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* LIGNITE ENERGY COUNCIL, ILLINOIS COAL ASSOCIATION, KENTUCKY COAL ASSOCIATION, METALLURGICAL COAL PRODUCERS ASSOCIATION, MONTANA COAL COUNCIL, NEW MEXICO MINING ASSOCIATION, OHIO COAL ASSOCIATION, PENNSYLVANIA COAL ALLIANCE, RELIABLE ENERGY, INC., ROCKY MOUNTAIN MINING INSTITUTE , TEXAS MINING AND RECLAMATION ASSOCIATION, UTAH MINING ASSOCIATION, WEST VIRGINIA COAL ASSOCIATION, AND WYOMING MINING ASSOCIATION IN SUPPORT OF PETITIONERS**

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## STATEMENT OF INTEREST[1]

The Lignite Energy Council (LEC) is a regional, non-profit organization whose primary mission is to promote the continued development and use of lignite coal as an energy resource. Lignite is a type or "rank" of coal distinct from other ranks. Due to its characteristics, its principal use is as fuel for power plants, and lignite-fueled power plants are often mine-mouth plants. Thus, lignite's economic value is almost entirely undermined when the power plants are no longer permitted to use it. LEC's membership includes: (1) producers of lignite who have an ownership interest in and who mine lignite; (2) users of lignite who operate lignite-fueled electric generating plants and the nation's only commercial scale "synfuels" plant that converts lignite into pipeline-quality natural gas; and (3) suppliers of goods and services to the lignite industry. North Dakota is the 5th largest coal production state according to the Energy Information Agency.[2]

Colorado-based Rocky Mountain Mining Institute (RMMI) is a nonprofit corporation dedicated to the promotion of western mining through education. RMMI membership is diverse and includes individuals from both surface and underground

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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.

[2] https://www.eia.gov/state/rankings/#/series/48

mines, equipment manufacturers, service/supply firms, utilities, law firms, government, universities and colleges, financial institutions, and others interested in supporting the industry in Colorado, Montana, Texas, Utah, Wyoming, North Dakota, and beyond. Colorado is the 13th largest coal production state according to the Energy Information Agency.[3]

The Kentucky Coal Association (KCA) is a non-profit organization that represents Kentucky operations that mine coal through surface and underground methods. KCA's constitution and by-laws were adopted on April 28, 1947, "to promote the best interest of the coal mining industry in the Commonwealth of Kentucky and all those engaged therein . . ." KCA has two classes of members: (1) corporations, firms or individuals directly engaged in producing and/or processing coal in Kentucky; and (2) any other association, organization, corporation, firm or individual interested in promoting the welfare of the coal industry in Kentucky. Kentucky is the 7th largest coal production state according to the Energy Information Agency.[4]

The Illinois Coal Association (ICA) is the professional trade organization responsible for the promotion of Illinois coal. ICA represents the coal industry in Illinois in governmental affairs, in public relations, and in related matters. Through the ICA,

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[3] *Id.*

[4] *Id.*

companies producing coal in Illinois deal with issues affecting their interests with a single, unified voice. Illinois is the 4th largest coal production state according to the Energy Information Agency.[5]

Indiana-based Reliable Energy, Inc. (REI) is a trade association promoting the interests of the coal industry and its supporting businesses and is committed to ensuring an abundant supply of available, affordable, and dependable energy in Indiana and across the country. Indiana is the 8th largest coal production state according to the Energy Information Agency.[6]

The Metallurgical Coal Producers Association (MCPA) is a non-profit organization made up of metallurgical coal producers and those who support its producing members' operations. While coal has traditionally been understood through the thermal coal lens of power plants and light bulbs, MCPA seeks to expand the general public's understanding of metallurgical coal and its critical benefit to our everyday lives. Bridges, automobiles, and common products like kitchen appliances are made possible by metallurgical coal. By looking at coal through another lens and helping to create a link between metallurgical coal and its many end uses, MCPA

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[5] *Id.*

[6] *Id.*

strives to broaden the understanding of how coal powers our lives.

