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 a Writ of Certiorari to the U.S. Court of Appeals for the D.C. Circuit

REPLY TO BRIEFS IN OPPOSITION

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INTRODUCTION

Across four briefs and over 25,000 words, the federal government, along with 23 states, eight cities, 13 health and environmental advocacy groups, three trade associations, and six power companies urge that the important statutory question presented here *not* be reviewed. Respondents protest too much.

For nearly a decade, battles over the EPA's power to limit greenhouse-gas emissions from existing sources have been fought over a single, discrete legal question: Must the agency set emission targets based on controls that are achievable at the source level, or may it adopt a system-wide approach that contemplates shuttering plants altogether or forcing them to subsidize other energy sources? After the EPA adopted the latter view in its revolutionary Clean Power Plan ("CPP"), this Court stepped in to stay it. The agency then reversed course and repealed the CPP in its Affordable Clean Energy ("ACE") rule. But the D.C. Circuit—without even *citing* this Court's stay order—has now held the EPA was right the first time, vacating the ACE rule. In doing so, the panel bestowed on the agency *carte blanche* authority to transform the Nation's energy grid (and much more) unilaterally.

Unable to downplay the importance of the discrete legal question presented, Respondents instead accuse Petitioner of asking this Court to address the *next* EPA rulemaking in an "advisory opinion." Not at all. Petitioner asks this Court to review the vacatur of the ACE rule, which presents a live controversy and harms Petitioner. That the panel's construction of the statute unleashes the EPA to reshape nearly every

facet of the U.S. economy absent congressional authorization is why review is *important*.

Notwithstanding Respondents' rhetoric, there is no justiciability issue here. Petitioner seeks review of a panel decision vacating the ACE rule (and reviving the CPP) based on a rejection of the EPA's construction of the Clean Air Act. Regardless of how the EPA might *respond* to the decision if it stands, it is plainly subject to review *now*. Just last year the Court granted review in an identical posture when the Ninth Circuit vacated agency action by rejecting the agency's view about its statutory power. *Dep't of Homeland Sec. v. Regents of Univ. of Cal.*, 140 S. Ct. 1891 (2020). The Court did not think certiorari was "premature" even though DHS's next steps were equally "speculative."

Review is not only proper now as a *legal* matter, it is also warranted as a *prudential* matter. Prospective importance is always a critical factor at the certiorari stage, which is why Petitioner set forth the real-world implications of the D.C. Circuit's interpretation (none of which Respondents meaningfully dispute). That does not mean Petitioner seeks an advisory opinion about a hypothetical *future* rule; it simply underscores why correcting the D.C. Circuit's erroneous vacatur of the *current* rule is critical. And Respondents offer no good reason for yet another deferral.

To be sure, the Court could allow the EPA to spin its wheels laboring under the panel's mistaken precedent, with the industry stuck in costly regulatory limbo, before confronting the issue again in an emergency request to stay whatever turbocharged CPP the EPA develops next. But every prudential factor counsels in favor of resolving this omnipresent legal issue now, in

the ordinary course, given that the only relevant Court of Appeals has now issued a precedential decision that cleanly tees it up for review.

ARGUMENT

I. REVIEW IS PLAINLY PROPER NOW.

Respondents' four opposition briefs share a common theme: All accuse Petitioner of jumping the gun by supposedly asking the Court to decide an "imaginary" or "hypothetical" case regarding regulations the "EPA might adopt in the future." States Opp. 10; Power Cos. Opp. 3; NGO Opp. 6. They go so far as to suggest that review now would result in "an advisory opinion." SG Opp. 16; States Opp. 10; Power Cos. Opp. 1; NGO Opp. 6. The State Respondents even insinuate there might be no "case or controversy" because the D.C. Circuit's partial stay of its mandate means there is "no present regulatory burden." States Opp. 14.

