitly assigned them by Congress; and it threatens grave, uncompensable harm to those (like Amici) who will be subject to this newly minted (and extra-statutory) authority. It likewise departs from settled principles of anti-commandeering.

The Court should reverse and reestablish the Act's requirement that—in determining the best system of emission reduction—EPA must fully respect the States' rights to set the final standards of performance for their existing sources.

ARGUMENT

I. THE D.C. CIRCUIT'S DECISION IGNORES THE PLAIN TEXT OF THE CLEAN AIR ACT, UNDERMINING THE ACT'S INHERENT SYSTEM OF FEDERALISM.

The D.C. Circuit's decision ignores the text and structure of section 7411. As this Court has made clear, courts must apply statutes as written. There is no "federal common law" that the courts may wield to adjust a statute according to what they perceive is (or should have been) required—nor would the separation of powers permit that anyway. Instead, "the Clean Air Act *displaces* federal common law" and "when Congress addresses a question . . . the need for such an unusual exercise of law-making by federal courts disappears." *Am. Elec. Power Co. v. Conn.* ("*AEP*"), 564 U.S. 410, 423-24 (2011) (emphasis added). The plain text of the CAA controls here; there is no room for judicial alteration or embellishment.

The D.C. Circuit's decision departs from this bedrock rule of statutory construction. The decision misconstrues the text of the CAA and erroneously grants to EPA expansive authority to regulate any system, in this case the wholesale energy markets, without regard to the statutory text, thus usurping

authority expressly reserved to the States. The Court should reverse.

A. The D.C. Circuit's Interpretation of Section 7411 Disregards Controlling Text to Eviscerate the States' Role in Controlling Air Pollution from Existing Sources.

The CAA establishes a comprehensive program for controlling and improving the nation's air quality through state and federal regulation. 42 U.S.C. §§ 7401-7671q. At issue here is the States' role in controlling air pollution originating from "existing stationary sources," rather than new sources, 42 U.S.C. § 7411(d), and whether the Act's plain text will be honored.

The Act give States authority to set standards for existing *sources*, *id.* § 7411(d)(1), while enabling EPA to issue guidelines identifying the "best *system* of emission reduction" ("BSER") for States to use in designing their source-specific standards of performance, *id.* §§ 7411(a)(1), (d)(1). The question is how the two delegations interact. The answer has to be that the delegation to EPA must be read harmoniously with the delegation to States to set standards for existing sources in the first place. *E.g. King v. Burwell*, 576 U.S. 473, 492 (2015) (noting "the fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme").

Standards of performance for existing sources are generally created under two steps. First, before the States develop source-specific standards, EPA issues "guidelines" for each category of existing source for which it has issued new-source performance standards. 42 U.S.C. § 7411(d)(1); 40 C.F.R. § 60.22. Guidelines reflect "the degree of emission limitation achievable through application of the best system of emission reduction" that has been adequately demonstrated. 42 U.S.C. § 7411(d)(1)(A)(ii); *see AEP*, 564 U.S. at 424; 40 C.F.R. § 60.22(b). The guidelines provide States, among other things, a description of the adequately demonstrated systems of emission reduction," "[i]nformation 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 facilities," and "periods of time normally expected to be necessary for the design, installation, and startup of identified control systems." 40 C.F.R. § 60.22(b).

Second, each State evaluates the individual characteristics of each existing source within its borders, "taking into consideration, among other factors, the remaining useful life of the existing source" and EPA's emissions guidelines, and establishes the appropriate standards of performance for each source. 42 U.S.C. § 7411(d)(1). In addition to the "remaining useful life" (discussed further below), those "other factors" may include costs of control technology, the age, location and design of the source,

physical constraints, fuel characteristics, and other facility-specific factors. 40 C.F.R. § 60.24(f). As such, the state-established standards of performance "reflect" EPA's emission guidelines but need not adhere to them as if they were a federally established standard, like the new source standards. 42 U.S.C. § 7411(d)(1).

Through this scheme, Congress preserved the States' primacy to establish standards of performance for the existing sources within their borders, taking into consideration the unique characteristics of those sources.