The Montana Coal Council (MCC) is a non-profit association whose membership includes all major coal mine operators, holders of Montana coal reserves, those who ship coal, utilities who use coal, and numerous suppliers and businesses directly and indirectly involved in the coal industry. Montana is the 6th largest coal production state according to the Energy Information Agency.[7]

The New Mexico Mining Association (NMMA) is a trade association organized in 1939 and incorporated in 1968 that serves as the chief spokesman for the mining industry in New Mexico. NMMA's members include: (1) companies that explore, produce and refine metals, coal, and industrial materials; (2) companies that manufacture and distribute mining and mineral processing; equipment and supplies; and (3) individuals engaged in various phases of the mineral industry. New Mexico is the 12th largest coal production state according to the Energy Information Agency.[8]

The Ohio Coal Association (OCA) is a non-profit trade association dedicated to representing the interests of Ohio's underground and surface coal producers. OCA represents nearly all of Ohio's coal

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[7] *Id.*
[8] *Id.*

producers and more than 50 associate members, which include suppliers and consultants to the mining industry, coal sales agents and brokers, and allied industries. As a united front, OCA is committed to advancing the development and utilization of Ohio coal as an abundant, economic, and environmentally sound energy source. Ohio is the 15th largest coal production state according to the Energy Information Agency.[9]

The Pennsylvania Coal Alliance (PCA) is a trade association that represents the Pennsylvania coal industry and associated service companies. PCA is committed to promoting and advancing the Pennsylvania coal industry and the economic and social benefit to the employees, businesses, communities, and consumers who depend on affordable, reliable, and increasingly clean energy from coal. Pennsylvania is the 3rd largest coal production state according to the Energy Information Agency.[10]

The Texas Mining and Reclamation Association (TMRA) is the professional trade association that represents the mining industry in Texas. TMRA serves as a single voice for the Texas mining industry and exhibits integrity, clarity, and vision in its efforts to create a balance between and among mineral production, environmental protection, economic

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[9] *Id.*
[10] *Id.*

strength, and public welfare. TMRA educates the public, regulators and policymakers on the value of mining to Texas's economy and advocates on issues including environmental regulation, legislation, and public perception. Texas is the 9th largest coal production state according to the Energy Information Agency.[11]

The Utah Mining Association (UMA) is a trade association that has been the voice of the Utah mining industry since 1915. UMA advocates for and advances the mineral resource and related industries in Utah, represents and informs its members in the legislative and regulatory arenas at the local, state, and federal levels, and educates elected officials, regulators, and the public on the Utah mining industry. Utah is the 10th largest coal production state according to the Energy Information Agency.[12]

The West Virginia Coal Association (WVCA) is a trade association located in Charleston, West Virginia, representing more than 90% of the state's underground and surface coal mine production. Its purpose is to have a unified voice representing the state's coal industry as well as increase emphasis on coal as a reliable energy source to help the nation achieve energy independence. WVCA is also a member of Amici West Virginia Business & Industry Council (WVBIC), which consists of more than 60

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[11] *Id.*
[12] *Id.*

West Virginia trade associations and businesses and represents more than 395,000 West Virginia workers across 26 separate industry categories. WVBIC focuses on improving the state's economic and political conditions with the goal of maximizing opportunity in the state. West Virginia is the 2nd largest coal production state according to the Energy Information Agency.[13]

The Wyoming Mining Association (WMA) is a trade association that serves as a unified voice, by communicating, influencing, and promoting issues on behalf of the Wyoming mining industry. WMA promotes the mining industry by communicating with elected officials, regulators, educators, and the public in a credible way that encourages trust and confidence, and earns respect as a reliable source of information on issues pertinent to the industry. Wyoming is the largest coal production state according to the Energy Information Agency.[14]

LEC and the above-referenced state coal associations (collectively "State Coal Association Amici") are comprised of members who have invested substantial amounts in the operation of coal and lignite-fueled power plants, coal and lignite coal mines supplying those plants, and businesses that supply goods and services to coal and lignite owners and users. All of these entities rely in their business planning on the express statutory provisions in the

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[13] *Id.*
[14] *Id.*

Clean Air Act ("CAA"), which establish the limits to the United States Environmental Protection Agency's ("EPA") authority and reserve the primary role of states in a system of cooperative federalism. Lignite and coal mines and reserves, as well as the power plants they supply, have substantial economic value at risk: their value will be significantly impaired if the EPA is permitted to extend the reach of its regulatory authority outside of the CAA's express statutory provisions.

