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

IN THE

Supreme Court of the United States

STATE OF WEST VIRGINIA, *et al.*,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

(Additional Captions Listed on Inside Cover)

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

BRIEF FOR *AMICI CURIAE* FORMER COMMISSIONERS OF THE FEDERAL ENERGY REGULATORY COMMISSION IN SUPPORT OF RESPONDENTS

STEPHEN E. ROADY
Counsel of Record
EMMA C. WELLBAUM
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive
Box 90360
Durham, NC 27708
(202) 257-9114
steve.roady@duke.edu

Counsel for Amici Curiae

THE NORTH AMERICAN COAL CORPORATION,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, et al.
Respondents.

WESTMORELAND MINING HOLDINGS LLC,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

STATE OF NORTH DAKOTA,
Petitioner,

v.

ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **Page(s)**

STATUTES

FEDERAL REGISTER

AGENCY ORDERS

COURT DOCUMENTS

MISCELLANEOUS AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are a bipartisan group of former Commissioners of the Federal Energy Regulatory Commission (FERC or Commission), the independent agency tasked by Congress to implement the Federal Power Act (FPA). *Amici* have a substantial interest in ensuring that the Court is informed on the reach of and limits to the Commission's FPA authority, as well as the way in which the Commission has recognized the Environmental Protection Agency's (EPA) distinct authority under the Clean Air Act. Moreover, *amici* have first-hand knowledge of the authority reserved to the States by the FPA, and three *amici* served as former state public utility regulators. *Amici* believe that they can provide a unique perspective to the Court based on their knowledge of federal energy law, federal and state jurisdiction, and the Commission's administrative practice of respecting EPA's authority under the Clean Air Act to regulate pollution from entities in the electric power sector.

Amici were appointed by Republican and Democratic Presidents and collectively served on the Commission for a total of 42 years from its founding in 1977 through 2017. Five *amici* chaired the Commission. Commissioners Brownell, Norris, and Honorable also served on state public utility commissions. The *amici* are:

---

[1] All parties have consented to the filing of this brief. In accordance with Supreme Court Rule 37.6, *amici curiae* state that neither the parties, nor their counsel, had any role in authoring, nor made any monetary contribution to fund the preparation or submission of, this brief.

Charles B. Curtis, Commissioner 1977-1981, Chair 1977-1981.

Elizabeth A. Moler, Commissioner 1988-1997, Chair 1993-1997.

James J. Hoecker, Commissioner 1993-2001, Chair 1997-2001.

Nora Mead Brownell, Commissioner 2001-2006.

Jon Wellinghoff, Commissioner 2006-2013, Chair 2009-2013.

John Norris, Commissioner 2010-2014.

Norman C. Bay, Commissioner 2014-2017, Chair 2015-2017.

Colette D. Honorable, Commissioner 2015-2017.

SUMMARY OF ARGUMENT

In the Affordable Clean Energy (ACE) Rule, EPA argued that the Clean Power Plan (CPP) impermissibly encroached upon the Commission's authority under the Federal Power Act (FPA). *Repeal of the Clean Power Plan; Emission Guidelines for Greenhouse Gas Emissions from Existing Electric Utility Generating Units; Revisions to Emission Guidelines Implementing Regulations*, 84 Fed. Reg. 32,520, 32,529–30 (July 8, 2019). On review before the D.C. Circuit, however, EPA did not press that argument. *Am. Lung Ass'n v. EPA*, 985 F.3d 914, 969 n.12 (2021), *cert. granted*, *West Virginia v. EPA*, 142 S. Ct. 420 (2021). The court noted that EPA had "good reason" for not doing so. *Id.* "The effects of environmental regulations on the power grid do not amount to power regulation statutorily reserved to FERC." *Id.*

Nevertheless, some parties continue to suggest that the CPP intruded upon FERC's FPA authority. *See* Brief for Petitioners at 42, *West Virginia v. EPA*, No. 20-1530 (Dec. 13, 2021) ("the federal government already has an energy regulator for some of these concerns: FERC"); Brief of Petitioner Westmoreland Mining Holdings LLC at 40, *West Virginia v. EPA*, No. 20-1530 (Dec. 13, 2021) ("[t]hose technical fields are the province of the States and FERC"); Brief of Respondent Basin Electric Power Cooperative in Support of Petitioners at 11–12, *West Virginia v. EPA*, No. 20-1530 (Dec. 13, 2021) ("EPA's attempt at generation shifting intrudes on energy management issues that are regulated by other federal, state, and local regulatory bodies"); Brief of Respondent National Mining Association in Support of Petitioners at 44, *West Virginia v. EPA*, No. 20-1530 (Dec. 13, 2021) ("Clean Power Plan would also have simultaneously intruded upon FERC's core powers").