Despite the plain text of section 7411(d) delegating control over existing source standards to States, the D.C. Circuit held EPA could define BSER however it chose, without regard to the specific stationary sources being regulated or the States' source-specific concerns. In doing so, the D.C. Circuit impermissibly read the delegation to States, as well as the specific considerations the States could account for, out of the Act. By misreading the CAA, and disregarding its embedded federalism principles, the D.C. Circuit's decision federalizes environmental and energy policy for the entire United States, including all existing sources, undoing authority reserved to the States to establish standards for their own existing sources.

1. The text and structure of CAA sections 7411(a)(1) and (d) guarantee States the flexibility to design standards of performance for their existing sources to accommodate source-specific concerns.

The statutory text and structure confirm the above-described authority granted to States to accommodate source-specific concerns in the course of regulating existing sources. Two main provisions are at play here: sections 7411(a)(1) and 7411(d). Both must be given effect; neither can be read to displace the other.

Read together, EPA cannot determine the "best system of emissions reduction" as something that applies beyond the stationary sources subject to regulation. Brief reflection establishes why: if EPA can do so, then it can require stationary sources to reduce emissions based on a "best system" that applies to some source other than the one that is being regulated. EPA could eliminate States' ability to set achievable standards for many of their existing sources; and EPA could prevent States from fully considering the very source-specific factors the CAA expressly permits them to consider, such as remaining useful life of a source. And this is not a far-fetched hypothetical; it is what the CPP would have done. Read harmoniously, as provisions of the same statute should be, sections 7411(a)(1) and (d) work together to prevent that result.

Section 7411 begins with the definition of the term "standard of performance," which generally applies to the regulation of both new and existing sources. *Am. Lung Assoc. v. EPA*, 985 F.3d 914, 941-42 (D.C. Cir. 2021) (describing section 7411 as "mark[ing] out a pair of distinct regulatory tracks for stationary sources of air pollution," with the first track applying to new sources and the second applying to existing sources). A "standard of performance" is a "standard for emissions of air pollutants" that "reflects the degree of emission limitation achievable through the application of the best system of emission reduction," which, "taking into account the cost of achieving such reduction," among other enumerated factors, EPA determines "has been adequately demonstrated." 42 U.S.C. § 7411(a)(1).

Importantly, on its face, the definition of "standard of performance" is directed at "air pollutants." *Id.* The definition describes how a standard of performance is *devised*; it says nothing about how a standard will be *implemented* at any particular source.

For new sources, the CAA expressly gave EPA responsibility to set applicable federal standards of performance. *Id.* § 7411(b)(1). The statute instructs EPA to list "*categories* of stationary sources" that may cause or contribute significantly to air pollution that may reasonably be anticipated to endanger public health or welfare and to establish "*Federal* standards of performance for *new* sources" within each such category. *Id.* § 7411(b)(1)(A) (emphasis added).

The federal standards of performance for emissions from new stationary sources must be "*achievable*" through the "best system of emission reduction" that is "*adequately demonstrated*" for the category of sources subject to regulation when taking into consideration the statutory criteria. *Id.* § 7411(a)(1). For *new* stationary sources, section 7411(b) imposes no other limitation on EPA's substantive authority.

The statute regulates emissions from *existing* stationary sources, like Amici cooperatives, quite differently. *Id.* § 7411(d). As recognized by the D.C. Circuit, existing stationary sources "raise distinct concerns about sunk costs and the health and environmental effects of older processes," and the regulation of these sources involves "more actors and steps." *Am. Lung Assoc.*, 985 F.3d at 942. Congress meticulously drew the lines of authority with regard to existing sources, assigning separate, yet related, tasks to the federal government and the States in section 7411(d). It is this division of authority that the D.C. Circuit's decision displaces.

In particular, section 7411(d) requires EPA to establish a procedure—*i.e.*, issue guidelines—under which *States shall submit* plans establishing, implementing, and enforcing *their own* "standards of performance for any existing source for any air pollutant" that (as relevant here) would be governed by a *federal* standard of performance if the "existing source were a new source." 42 U.S.C. § 7411(d)(1);

AEP, 564 U.S. at 424 (citing 40 C.F.R. §§ 60.22, 60.23 and explaining that EPA issues emissions guidelines for existing stationary sources).

To be clear, section 7411(d) does not permit EPA directly to regulate or set standards of performance in the first instance for existing sources. It reserves that power to the States. 42 U.S.C. § 7411(d)(1). Moreover, EPA's authority to establish guidelines applicable to the States' standards of performance under section 7411(d) is expressly limited: EPA "shall permit" the States to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." *Id.* § 7411(d)(1)(B).