Lignite- and coal-fired electricity is abundant, low-cost, reliable, weather-resilient and environmentally stable. It is therefore a reasonable, often state-preferred, method of supplying power to a region. In fact, many states, depend primarily on lignite or coal as a primary source of electricity, including Petitioners West Virginia (90%), Wyoming (83%), Missouri (71%), Utah (62%), North Dakota (57%), Indiana (56%), Nebraska (51%), Ohio (38%), Kansas (31%), and Arkansas (30%), as well as Amici Kentucky (69%) according to the Energy Information Agency.[15] Other Petitioners continue to rank among the top consumers of coal and lignite as key sources powering their very large power plant fleets, including Texas (#1), Missouri (#2), Alabama (#12), Pennsylvania (#16), Arkansas (#17), and Georgia (#20).[16]

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[15]https://www.eia.gov/coal/data.php

[16] *Id.*

As explained by the separate brief in support of Petitioners filed by Amici 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 (collectively "Rural Electric Cooperative Amici"), the D.C. Circuit's erroneous decision grants the EPA extra-statutory authority to force states to cast aside their own policy choices in favor of those preferred by the federal government. This stands in direct contrast to the statute's plain text, which delegates this authority to states. LEC and the State Coal Association Amici agree with the arguments advanced by the Rural Electric Cooperative Amici and join them fully.

LEC and the State Coal Association Amici write separately to provide an additional perspective regarding the D.C. Circuit's affront to the major questions doctrine, as well as its offense to the fundamental prohibition against federal commandeering of the states. Because the decision adopts a statutory interpretation 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), by turning the states into the instruments of the federal government, the Court must reject it and reverse.

## SUMMARY OF ARGUMENT

Of great concern to LEC and the State Coal Association Amici is the manner in which the D.C. Circuit allows EPA to ignore this Court's major questions doctrine, which prohibits the D.C. Circuit's strained interpretation of 42 U.S.C. § 7411(d) of the Clean Air Act ("Section 111(d)"). The D.C. Circuit's decision empowers EPA to convert its statutorily defined and modest role as an environmental regulatory body into *the sole* energy policymaker, supplanting states even in their expressly delegated areas of authority.

LEC and the State Coal Association Amici are also disturbed by the manner in which the D.C. Circuit would allow EPA to flip the roles of the state and federal government under Section 111(d). The D.C. Circuit's approach converts the cooperative federalism embodied in the CAA into a top-down coercive federalism regime that subjugates every state to be a pawn, rather than a partner, of the federal government.

## ARGUMENT

### I. THE MAJOR QUESTIONS DOCTRINE FORECLOSES THE D.C. CIRCUIT'S "DISCOVERY" OF EPA AUTHORITY TO REGULATE STATE EXISTING SOURCES UNDER SECTION 111(D).

The major questions doctrine ensures that Congress must provide clear authorization to an

agency when it intends to grant that agency the power to make decisions of vast economic and political significance. Because the D.C. Circuit's decision offends this bedrock principle, it must be reversed.

The Court has made clear that "if [Congress] wishes to assign to an agency decisions of vast economic and political significance" it must speak "clearly." *UARG*, 573 U.S. at 324; *see also King v. Burwell*, 576 U.S. 473, 485-86 (2015) (noting that for questions of "deep economic and political significance," Congress "surely" would only "assign that question to an agency . . . expressly"). A grant of such expansive power should not be lightly presumed. *E.g.*, *Loving v. I.R.S.*, 742 F.3d 1013, 1021 (D.C. Cir. 2014).

Here, the D.C. Circuit concluded that Congress authorized EPA to dictate to states what type of energy will be generated and available in this country. *Am. Lung Assoc. v. EPA*, 985 F.3d 914, 945-50 (D.C. Cir. 2021). But no clear language appears in the CAA granting EPA this power of vast economic significance. Rather, Section 111(d) expressly reserves *to states* the primary authority to set standards of performance for the existing sources within their borders—defining for themselves the best and most efficient energy policy for their citizens. 42 U.S.C. § 7411(d). The D.C. Circuit's decision offends the Major Questions Doctrine.

### A. This Situation Was Tailor-Made for Application of the Major Questions Doctrine.

The primary EPA action affirmed by the D.C. Circuit's decision—and what is the source of LEC and the State Coal Association Amici's main concern with the decision—is EPA's power grab effected through the re-definition of one phrase in the CAA—"Best System of Emission Reduction (BSER)" under the supposed auspices of Section 111(d). Breaking from explicit statutory text and 45 years of regulatory and judicial precedent, EPA redefined the word "system" to mean the entire electric grid. It reread the term to afford itself new ability to create mandatory emission standards based, not on what was achievable inside the fence of a facility, but instead on its own assumptions of what could be built anywhere in a large power system to offset a facility's emissions. Dubbed the "outside the fence" approach, this enables EPA to disregard specific Sites altogether.