Those arguments are meritless. In regulating air pollutants, EPA exercises its broad statutory authority under the Clean Air Act to protect public health and welfare. The Commission, by contrast, is charged with ensuring just and reasonable wholesale rates under an entirely different statutory regime. The CPP's aim and target was reducing carbon emissions. It was one of a long line of Clean Air Act rules promulgated by EPA targeting air pollution from fossil fuel-fired power plants. Many of those rules have had a substantial impact on the cost and utilization of higher-emitting power plants. Yet any potential effect on wholesale electricity rates was indirect. Despite EPA having regulated air pollution from such sources for fifty years, *amici* are not aware of a single Clean Air Act regulation that the

Commission has challenged in court as intruding upon its authority under the FPA.

Fossil fuel-fired power plants, regulated as electric generating units (EGUs) under the Clean Air Act, are a significant source of air pollution in the United States. *Am. Lung Ass'n*, 985 F.3d at 934–35. This includes emissions of greenhouse gases and other air pollutants. Therefore, the Clean Air Act authorizes and, at times, directs EPA to regulate air pollution from EGUs. *See, e.g.*, 42 U.S.C. §§ 7651–7651o.

Although such regulation inevitably affects power generation, Congress did not preclude EPA from acting. On the contrary, at the height of concerns about an energy crisis in the late 1970s, Congress enhanced EPA's air quality authorities as they relate to the power sector. Further, only in time of war or emergency did Congress empower energy regulators under the FPA with a temporary and narrowly tailored authority to require electric generation and to suspend environmental compliance. 16 U.S.C. § 824a(c). Congress was therefore aware of the impact of environmental regulations in reducing pollution from the power sector and, barring exceptional circumstances, was unwilling to allow the FPA to override such regulations.

Against this backdrop, EPA and the Commission have worked together to harmonize their authorities in the context of major air pollution rules. EPA's authority to regulate air pollution is likewise not limited by FPA provisions reserving state authority over facilities used for the generation of electric energy. The plain language of the FPA delineates the relationship between the Commission and the States, not the relationship between EPA and the States. In

contrast, the Clean Air Act authorizes EPA to set national and interstate air pollution requirements and standards, and relies upon a cooperative federalism framework.

Finally, a profound energy transition is underway in the United States. Even though the CPP was never implemented, the United States met the national target of a 32 percent reduction in carbon emissions from 2005 levels in 2019, 11 years ahead of the CPP's schedule. *See* U.S. Energy Info. Admin., *Monthly Energy Review December 2021*, at Table 11.6. This ongoing energy transition validates generation shifting as a cost-effective way to reduce air pollution, including carbon pollution, without compromising grid reliability or affordable electricity. Moreover, in light of this transformation, any future greenhouse gas regulation of the power sector by EPA under the Clean Air Act would encounter a far different industry than the agency did in 2015. This fact undermines the necessity or relevance of reviewing a rule that has been vacated and not replaced.

ARGUMENT

I. EPA's Exercise of Authority Under the Clean Air Act Does Not Contravene the Commission's Authority Under the FPA

The Commission and EPA regulate pursuant to independent authorities granted under different statutes. The plain text of the Clean Air Act and the FPA makes clear that each reaches different aspects of electric generation—air pollution for the former and wholesale rates for the latter. The Commission's ratemaking authority is also limited to rules or practices that *directly* affect wholesale rates. Unless

EPA targets and directly affects wholesale rates, the Commission's jurisdiction has not been invaded. Moreover, the FPA does not give the Commission a license to prevent other agencies from using their own authorities simply because their regulations may affect wholesale rates. Only in time of war or emergency does the FPA provide a temporary and narrowly tailored authority to suspend environmental laws and regulations. 16 U.S.C. § 824a(c). Congressional acts enhancing air quality authorities during the 1970s energy crisis underscore EPA's expansive authority to regulate power sector air emissions even when environmental regulations affect electricity generation. *See, e.g.*, Pub. L. No. 95-95, 91 Stat. 685 (1977). Not surprisingly, given this broader statutory context and the text of the FPA, the Commission's longstanding administrative practice has been to respect EPA environmental regulations, to collaborate with EPA, and to harmonize the exercise of its authority with that of EPA.

A. The Commission and EPA Exercise Independent Authorities Under Different Statutes

EPA is an environmental regulator, charged with implementing and enforcing the Clean Air Act to limit air pollution. The Commission, by contrast, is the economic regulator for the wholesale power market, ensuring, *inter alia*, that wholesale electricity rates are "just and reasonable." 16 U.S.C. § 824d(a). Although the Commission and EPA regulate some of the same entities, their statutory aims are distinct. That a Clean Air Act rule may indirectly affect wholesale rates does not preclude EPA action.