In fact, section 7411(d) permits EPA to regulate existing sources directly only if a State "fails to submit a satisfactory plan." *Id.* § 7411(d)(2)(A). And even in that circumstance, in promulgating a standard of performance for emissions at an existing source, EPA is *required* to take into consideration, among other factors, the source's remaining useful life. *Id.* § 7411(d)(2)(B). If anything is clear under Section 7411, it is that EPA may not apply a standard of performance to an existing source without taking into account its "remaining useful life."[2]

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[2] This aspect of section 7411(d) is particularly important to rural electric cooperatives because of the combined impact of the Powerplant and Industrial Fuel Use Act, 42 U.S.C. §§ 8301-8484, and subsequent federal environmental mandates. As discussed further below, cooperatives invested hundreds of millions of dollars in coal plants and subsequent pollution control projects

Whether a standard of performance for emissions at an existing stationary source is initiated by a State or EPA, section 7411(d) requires EPA to develop BSER guidelines for existing sources with the flexibility for States to consider their source-specific factors when developing their standards of performance. That express statutory requirement necessarily means that EPA's BSER for existing sources must be achievable with means available to the source (at the source)—otherwise Congress's promise that the States be permitted to "consider, among other factors, the useful life of the existing source to which such standard applies," *id.* § 7411(d)(1)(B), would be effectively read out of the statute.

Correctly reading section 7411 in its entirety yields but one result: Congress expressly devised a scheme to minimize air pollution that operates on two separate tracks. EPA regulates emissions from *new* sources of pollution within its discretion with little or no obligation to consider source-specific factors. This makes sense: no existing interests or source- or state-specific logistical restraints must be accounted for, and EPA has the authority to guide the air pollution prevention process *going forward. See id.* § 7411(b)(1)(B) (establishing ongoing and future EPA

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that have yet to be recovered because their plants still have significant remaining useful life. That useful life was reasonably assumed to be available for long-term cost recovery to protect rural ratepayers not capable of absorbing escalating rates due to accelerated cost recovery.

action with regard to regulation of *new* sources). New sources can be designed and built to comply with the new source standards.

Congress treated *existing* sources differently, and for good reasons. Those sources are *already built*. Investments were made and plants were built with equipment and site configurations that relied upon the regulatory requirements in place at the time of their installation. States are in the best position to consider source-specific factors. States have structured their electric grids around their existing sources and can appreciate transmission constraints in rural areas, cost-sensitivity, and other challenges particular to electric cooperatives. States have routine interaction with sources through permitting, inspections, and other delegated environmental federal programs. Further, States have first-hand experience with unique regional factors such as geography, natural resources, and climate that can impact source operations. Accordingly, through section 7411(d), Congress put States on the front lines and empowered them to make the initial decisions as to the best way to meet EPA's existing source guidelines, considering source- and state-specific factors. *Id.* § 7411(d). And because Congress specified that standards of performance for any particular existing source *must* take into account factors related to *that particular source*, EPA's authority in this regard is limited. It may not impose across-the-board BSER requirements (like carbon emission caps) that cannot be achieved by a particular source.

2. The D.C. Circuit's atextual reading of CAA section 7411 impermissibly vests EPA with unchecked authority to set federal standards for existing sources—directly contrary to the statutory grant of such power to the States.

Instead of reading sections 7411(a)(1) and (d) together, the D.C. Circuit construed section 7411(a)(1) as a separate power, unto itself—without regard to the express limitations that section 7411(d) imposes on regulation of emissions from existing sources. *Am. Lung Assoc.*, 985 F.3d at 945-50. In the D.C. Circuit's view, the "root" of EPA's authority to determine BSER is section 7411(a)(1); that provision "announces its own limitations," and it does not include any requirement that EPA account for the delegation to States or source-specific factors in establishing BSER for emissions from existing sources. *Id.* at 945. Instead, according to the D.C. Circuit, EPA may develop BSER for emissions generally with *no limitation* other than those contained in section 7411(a)(1) itself: that EPA must "study all 'adequately demonstrated'" means of emission reduction, drawing on "adequately demonstrated" methods to determine the "best" system to reduce emissions. *Id.* at 946. And, according to the court, section 7411(d) has no impact on this authority. Rather, once EPA develops BSER for an air pollutant, "state-developed 'standards of performance' [for a particular source] follow on but are legally and functionally distinct from the 'best system' that the EPA develops." *Id.* at 948.