This "outside the fence" approach, while acceptable as a method of flexible compliance with an emission standard, has never been accepted as a means to derive mandatory limits applicable to states or individual facilities, let alone seize control of wholesale energy markets. Indeed, in all the years Section 111(d) has been on the books, EPA has never attempted to use the provision in the manner proposed by the Clean Power Plan ("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 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 v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The Court has made clear that EPA has no discretion to act beyond the power delegated to it by Congress. *UARG*, 573 U.S. at 315. And the Court has "typically greet[ed]. . . with a measure of skepticism" situations "[w]hen an agency claims to discover in a long-extant statute an unheralded power to regulate a significant portion of the American economy." *Id.* at 324.

Yet the CPP's wholesale revision of BSER to dictate state energy policy illustrates precisely the power grab the major questions doctrine forbids. Because EPA made its own assumptions about the power grid in deriving the emission standard in the CPP, it was able to impose its own policy preferences

about what type of electric generation could and should be built in the grid (primarily renewables) and made it impossible for traditional fossil fuel-fired plants (coal and simple-cycle natural gas) to meet the standard it derived without a massive transfer of wealth from fossil energy owners to renewable developers.

A compelling example of the problems that ensue when EPA ignores the statutory limits on its power and infers grand energy policymaking authority can be found at the power plant owned by Amicus WVCA member, Longview Power. The Longview Power Plant commenced operations in Maidsville, West Virginia, in 2011. Due to its state-of-the-art technology and high quality fuel supply, Longview Power Plant is the cleanest, most-efficient coal-fired power plant in the 13-state PJM Interconnection and one of the most efficient coal-fired power plants in the entire United States. Longview boasts a best-in-class heat rate of 8,750 btu/kwh and produces the lowest cost dispatch and lowest carbon dioxide emissions rate (1,958 lb/MWh) of any coal-fired plant in the region.

In developing the emission goals of the CPP, the EPA hard-wired the aforementioned "outside the fence" assumptions in setting the emission standard it handed down to West Virginia to impose on Longview a rate-based carbon emission limit of 1305 lb/MWhr). Because Longview is a one-site facility, meaning it is not part of a power generation portfolio within which Longview could trade emissions,

Longview is not able to switch fuels or rely on dispatch of other renewable sources to meet the goals set out by EPA. Therefore, Longview would be required to purchase significant emission credits from other entities, install carbon capture equipment, or reduce its dispatch. These economically infeasible options would likely have led to the retirement of the plant at the extremely young age of 10 years. Given that the standard industry useful life of large power plants exceeds 50-60 years, the investors in the Longview Power Plant could not have conceived that EPA would decree its obsolescence a mere four years after it commenced construction.

An analogy to automobile mileage standards is illustrative of the absurdity of the Longview situation as car mileage is a more familiar subject than power plant efficiency. Imagine buying a Toyota Prius in 2011, which boasted the best mile-per-gallon (MPG) performance of its class at the time (48 MPG combined city/highway). Then, four years later, EPA sets the new car standard at 60 MPG, and in so doing, recognizes that existing cars that are rebuilt cannot do better than 50 MPG. Yet EPA, at the same time, imposes a 75 MPG requirement on existing cars, including your Prius, because it assumes that, in your state, you can buy credits from somebody else who happens to own a higher MPG vehicle or an electric vehicle (EV) or, alternatively, you can simply park your Prius for most of the year and take the bus or a train to get to work and your kids to school.

It sounds absurd, but it is actually an appropriate analogy for what EPA did and the D.C. Circuit decision sanctions in the context of the CPP. In 2015, EPA set the new plant carbon dioxide emission standard at 1400 lb/MWhr and, at the same time, acknowledged that existing plants that are reconstructed could, at best, meet a 1800 lb/MWhr standard. Yet in the CPP, EPA imposed a standard of 1305 lb/MWhr on Longview, which can only achieve a best-in-class (1958 lb/MWhr) emission rate, and which EPA acknowledged could not hope to do better than 1800 lb/MWhr if reconstructed.

So, the CPP was like imposing a 75 MPG standard on Longview's 2011 Prius that did 48 MPG and was assumed by EPA to be capable of only 50 MPG if reconstructed. But EPA claimed that 75 MPG was achievable and the states would have "flexibility" to help Longview achieve it because EPA assumed Longview could buy credits from others in West Virginia who own or want to buy an EV or simply park its Prius. What is even more absurd about the CPP is that, in other states where EPA made more extreme outside-the-fence assumptions, the effective emission rate being imposed on the fleet was much lower than the 1305 lb/MWhr imposed on Longview and West Virginia. For example, in Texas, the rate imposed was 1042 lb/MWhr and, in Florida, it was as low as 919 lb/MWhr. In those states, Longview's Prius would be expected to get 20-30% better mileage than 75 MPG (nearly doubling what your Prius can do in reality) because, perhaps, there are more brand new fuel-

efficient cars, EVs, or theoretically better mass transit in those states.