These gestures toward justiciability are misleading and wrong. This case is not about the next EPA rule, it is about the current one: the ACE rule. Respondents assume there will be a new rulemaking only because the *D.C. Circuit vacated the ACE rule*. That assumes the conclusion. If this Court were to reverse, the ACE rule would remain in force.

To remind the reader of the state of play: The EPA promulgated the CPP by claiming the extraordinary power to regulate based on an industry-wide "system" of "generation shifting" from coal- and gas-fired power to "cleaner" energy sources. After this Court stayed the rule, the EPA reconsidered and promulgated the ACE rule, which repealed the CPP as beyond the scope of its authority. Now, in the decision below, the D.C. Circuit turned back the clock, vacating the ACE rule

(and so presumptively reviving the CPP) on the back of its holding that the EPA does, in fact, possess the extraordinary authority it initially asserted.

Thus, if not for the D.C. Circuit's decision, the ACE rule would still be in effect. If the rule is now "defunct" (States Opp. 20; NGO Opp. 6), that is only because the D.C. Circuit vacated it—but the point of this petition is to secure *reversal* of that decision. Put simply, this case controls whether the ACE rule survives or falls, and judging from the number of voices urging for and against review, that controversy is not just live but kicking and screaming. Reviewing the vacatur of agency action is routine, especially when the decision limits or expands agency power, even if the agency remains free on remand to adhere to the same result or chart a new course. *E.g.*, *Regents*, 140 S. Ct. 1891; *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150 (2021); *Dep't of Homeland Sec. v. New York*, 141 S. Ct. 1370 (2021). And the government's decision to decline to seek review makes no jurisdictional difference. *E.g.*, *Cherry Hill Vineyards, LLC v. Lilly*, 553 F.3d 423, 428–29 (6th Cir. 2008).

Importantly, while the EPA does not affirmatively seek review of the decision below, it does not defend it either, and has never walked back its interpretation of the Clean Air Act reflected in the ACE rule. Nor has the agency suggested that it plans to revisit the repeal of the CPP other than in response to the decision below. SG Opp. 13. Plus, even if the new EPA *wanted* to revisit the ACE rule of its own accord, the standard for doing so would be very different if this Court first reinstated it. "An agency may not … disregard rules that are still on the books," and must justify a change in policy when, as here, a "prior policy has engendered

serious reliance interests." *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Reversal of the D.C. Circuit would also narrow significantly the parameters of the agency's discretion.

It is true that the EPA secured a partial stay of the mandate so the now-outdated CPP will not spring back into law. But a stay is irrelevant to whether the lower court's *judgment* injures Petitioner. And at minimum, the decision strikes the ACE rule, which relative to the CPP is favorable to coal interests. It also gives the new EPA a blank slate with unbounded authority, instead of forcing it to justify any further change, account for reliance, and remain within the parameters of the congressional authorization. The decision, and the uncertainty it causes, thus seriously and adversely affects the coal industry, which is why Petitioner is seeking review. It is also why the Power Company Respondents, who would benefit from EPA-mandated generation-shifting away from coal, oppose review: They want to be rid of the ACE rule, which is less favorable to them, and free up the agency to once again use regulation to coerce their competitors to subsidize their operations.

At bottom, Respondents' entreaties to let the EPA conduct a "fresh" rulemaking (NGO Opp. i; SG Opp. 20; States Opp. 9; Power Cos. Opp. 5) are a convenient excuse to freeze the D.C. Circuit's favorable precedent and status quo. It has nothing remotely to do with justiciability. Reversal of the decision below, and revival of the ACE rule, would be a meaningful victory for Petitioner legally and practically, regardless of the agency's next steps. Tellingly, no Respondent actually claims this case is moot; if it were, the appropriate course would be to vacate the decision below. *United*

States v. Munsingwear, Inc., 340 U.S. 36 (1950). Respondents want to avoid that outcome because they know how important the decision truly is, and that belies their "nothing to see here" routine.