The D.C. Circuit grievously misread the statute. Section 7411(a)(1) itself does not limit EPA's authority with regard to setting guidelines for particular sources—but it should not be expected to. By its own terms, section 7411(a)(1) applies to *pollutants*. It establishes the baseline procedure for how a standard of performance is to be developed. Then the rest of the statute kicks in: section 7411(b)(1)(B) applies that definition to *new sources*, and section 7411(d) apples that definition to *existing sources*, enabling States to set their standards.

Although section 7411(b)(1)(B) imposes no additional criteria on EPA's application of standards of performance and BSER for *new* sources, section 7411(d) expressly limits EPA's authority with regard to *existing* sources. As discussed above, "standards of performance" applied at "any particular [existing] source"—including the underlying BSER that forms the basis of the standard of performance—must take into account source-specific factors such as remaining useful life.

This necessarily means that "standards of performance" for emissions at existing sources established under section 7411(d) may (and often will) vary from the "*Federal* standards of performance" that EPA may promulgate for *new* sources under section 7411(b)(1)(B). And to give any effect to the statutorily guaranteed consideration for factors related to "particular source[s]" under section 7411(d), States must retain discretion to consider source-

specific factors in setting existing source standards. EPA is not permitted (contrary to the D.C. Circuit's view) to use BSER to usurp the States' statutory prerogative to regulate their own existing sources.

The authority section 7411(d) grants States stands in marked contrast to EPA's authority to regulate *new* sources according to its own "Federal" standards of performance. 42 U.S.C. § 7411(b)(1)(A), (B). If Congress did not intend the States to have flexibility in the establishment and application of emissions standards to their existing sources, it would not have expressly included that authority in section 7411(d). Because it did, EPA is required to follow that statutory mandate. *AEP*, 564 U.S. at 423.

B. The D.C. Circuit's Decision Also Upends the System of Cooperative Federalism Embodied in the CAA by Stripping States of Their Statutory Right to Serve as the Primary Regulator of Existing Sources.

As the Court has confirmed, and the D.C. Circuit acknowledged, the plain text of the CAA establishes a system of cooperative federalism between EPA and the States, under which the States are assigned the primary role in air pollution prevention and control as it applies to existing sources. *AEP*, 564 U.S. at 424-28; *Am. Lung Assoc.*, 985 F.3d at 942 (describing CAA section 7411(d) as creating "complementary roles" for EPA and the States); 42 U.S.C. § 7401(a)(3) (affirming that "air pollution prevention" and "air pollution control at its source is the primary responsibility of

States and local governments."). The CAA was built on the principle that EPA would set certain minimum standards, and the States would implement those standards using methods that would meet their own particular needs. *Cf. Hodel v. Va. Surface Min. & Reclamation Ass'n, Inc.*, 452 U.S. 264, 289 (1981).

For this reason, the D.C. Circuit's evisceration of the express statutory limitation on EPA's authority to regulate emissions from existing sources is an anathema to the CAA's instructions. Section 7411(d) expressly authorizes States, within guidelines set by EPA, to establish and administer their own regulatory programs, structured to meet their own needs. 42 U.S.C. § 7411(d) ("Regulations . . . under this paragraph *shall permit* the State in applying a standard of performance to any particular source . . . to take into consideration, among other factors, the remaining useful life of the existing source."). This flexibility is a crucial attribute of the CAA's system of cooperative federalism. It ensures the States' primary role in fighting air pollution from their existing sources as guided—not mandated—by EPA.

But the D.C. Circuit's decision permits EPA to impose generic limitations without regard to the capability of specific sources. The decision then requires States to implement those limitations through their section 7411(d) plans. As a result, the D.C. Circuit's decision permits EPA to impose standards on existing sources *that they cannot conceivably meet*, irrespective of their useful life or

other source-specific or state-specific factors the States are entitled to consider under the terms of CAA section 7411(d). The D.C. Circuit allows EPA to unilaterally eliminate existing sources, even if States depend on those sources and the sources would meet State and federal standards. The system blessed by the D.C. Circuit imposes federal mandates for State implementation. This approach is not cooperative federalism. In fact, it is more akin to coercive federalism.