The scope of authority the D.C. Circuit would cede to EPA under Section 111(d) of the CAA does not just impact state coal and power producers. The new definition of BSER permitted by the D.C. Circuit decision would pave the way for EPA to infer authority that would have vast economic and political significance to other energy sectors. Under the D.C. Circuit's construction of 111(d), what is to stop EPA from imposing greenhouse gas emission limits on individual operators in the oil and gas sector based on assumed reductions that could be achieved from other operators, or even downstream refineries, because they are all connected to the same pipeline? Could they not assume individual operators could purchase credits from newer, less methane-emitting facilities and even pay downstream operators to produce biofuels instead of petroleum products? This economy-wide regulatory authority is no more contemplated than what EPA argued for in the CPP, yet is certainly within its reach based on the vast authority the D.C. Circuit decision cedes EPA by inference.

Based on the importance of the lignite and coal industry to multiple states spanning the United States and the members of LEC and the State Coal Association Amici (further discussed below), the D.C. Circuit's blank check to EPA certainly exceeds the threshold of "economic and political significance" established by this Court. And Section 111(d) qualifies

as a "long-extant statute" that comes woefully short of "speaking clearly" about the unprecedented federal energy policymaking that the D.C. Circuit would allow it to confer upon EPA by inference.

The Court should apply the major questions doctrine and, like the *UARG* decision, keep EPA tethered to the authority expressly granted to it by Congress and reverse the D.C. Circuit decision to do otherwise.

### B. The D.C. Circuit's Decision Would Allow EPA to Make Pawns Out of Its Cooperative Federalism Partners.

Another very troubling legal failing of the D.C. Circuit decision is the manner in which it allows a shift of power from the states to the federal government, in direct conflict with express terms of Section 111(d) and the cooperative federalism compromise that is built into that and several other sections of the CAA (and most federal environmental statutes).

The plain text of Section 111(d) is a classic example of a statutory scheme that sets distinct and particular roles for the states apart from the federal government. *E.g.*, *Am. Elec. Power Co. v. Conn.*, 564 U.S. 410, 424-28 (2011). States are expressly permitted to establish standards of performance for the existing sources within their borders, subject only to EPA guidelines. Among the many state-specific considerations that EPA guidelines "shall permit" under Section 111(d),

each state may consider "the remaining useful life of the existing source to which such standard applies." *Id.* The D.C. Circuit ignored these plain terms in concluding that the EPA has authority to directly promulgate standards of performance applicable to states' existing sources under the CPP. *Am. Lung Assoc.*, 985 F.3d at 941-42. As a result, the D.C. Circuit's decision permits EPA to impose standards on existing sources, irrespective of their useful life or other considerations EPA is mandated to allow states to consider (and that it must consider itself if it were to impose its own direct federal plan).

Like EPA when defending the CPP before this Court issued its stay,[17] the D.C. Circuit decision waves the banner of "flexibility" in attempting to explain away the coercive nature of the CPP's federally mandated emission budgets. *Id.* at 963. But the claim of flexibility is illusory. Using the example of the CPP, the D.C. Circuit decision allows EPA to set state carbon budgets at unreasonably low levels based on hard-wired assumptions about what states could accomplish in their electric grids. For many states, EPA's assumptions were completely unrealistic, including the construction of unprecedented levels of renewable energy not owned by the sources on which the limits were being imposed and without regard to the remaining useful life of the units being forced to

[17] Order in Pending Case, *North Dakota, et al. v. EPA, et al.*, Nos. 15A793, 15A773, 15A776, 15A778, 15A787 (Feb. 9, 2016).

retire—something that simply cannot be ignored in the statute.

This approach—to mandate budgets based on unrealistic assumptions and then claiming that states can "flexibly" comply—is coercion, not the cooperative federalism structure established by Congress. As one state environmental agency official appropriately pointed out, EPA was treating states more like "pawns" than "partners."

The CPP did not abide by the express statutory command to allow state-specific considerations to be utilized by state decision-makers implementing the guidelines promulgated by EPA.

In fact, the coercive nature of the CPP demonstrates how the D.C. Circuit decision effectively permits the commandeering of the states, in violation of the Tenth Amendment. *See e.g.*, *New York v. United States*, 505 U.S. 144, 188 (1992).