II. REVIEW IS MANIFESTLY IMPORTANT NOW.

Of course, whether the Court *should* grant review is distinct from justiciability, and turns on (among other things) the importance of the issue. *See* S. Ct. R. 10(c). Petitioner explained why this statutory question holds immense practical significance for the power industry and beyond—as this Court has already recognized by staying the CPP. *See* Pet. 15–22. That nearly half the States, numerous large cities, industry actors, and environmental activists are so intent on *avoiding* this Court's intervention is powerful corroboration.

A. As Petitioner explained, the D.C. Circuit's ruling would empower the EPA to mandate emission limits (for *any* existing source of greenhouse gases) drawn from any national "system" the agency determines would be "best" for fighting climate change. *See* Pet. 18–20. On that understanding, this ancillary provision of the Act is no longer limited to ensuring that sources use the best available technology to control their own emissions. It instead is a sweeping delegation to the EPA to "fix" global warming through whatever means it deems "best"—cap-and-trade regimes, solar panels on the roof of every house, canceling coal, or anything else—without any need for congressional approval.

Respondents try to run from the panel opinion, but fail to identify any limiting principles. They parrot the same "limit" as the D.C. Circuit: the requirement that the EPA also consider cost, health and environmental

impacts, and energy requirements. But as Petitioner explained and no Respondent denies, nothing in the statute meaningfully constrains the EPA's discretion in applying these incommensurate, discordant, and competing factors. *See* Pet. 19.

Respondents also argue that the D.C. Circuit did not "decide" the statutory question, but merely held that the EPA's original, broad view of its authority was a "permissible" reading of § 7411(d). *E.g.*, SG Opp. 19–20; States Opp. 12–13; Power Cos. Opp. 12–13. That is a meaningless distinction. Either way, the EPA now has the unfettered authority Petitioner identified.

Indeed, Respondents do not actually deny that the EPA *could* impose all of the extreme measures that Petitioner hypothesized, from cap-and-trade regimes to demands that regulated industries plant trees to forced subsidization by high-emitting suburban homes of "efficient" downtown apartments. The EPA feebly responds that it has *not yet chosen* to regulate residential homes under § 7411, but does not dispute that it *could*. SG Opp. 21.

More generally, the EPA intones that whether it will *use* its newly conferred authority to reshape the entire national economy is "speculative." SG Opp. 19. This Court does not, however, accept an overbroad interpretation of a statute "merely because the Government promised to use it responsibly." *United States v. Stevens*, 559 U.S. 460, 480 (2010); *see also McDonnell v. United States*, 136 S. Ct. 2355, 2372–73 (2016). And here the EPA has not even made such a promise; it has only stayed studiously silent while this Court considers the certiorari petitions. Meanwhile, every sign confirms that the new Administration has

made addressing climate change a top priority, is willing to impose transformational changes on society to do so, and has already decided to take such action. *See, e.g.*, The White House, *FACT SHEET: President Biden Announces Steps to Drive American Leadership Forward on Clean Cars and Trucks* (Aug. 5, 2021) ("[T]he President will sign an Executive Order that sets an ambitious new target to make half of all new vehicles sold in 2030 zero-emissions vehicles."). As one recent report observed, the consolidated petitions here "come as the Biden administration looks to craft a more aggressive rule 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).[1]

The panel below handed extraordinary power to the EPA, and it defies belief that the agency will not use it. That makes this case exceptionally important.

B. Respondents do not truly dispute that the legal issue here, and the larger issue of the EPA's regulatory power over existing greenhouse-gas emission sources, are important. Instead, they urge the Court to *defer* review, downplaying the immense cost, inefficiency,

[1] In an attempt to minimize the EPA's ambitions, Respondents assert that the CPP ended up being less draconian than expected because power plants met its targets ahead of schedule without the need for regulation. *See* NGO Opp. 6; States Opp. 15. But that is beside the point now. While the scope of the CPP helps illustrate the breadth of the authority that the EPA holds under the D.C. Circuit's decision, whether the EPA actually *needed* that authority in that one specific, outdated instance does nothing to detract from the point. And the success of the industry in achieving the CPP's targets will undoubtedly extend the regulatory goalposts, making the EPA's next iteration of its climate rule all the more aggressive.

and extended uncertainty that follow. That is misguided. This Court should not miss this chance to confirm the message sent by its CPP stay order, correct the D.C. Circuit's refusal to heed that message, and affirm the EPA's determination about the crucial statutory limits on its authority under § 7411(d).