The D.C. Circuit downplayed the impact its decision would have on States, claiming that, even under a regime such as the CPP, States would still maintain "considerable flexibility in choosing how to calculate and meet their emissions targets." *Am. Lung Assoc.*, 985 F.3d at 963. Not so, because EPA-mandated carbon dioxide limits—such as those envisioned by the CPP—are hard limits, not "targets." States are not given flexibility to adjust those limits.[3] Moreover, those limits are based on EPA's own assumptions of what could be accomplished within a given State's electric grid, "outside the fence" of individual facilities, without regard to the age or importance of each facility to a given State's electric grid. Any system setting limits up front based on

[3] In the preamble to the CPP, EPA dispelled any notion that the CPP would have provided States any real flexibility, explaining that States were permitted to deviate from EPA's standards for individual sources only if the States could meet the standards set by EPA "in aggregate, or in combination with other measures undertaken by the state." 80 Fed. Reg. 64662-01 (Oct. 23, 2015).

hard-wired assumptions about each State without each State having the ability to change those assumptions and adjust the limits amounts to a top-down federal mandate that does not provide "flexibility," and it is certainly not "cooperative." Nor, critically, does it allow States to account for the very factors the statute allows them to consider.

The D.C. Circuit's decision upsets the delicate balance of State and federal power forged by Congress in the CAA. The Court should reverse.

II. Additionally, the Major Questions Doctrine Forecloses the D.C. Circuit's Interpretation of the Clean Air Act.

As explained above, the plain text of the Clean Air Act unambiguously forecloses the D.C. Circuit's interpretation of section 7411(d). The D.C. Circuit's view is also contrary to the major questions doctrine, which rejects statutory interpretations that "would bring about an enormous and transformative expansion in [an agency's] regulatory authority without clear congressional authorization." *Util. Air Regulatory Grp. v. EPA* ("*UARG*"), 573 U.S. 302, 324 (2014).

A. The Major Questions Doctrine Ensures That Only Through Clear Congressional Authorization Will an Agency Be Given the Authority to Make Decisions of Vast Economic and Political Significance.

Congress must "speak clearly if it wishes to assign to an agency decisions of vast 'economic and political significance.'" *Id.* at 324 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 160 (2000)); *see also King*, 576 U.S. at 485-86 (2015) (noting that for questions of "deep economic and political significance," Congress "surely" would only "assign that question to an agency . . . expressly"). "When an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy, [the Court] typically greet[s] its announcement with a measure of skepticism." *UARG*, 573 U.S. at 324 (internal quotation omitted).

Yet no clear language appears in the CAA granting EPA the broad authority the D.C. Circuit has now afforded it. As set forth above, the statutory text plainly provides the opposite, reserving for States the power to set standards for existing sources.

In circumstances like this, courts routinely apply the major questions doctrine to reject an agency's attempt to expand its power beyond that explicitly authorized by Congress. *E.g.*, *Loving v. I.R.S.*, 742 F.3d 1013, 1021 (D.C. Cir. 2014) ("[C]ourts should not lightly presume congressional intent to implicitly delegate decisions of major economic or political

significance to agencies." (citation omitted)); *Texas v. United States*, 809 F.3d 134, 182-83, 188 (5th Cir. 2015), *aff'd by an equally divided court*, 136 S.Ct. 2271, 2272 (2016) (per curiam).

The doctrine is particularly applicable here, where the economic and political significance of EPA's attempt to expand its own authority cannot be understated. EPA previously promulgated a regulation (the CPP) that would have had the effect of shutting down coal-fired generators to the country's power grid, contrary to State preferences. It is hard to imagine a decision that EPA could make that would have greater "economic and political significance." Yet nowhere in the CAA is there any authority for EPA to undertake such a mission or arrogate the States' authority.

The D.C. Circuit's decision below would have far-reaching consequences by conferring unchecked authority on EPA to dictate power generation sources in a manner far outside the bounds of the CAA. This purported grant of authority to control the country's mix of electric generation is a major question that Congress can assign only through unambiguous statutory language—it is "implausible that Congress would give to the EPA" this sweeping power through, at most, "modest words" rather than through "a clear" "textual commitment." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also U.S. Forest Serv. v. Cowpasture River Pres. Ass'n*, 140 S. Ct. 1837, 1849 (2000) ("[W]hen Congress wishes to alter the

fundamental details of a regulatory scheme," courts "expect it to do speak with the requisite clarity to place that intent beyond dispute."). Moreover, the millions of rural electric ratepayers served by Amici will shoulder severe economic and human consequences unless this Court reverses the judgment of the D.C. Circuit.