The anti-commandeering doctrine flows from the "incontestable [proposition] that the Constitution established a system of dual sovereignty," under which the States retain "'a residual and inviolable sovereignty.'" *Printz v. United States*, 521 U.S. 898, 918-19 (1997) (quotation omitted). States are not the instruments of the federal government, instead they "remain independent and autonomous within their proper sphere of authority." *Id.* at 928. No energy producing state can be stripped of its ability to control

its energy destiny in the brazen way attempted by the CPP and permitted by the D.C. Circuit's decision.

## II. THE "VAST ECONOMIC AND POLITICAL SIGNIFICANCE" OF THE D.C. CIRCUIT'S DECISION IS CLEAR FROM THE IMPACT IT WOULD HAVE ON AMICI IN STATES ACROSS THE COUNTRY WHO WILL BE IMMEDIATELY AND ADVERSELY AFFECTED BY THIS UNBRIDLED EPA POWER.

As explained above and fully briefed by Petitioners and the Electric Cooperative Amici, application of the major questions doctrine guards against inferred authority when the impact of that inference is of "vast economic and political significance." The D.C. Circuit's view that EPA can ignore the remaining useful life of facilities and effectively mandate the premature retirement of coal plants will most certainly have that type of vast impact to the members of LEC and the State Coal Association Amici in the states in which they operate, which span the continent.

The concerns expressed by LEC and the State Coal Association Amici in this brief are not theoretical. Rather, lignite and coal-using facilities and the states in which they are located across the country will experience tremendous economic hardship and uncertainty if the Court does not reverse and allows EPA to run with the untethered interpretation from the D.C. Circuit. The following are a few examples.

In North Dakota, the D.C. Circuit's decision authorizing the EPA to significantly reduce, if not eliminate, the use of coal in the grid, would lead to significant adverse impacts on the state. Five mines in North Dakota produce 26,996,860 tons of coal annually, almost all of which (26,881,632 tons) is consumed by its seven in-state coal-fired generation plants, which supply 57% of the state's electricity generation. If coal were eliminated from the grid, the state would be forced to replace the 4,224 megawatts of total capacity generated by coal-fired plants. The decision would threaten grid stability and cause serious economic hardship to the state's coal mining and coal-fired generation industries, which have a total output of $5.4 billion. Moreover, eliminating coal would result in a significant number of lost jobs, as 13,100 people are employed by the North Dakota coal mining and coal-fired generation industries. Losing this industry would result in the loss of $124 million in annual taxes paid by North Dakota coal mining and coal-fired generation industries.

In Wyoming, the D.C. Circuit's decision would also lead to severe economic hardship. Wyoming is the top coal-producing state, with 16 operating mines producing 276,911,907 tons of coal annually that is shipped to 128 power plants in 26 states. Wyoming also relies heavily on coal-fired generation, with 83% of the state's electricity generation from coal-fired plants. Wyoming's 10 in-state coal-fired generation plants consume 22,600,000 tons of coal annually and generate 6,604 megawatts of electric capacity. The

total output relating in taxes, royalties, and fees to coal mining and coal-fired generation is an estimated $833.5 million. The EPA's effective removal of coal from the grid would thus be devastating to Wyoming. It would also result in lost jobs—960 (or almost 1% of the population) are employed in the coal mining and coal-fired generation industries in Wyoming, with an estimated payroll of $547 million excluding benefits. Estimates indicate that each coal industry position supports an additional two jobs in the service and supply sectors, bringing direct and indirect employment to more than 15,000 workers. The decision would also diminish the estimated $555.9 million in state and local tax revenue on which the state relies.

West Virginia depends primarily on coal for 90% of the state's electricity. The state's 91 operating mines produce 100.3 million tons of coal annually that is shipped to 41 power plants in 15 states. Coal-fired power plants in West Virginia consume 26 million tons of coal annually and generate 12,610 megawatts of total capacity. If coal were effectively eliminated from the grid, the state would be forced to shift their generation capacity to other fuel sources, seriously threatening the state's ability to maintain grid stability. Moreover, eliminating coal would result in a significant number of lost jobs—33,000 people are employed by the West Virginia coal mining and coal-fired generation industries for a total annual employee compensation of $2.8 billion—along with a loss of $611.3 million in state and local tax revenue.

The decision would result in tremendous economic hardship, as the total annual economic output of coal mining and coal-fired generation industries is $13.9 billion.