If the question is review *now* or review *later*, every prudential consideration favors the former. The Court now has a perfect vehicle to resolve this discrete legal issue through its ordinary merits docket. And doing so will finally provide regulatory certainty. Even if the new EPA then determines to reevaluate the ACE rule on its own accord, this Court's reversal would ensure that any further rules remain within the bounds Congress set. In an industry that plans over decades-long horizons, that certainty is critical. Pet. 22–23.

By contrast, deferring review until after the EPA conducts a *third* rulemaking on this topic, now based on the D.C. Circuit's flawed ruling, would (i) waste the time and money of every participant in the regulatory process; (ii) leave the industry in an untenable state of uncertainty for years into the future; (iii) repeat the cycle of litigation that has been ongoing since the CPP in 2015; and (iv) guarantee that the Court is next faced with this issue in the far-from-ideal context of another emergency stay application. And if this Court were to reverse that future rule on this same legal ground, it would be too late to revive the ACE rule.

Respondents provide no justification for delay. The States suggest waiting would allow for compilation of an "administrative record." States Opp. 11–12. But there already *is* an administrative record—two, in fact—and nothing to be gained from a third, when the

only dispute concerns a "relatively discrete" and purely legal question (Pet.App.50a). For its part, the EPA asks for a chance to "take into account" this Court's stay order alongside the D.C. Circuit decision. SG Opp. 18. But those two orders *directly conflict*, making that request incoherent and confirming that only this Court can provide a meaningful resolution.

In short, early definitive resolution would be better for the EPA, better for the courts, better for industry—and better for Congress, too, by clarifying the present allocation of authority so the legislative branch can make any adjustments it deems appropriate.

C. There is one other reason why review at this time would be best. Beyond resolving the dispute over the EPA's § 7411(d) authority, this case would allow the Court to explicate the major-questions doctrine. That doctrine has assumed increased importance in an era of quasi-permanent legislative gridlock, as agencies of every stripe resort to discovering sweeping powers in vague statutory provisions. *E.g.*, *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 141 S. Ct. 2320 (2021). In this environment, elucidating the doctrine, and rejecting Respondents' artificial limits on its scope, would be timely and worthwhile.

Specifically, Respondents claim the doctrine does not apply because the D.C. Circuit did not *mandate* a broad reading of the statute; it merely held it permissible. *E.g.*, States Opp. 23; Power Cos. Opp. 15. So what? The court held that the EPA can decide, if it so chooses, to use an "unheralded power to regulate 'a significant portion of the American economy.'" *Util. Air Regul. Grp. v. EPA*, 573 U.S. 302, 324 (2014). The whole point of the major-questions doctrine is that the

Court does not lightly assume that Congress delegated policy discretion of such enormous import.

Respondents also argue that because the EPA is acknowledged to have *some* authority to regulate in this area, its *extent* cannot be a major question. *E.g.*, NGO Opp. 9; States Opp. 23–24. Nothing supports that distinction, which is subject to semantic manipulation just by defining the regulated "area" or "activity" at a high enough level of generality. Whether an agency has authority only to regulate within parameters set by Congress—or instead has unlimited power to do nearly anything—is a paradigmatic major question.

Respondents cannot and do not actually deny the far-reaching significance of the statutory question at issue. The decision below would effect an "enormous and transformative expansion in EPA's regulatory authority without clear congressional authorization." *Util. Air*, 573 U.S. at 324. Rejecting that construction by invoking the major-questions canon would be an important development in its own right, and the Court should grant review now for that reason too.

CONCLUSION

This Court should grant the petition.

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Respectfully submitted,

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