Thus, the major questions doctrine provides yet another reason to reverse here.

B. Factors That Courts Traditionally Use to Determine Major Questions Confirm That the D.C. Circuit's Interpretation of the Act Is Erroneous.

Three factors that Courts traditionally analyze for major questions illustrate just how wrong the D.C. Circuit decision is.

First, when an "unheralded power" is purportedly found in a secondary provision of a "long-extant statute" courts are skeptical of that purported new interpretation. This is precisely the situation here. The D.C. Circuit's view of EPA's authority arises from an "unheralded power" in a fifty-year-old provision.

The CAA was enacted in 1963, and section 7411(d) was added in the 1970s. Yet EPA never attempted to use section 7411(d) in such a sweeping manner prior to the CPP. Rather, EPA's prior uses of this section were narrow, imposing individualized measures aimed at reducing specific pollutants. *E.g.*, 61 Fed.

Reg. 9,905, 9,914 (Mar. 12, 1996) (guideline for a landfill based upon "[p]roperly operated gas collection and control systems"); 45 Fed. Reg. 26,294 (Apr. 17, 1980) (aluminum plant guideline for "effective collection of emissions").

EPA's infrequent and narrow historical use of section 7411(d) confirms that this provision was understood to allow limited regulation of existing sources—consistent with its plain text—and that the provision was a secondary part of the overall statutory scheme. "Congress . . . does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouse holes." *Whitman*, 531 U.S. at 46.

This conclusion is buttressed by the fact that, elsewhere in the CAA, Congress did use language that would afford EPA authority to establish emission limitations based on trading among sources—a kind of generation shifting. *See, e.g.*, 42 U.S.C. §§ 7651-7651o (comprehensive acid rain program). An agency's reliance on purported delegated authority is "especially questionable" when "Congress has used express language in other statutes" to accomplish the same goals. The D.C. Circuit's interpretation is an impermissible attempt to embody a long-extant statute with a meaning not given the statute by Congress.

Second, the D.C. Circuit decision—which grants power to EPA far beyond what appears in the CAA's text—is especially problematic because the subject of

EPA's newfound power, electricity generation shifting, is an issue of "vast economic and political significance." *UARG*, 573 U.S. at 324 (citation omitted). How electricity is generated in this country is an issue of deep economic and political significance. Giving EPA the power expressed by the D.C. Circuit would expand EPA's authority to cover aspects of "entire industries," *MCI Telecomms. Corp. v. Am. Tel. & Telegraph Co.*, 512 U.S. 218, 231 (1994), and thus "a significant portion of the American economy." *Brown & Williamson*, 529 U.S. at 159. As noted by North Dakota in its merits brief, N.D. Br. at 32-33, the effect of the D.C. Circuit's decision is to grant EPA the authority to force States to shift their generation capacity from coal and other fossil-fuel sources to renewable sources, regardless of the States' views based on State-centered factors, such as remaining useful life, that States are expressly permitted to consider.

For most cooperatives, including those represented by Amici, generation shifting—without accounting for each site's specific circumstances—is simply not an option. Because nearly two-thirds of the nation's cooperative coal-fired power plants were constructed under the Powerplant and Industrial Fuel Use Act's mandate that they be "coal capable," 42 U.S.C. § 8311, these plants do not have the infrastructure needed to shift generation sources without massive new investment. And that investment is equally infeasible—cooperatives are not investor-backed. They serve and are financially supported by their

customers. And many of the communities the cooperatives serve are among the nation's most sensitive to cost increases.

Granting EPA this power will have practical consequences as well. Empowering EPA to force generation shifting will effectively force the shut-down of fossil-fuel-fired plants, regardless of whether those plants may provide the State with the most reliable and cost-effective power source or whether the source has remaining useful life. Electric cooperatives, including Amici, are uniquely limited when it comes to generation shifting. Unlike for-profit investor-owned utilities, electric cooperatives have small generation portfolios. In fact, several Amici operate only one fossil-fuel-generation plant, which provides essential baseload generation when renewable generation is not available due to seasonal or meteorological conditions. Generation shifting for environmental compliance is either very limited or not an option for electric cooperatives.