Pennsylvania is the third-largest coal-producing state in the nation. In 2019, 149 coal mines produced over 50,053,000 tons of coal, of which 25,773,050 tons were sent to 41 coal-fired power plants in 18 states and 4,830,146 tons were sent to 10 waste coal-fired power plants in Pennsylvania. The D.C. Circuit's decision would impose serious economic hardship upon the state and its coal mining and coal-fired generation industries, which have a total output of over $10.4 billion. Sixteen coal-fired plants in Pennsylvania, including 10 waste coal-fired power plants, have 10,682 megawatts of total installed capacity. If the D.C. Circuit's decision were allowed to stand, coal-fired generation and waste coal-fired generation would effectively be removed from the grid, threatening grid reliability and the $37 million annual value of environmental and public value the waste coal industry is projected to contribute over the next 20 years. Moreover, the decision threatens the 8,138 direct jobs in the coal mining and coal-fired generation industries that pay $719,500,000 in total compensation per year, in addition to the $313.7 million in annual state and local tax revenue on which the state relies.

Similarly, in Kentucky, allowing the D.C. Circuit's decision to stand would result in serious economic

hardship. 139 operating mines in Kentucky produce 36,111,423 tons of coal that is shipped to 41 plants in 13 states. Kentucky's 15 coal-fired power plants consume 27,998,584 tons of coal annually and supply 12,515 megawatts of electric capacity, for 69% of Kentucky's electricity generation. If the EPA effectively removed coal from the grid in Kentucky and that capacity had to be replaced by other sources, it would be extremely costly, grid stability would suffer, and the coal mining and coal-fired generation industries would be unfairly prejudiced. In addition, eliminating coal would result in a significant number of lost jobs in the state, as 5,656 people are employed by coal mining and coal-fired generation industries in Kentucky.

The State of Illinois would likewise suffer adverse economic impacts if the D.C. Circuit's decision is not reversed. In Illinois, 21 mines produce 45,859,652 tons of coal annually and ship such coal to 32 plants in 12 states. The 15 coal-fired generation plants in the state consume 34,331,544 tons of coal and generate 12,737 megawatts of total electric capacity on which the state relies. Illinois has 2,613 jobs in the coal mining and coal-fired generation industries. As in the states referenced above, the D.C. Circuit's decision threatens the viability of these important industries, along with grid reliability in the state.

In Montana, six mines produce 26,033,018 tons of coal annually, with such coal being shipped to 11 plants in six states. The state's coal-fired plants

consume 5,359,435 tons of coal annually and generate 1,813 megawatts of electricity that would have to be replaced with an alternate source of electricity if the EPA were permitted to effectively remove coal from the grid. The D.C. Circuit's decision would thus threaten serious harm to the state's economy, as the total output of coal mining is $611 million and put in jeopardy the state's 1,151 coal mining and coal-fired generation jobs and state and local tax revenue totaling $46,755,000.

Indiana's economy and grid stability would also be impaired if the D.C. Circuit's decision is allowed to stand. 18 Indiana mines produce 19.7 million tons of coal annually and ship such coal to 20 plants in eight states. The 14 coal-fired power plants in Indiana consume approximately 29 million tons of coal annually and generate 16,638 megawatts of total electric capacity that would have to be replaced with other energy sources if the EPA were allowed effectively remove coal from the grid. Indiana's coal industry supports more than 16,000 jobs, directly and indirectly, in the Hoosier state and generates more than $2.64 billion in economic impact annually. Scores of suppliers, vendors, and local businesses are positively impacted by the presence of the coal industry in Indiana.

In Utah, 64.5% of the state's electricity generation is from coal-fired plants, and if the EPA were authorized to impose nationwide standards on Utah without regard to the state's reliance on coal as

an energy source, it would cause serious harm to the grid and the Utah economy. Eight Utah coal mines produce 14,347,000 tons of coal, the vast majority of which is used for electricity generation in six plants in two states. The five coal-fired generation plants in Utah consume 11,500,000 tons of coal annually and have 4,972 megawatts of total nameplate capacity. The D.C. Circuit's decision would risk grid vulnerability and would also threaten the 1,397 jobs in the coal mining industry, which pay $134,860,000 in direct employee compensation, $65,996,000 in state and local taxes and federal royalties paid by coal operators, and thousands of other generation, trucking, and contractor jobs supported by the Utah's coal mining industry. Moreover, Utah's coal mining, coal-fired generation, and related support industries are the largest and highest-paying employers in the rural Utah counties in which they operate, and these industries are vitally important to these counties and to the state.

New Mexico would also suffer if the D.C. Circuit's decision is not reversed. Three mines in New Mexico produce 14,535,660 tons of coal annually, with New Mexico's coal-fired power plants consuming 7,356,214 tons of coal and generating generate 2,464 megawatts of total electric capacity. The decision would cause serious economic hardship to the New Mexico coal mining and coal-fired generation industries, which have a total output of $392 million. Moreover, eliminating coal would result in lost jobs—1,664 people are currently employed by the New Mexico coal

mining and coal-fired generation industries. Eliminating coal from the grid would also result a loss of $11 million in state and local tax revenue.