The risk to grid reliability and reliance associated with the loss of coal-fueled power plants is not abstract for Amicus STEC, which is located in a State (Texas) that just witnessed unprecedented power outages during Winter Storm Uri earlier this year. STEC was fortunate to have enough power generation to cover the needs of its members, which protected it from the kind of economic ruin experienced by other rural cooperatives in Texas that did not have enough reliable generation to meet the needs of their

members. *See, e.g.*, *In re Brazos Elec. Power Coop., Inc.*, No. 21-30725 (Bankr. S.D. Tex. 2021) (information regarding the multi-billion dollar exposure of Brazos due to insufficient generation resources may be obtained on the website of the Debtor's claims and noticing agent at http://cases.stretto.com/Brazos).

But STEC's ability to cover the needs of its members is dependent upon the ongoing viability of the San Miguel coal-fired power plant. That plant was the focus of one of the declarations establishing the need for this Court's stay of the CPP. *Basin Elec. Power Coop., et al. v. EPA, et al.*, No. 15A776, App. at a307-322 (declaration of Derrick Brummett, CFO, San Miguel Electric Cooperative, Inc.). As Brummett made clear, the immediate threat to San Miguel (and thus to STEC based upon its dependence on San Miguel) caused by EPA's outside-the-fence carbon regulation of power plants extends beyond the ultimate passage of a rule.

There is also harm caused by the uncertainty from the threat of EPA exercising a vastly expanded authority beyond the law enacted by Congress—the text of which STEC and San Miguel have relied upon when making generation planning decisions. Just like the irreparable harm San Miguel demonstrated would result if it had to make major capital decisions while awaiting the conclusion of litigation over CPP, the current state of EPA's authority—as expanded by the D.C. Circuit—is interfering with STEC's planning

decisions. The regulatory uncertainty also increases STEC's costs: it creates reluctance in investment in fossil-fuel-fired assets, including performance improvement. Thus, even attempting to comply with EPA's newly discovered authority will prove difficult for financial reasons.

In a world where tight grid conditions mandate that STEC continue to make capital investments in its generation resources, the D.C. Circuit's endorsement of regulatory decisions that would ignore source-specific factors and grossly exceed the limits imposed by Congress in the CAA puts into question whether the investments STEC, San Miguel, and other cooperatives make in their plants will be wasted if those assets are forced to retire before the end of their useful lives.

Other Amici share similar concerns. For example amicus AEPC operates a single power plant that supplies its members. As part of the initial Regional Haze program, AEPC converted one of its two large coal units to natural gas. Under D.C. Circuit's view, EPA may require AEPC to shut down its remaining coal unit (because coal is not the "BSER"). This leaves AEPC substantially dependent upon natural gas generation with no backup for its system if the single gas line supplying its facility goes down. Nor is it certain that the primary transport line in the area has sufficient capacity to support conversion of the remaining coal unit. Surely these are the type of source-specific concerns that Congress intended

States, as the standard setters, to consider in reaching their decision and it is unreasonable to infer that EPA can bypass that State consideration.

Amicus BPI provides a powerful example of another concern as its history is illustrative of the type of investments that Amici have made to comply with prior federal mandates that would be jeopardized by the D.C. Circuit's expansion of the EPA's authority. BPI invested $185 million to install selective catalytic reduction systems to remove nitrogen oxides air emissions at its two coal units in 2003, and approximately $70 million of that investment is yet to be recovered during the units' useful lives. BPI also invested $674,000,000 to install flue gas desulfurization systems to remove sulfur dioxide air emissions at its units in 2008 and 2011 to comply with federal mandates, and approximately $421 million of that investment is yet to be recovered during the units' useful lives. BPI very recently needed to invest approximately $53 million to comply with recently promulgated EPA rules governing coal combustion residuals (CCRs), *i.e.*, fly ash and bottom ash, nearly all of which is yet to be recovered. BPI also anticipates the need to invest another approximately $45 million over the next several years to comply with EPA rules on water intake and wastewater discharge.

In addition to the textual arguments noted above and the unique significance of that statutory text to electric cooperatives, a third compelling reason Congress is "especially unlikely" to have delegated the

expansive authority over the electric grid is the fact that EPA has "no expertise" in electricity generation, transmission, or reliability. *King*, 576 U.S. at 486. Plainly, energy "grid reliability is not a subject of the Clean Air Act and is not the province of EPA." *Del. Dep't of Nat. Res. & Envt'l Control v. EPA*, 785 F.3d 1, 18 (D.C. Cir. 2015). In an opinion noting that EPA had inadequately analyzed the impact of its decision on the Texas electric grid, the Fifth Circuit emphasized that "EPA has no expertise on grid reliability." *State of Texas, et al. v. U.S. E.P.A.*, No. 16-60118, Order Granting Stay at 39 (5th Cir. 2016). As shown above, grid reliability is far too important for Congress to have implicitly left it to the whims of a federal agency with no expertise in the field. *Cf. UARG*, 573 U.S. at 318 (in the context of applying the major questions doctrine, explaining that EPA is not compelled to regulate in a manner "extreme, counterintuitive, or contrary to common sense") (citation omitted); *cf.* 42 U.S.C. § 8301 (explicating requiring nation-wide generation fuel shifting and providing federal agencies explicit authority to further the purposes of the Act).

III. THE D.C. CIRCUIT'S DECISION SEPARATELY VIOLATES THE ANTI-COMMANDEERING DOCTRINE.

The anti-commandeering doctrine flows from the "incontestable [proposition] that the Constitution established a system of dual sovereignty," *Printz v. United States*, 521 U.S. 898, 918 (1997) (quotation omitted), under which the States retain "'a residual

and inviolable sovereignty,'" *id.* at 919 (quoting The Federalist No. 39, at 245 (James Madison)). Rather than serve as instruments of the federal government, the States "remain independent and autonomous within their proper sphere of authority." *Printz*, 521 U.S. at 928.

Put simply: "The Federal Government may not compel the States to enact or administer a federal regulatory program." *New York v. United States*, 505 U.S. 144, 188 (1992). Congress thus has no authority to "'commandeer[] the legislative processes of the States by directly compelling them to . . . enforce a federal regulatory program.'" *Id.* at 176 (quoting *Hodel*, 452 U.S. at 288. The Court has described "[f]ederal commandeering of state governments [as] a novel phenomenon," which, quite notably, the Court "first experienced [in] the 1970s, when the Environmental Protection Agency promulgated regulations" imposing impermissible obligations on the States. *Printz*, 521 U.S. at 925. This case once again presents an instance of impermissible EPA encroachment into the proper role of the States in our dual-sovereignty system.

The CAA itself established a system of cooperative federalism for the prevention and control of air pollution in which Congress assigned the States, rather than EPA, the primary role as to existing sources. *E.g.*, *AEP*, 564 U.S. at 424-28. As detailed above, section 7411(d) requires States to determine and submit to EPA for approval standards of

performance for existing stationary sources, and EPA "shall permit" States to "take into consideration, among other factors, the remaining useful life of the existing source to which such standard applies." 42 U.S.C. § 7411(d)(1); *see supra* Part I.A.1.

The D.C. Circuit's decision destroys the balance struck by Congress. It permits EPA to impose nationwide emissions limitations that the States would then be forced to implement through their section 7411(d) plans. By eliminating the States' authority to set standards for existing sources and to consider the factors the CAA permits them to consider, the D.C. Circuit's decision would impermissibly turn the States into mere instruments of the federal government. And by authorizing EPA to impose nationwide standards on existing sources without regard to individualized, local considerations, the decision displaces the flexibility inherent in the cooperative federalism Congress established with coercive federalism.

As noted above, contrary to the D.C. Circuit's claims of "flexibility," the CPP is a compelling example of how the D.C. Circuit's opinion gives license to EPA to create emission limitations based on unreasonable assumptions about what each State can accomplish without each State having the ability to adjust those assumptions and ensure that the statutorily required source-specific factors, including remaining useful life, are addressed.

The dual-sovereignty system embodied in the Constitution works, in part, because "state governments [must] remain responsive to the local electorate's preferences" because "state officials remain accountable to the people." *New York*, 505 U.S.at 167-68. A contrary scheme, such as the one established by the D.C. Circuit's decision, would make state officials accountable for federal preferences and decisions; it would erase the State's authority to create plans that are workable and responsive to local needs. For this reason also, the Court should reverse the judgment of the court of appeals.

CONCLUSION

The Court should reverse the judgment of the D.C. Circuit Court of Appeals.

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