In Ohio, the D.C. Court's decision would harm the state's economy. 15 Ohio coal mines produce 11,869,561 tons of coal that is shipped to 13 power plants in four states. Nine coal-fired generation plants in Ohio consume 22,722,148 tons of coal annually and generate 12,835 megawatts of total capacity, and coal is thus important to the electric grid. The D.C. Circuit's decision would risk grid vulnerability and would also threaten the 827 jobs in the coal mining and coal-fired generation industries.

Last, but not least, the power the D.C. Circuit decision would bestow on EPA is of great economic consequence to Texas. This is because of both the economic hardship to the coal mining and generation industries and the growing threat to reliability and resilience of the already-stressed Texas electric grid. As recently as 2014, Texas ranked in the top 5 of coal production, which came from eight mines producing a combined 23,306,690 tons of lignite coal annually, with such lignite being shipped to and consumed by 15 power plants that constitute, by far, the largest coal-fired power plant fleet in the nation at nearly 20,000 megawatts of capacity. At the time of the last economic impact study, total annual economic activity from these industries exceeded $7 billion with over $1.8 billion in annual labor income from 24,290 jobs netting over $693 million in annual state and local tax

revenue. Although the industry has contracted with the retirement of several units and closure of several mines, the Texas economy is still materially impacted by coal mines, the plants they supply, and the people both the mines and plants employ (directly and indirectly).

Because of the size of the Texas grid, Texas still consumes the largest amount of coal for power generation of any state even though the installed capacity of the coal fleet makes up just 13.4% of the Texas grid. That is an extremely valuable component of the grid, however, as recently demonstrated during the power outages of Winter Storm Uri when that 13.4% capacity (of the portion of Texas governed by the Electric Reliability Council of Texas (ERCOT)) was called upon to take up the slack for weather-dependent sources and was able to power over 18% of the grid because of the fuel resilience attributes of coal during extreme cold.[18]

Texas's expanded reliance on coal during the recent Winter Storm Uri power outages was not unique. In fact, in the states served by the Southwest Power Pool (SPP) (Arkansas, Iowa, Kansas, Lousiana, Minnesota, Missouri, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, and parts of Texas and Wyoming), coal dependence

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[18] https://www.eia.gov/electricity/gridmonitor/dashboard/electric_overview/balancing_authority/ERCO

jumped from the installed capacity of 24% to over 46% of the total generation during the storm.[19] In the states served by the Midcontinent Independent System Operator (MISO) (North Dakota, South Dakota, Minnesota, Wisconsin, Michigan, Illinois, Indiana, Missouri, Arkansas, Louisiana and parts of Mississippi and Texas), the 30% share of installed capacity for coal had to cover nearly 48% of the generation demand during the storm.[20]

This continued dependence upon coal for fuel-resilient power across the majority of the continent and the multi-state, multi-billion dollar economic impact of the coal mining and coal-fired power industries to the states served by LEC and the State Coal Association Amici, certainly meets the threshold necessary to warrant application of the major questions doctrine here. Even if Respondents could argue that the impact was less or that the role of coal was shrinking, no reasonable interpretation of the current state of the grid would conclude that empowering EPA to take actions to significantly reduce its use as a fuel in the United States would not have "vast economic and political significance."

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19 https://www.eia.gov/electricity/gridmonitor/dashboard/electric_overview/balancing_authority/SWPP

20 https://www.eia.gov/electricity/gridmonitor/dashboard/electric_overview/balancing_authority/MISO

## CONCLUSION

The D.C. Circuit's decision brought back to life the extra-statutory "outside the fence" approach EPA first attempted in the CPP. It should be rejected once more by this Court, but done so in a way that restores cooperative federalism and the predictability that agency powers will not be allowed to be inferred on such a grandiose scale as the D.C. Circuit would permit. Instead, D.C. Circuit and, by extension, the EPA, must be returned to the approach that made American environmental regulation great—partnering with states to control pollution with technology, not ideology.

It is through the development and deployment of technology, once commercially demonstrated, that the United States has made its air and water safe while respecting the primary role of states and remaining globally competitive. The D.C. Circuit's decision illegally expands EPA's authority and allows it to regress back to imposing ideological policy preferences that pick winners and losers from the top down with vast economic and political consequences for LEC's members, those of the State Coal Association Amici, and the citizens of energy producing (and consuming) states across the country.

The Court should reverse the D.C. Circuit's decision.

Respectfully submitted,

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