The key is whether EPA's regulation tries to set the rate to be paid for wholesale power. *See FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 284 (2016) (ratemaking involves establishing the amount of money the purchaser must pay in exchange for power). To ascertain whether jurisdictional overreaching has occurred, this Court considers "the *target* at which [a] law *aims*." *Id.* at 282 (quoting *Oneok, Inc. v. Learjet, Inc.*, 573 U.S. 373, 385 (2015)); *see also Hughes v. Talen Energy Mktg., L.L.C.*, 578 U.S. 150, 164 (2016) (finding FPA preemption of state law that targeted wholesale rates). As long as EPA's aim and target is reducing pollution, its exercise of authority under the Clean Air Act is not in conflict with the Commission's authority under the FPA. *See Am. Lung Ass'n*, 985 F.3d at 966 ("The Clean Power Plan was aimed not at regulating the grid, but squarely and solely at controlling air pollution—a task at the heart of the EPA's mandate.").

In contrast, the Commission's ratemaking jurisdiction under the FPA is limited to "rules or practices that '*directly* affect the [wholesale] rate.'" *Elec. Power Supply Ass'n*, 577 U.S. at 278 (quoting *Cal. Indep. Sys. Operator Corp. v. FERC*, 372 F.3d 395, 403 (2004)). As the Court has explained, "indirect or tangential impact on wholesale electricity rates" lie beyond the Commission's reach. *Id.* To hold otherwise would give the FPA "near-infinite breadth": "FERC could regulate now in one industry, now in another, changing a vast array of rules and practices to implement its vision of reasonableness and justice." *Id.*

Regulations from a myriad of federal agencies can increase generator costs—be they requirements from the Department of Labor, Occupational Safety and

Health Administration, Pipeline and Hazardous Materials Safety Administration, Nuclear Regulatory Commission, National Surface Transportation Board, Mine Safety Health Administration, or Bureau of Land Management, to name but a few. To assert that the Commission's authority over wholesale electricity markets precludes those agencies from exercising their statutory authorities would be nothing short of remarkable. Supreme Court precedent, "a common-sense construction of the FPA's language" and longstanding Commission practice, repudiate such a sweeping view. *Id.*

Indeed, the CPP was one of a long line of Clean Air Act rules promulgated by EPA, targeting air pollution from fossil fuel-fired power plants. Many of those rules—including the Mercury and Air Toxics Standards, the Cross-State Air Pollution and Clean Air Interstate Rules, the Acid Rain Program, the NOx SIP call, and the first ever performance standards for EGUs under the Clean Air Act, in 1971—have had a substantial impact on the cost of operating higher-emitting power plants and on the plants' relative utilization. *See Am. Lung Ass'n*, 985 F.3d at 966 ("Any regulation of power plants—even the most conventional, at-the-source controls—may cause a relative increase in the cost of doing business for particular plants but not others, with some generating-shifting effect. That is how pollution regulation in the electricity sector has always worked.").

Not only is the Commission's ratemaking authority limited to rules or practices that directly affect wholesale rates, but the FPA and Clean Air Act have different statutory mandates. The Commission's obligation is to ensure just and

reasonable rates; EPA's obligation is to protect the "public's 'health' and 'welfare.'" *Massachusetts v. EPA*, 549 U.S. 497, 532 (2007) (quoting 42 U.S.C. § 7521(a)(1)). "The two obligations may overlap, but there is no reason to think the two agencies cannot both administer their obligations and yet avoid inconsistency." *See id.* (comparing the statutory obligations of EPA and the Department of Transportation). The Commission's obligation to ensure just and reasonable rates is independent of EPA's obligation to protect the public health and welfare. Their authorities arise out of different statutes and reflect distinct policy goals. Compliance with the regulation of air pollution from EGUs may affect the cost of certain generators and therefore generator choice but this impact is indirect and tangential to EPA's proper aim and target of reducing carbon emissions. It does not intrude upon the authority of the Commission.

B. The FPA Authorizes Environmental Regulations to Be Temporarily Overridden in Emergencies Only

The FPA contains an emergency provision to order electric "generation, delivery, interchange, or transmission" during a time of "war" or "emergency." FPA § 202(c), 16 U.S.C. § 824a(c). This authority no longer resides with the Commission, as Congress delegated it to the Department of Energy (DOE) in the DOE Organization Act. 42 U.S.C. § 7151(b). In 2015, Congress amended section 202(c) to provide a temporary and narrowly tailored authority to suspend environmental laws and regulations in an emergency order. Pub. L. 114-94, § 61002(a), 129 Stat. 1772 (2015).

Congress imposed significant guardrails to limit use of this provision, which underscores its exceptional nature. A section 202(c) order only applies "during hours necessary to meet the emergency and to serve the public interest." 16 U.S.C. § 824a(c)(2), and must be "consistent with any applicable Federal, State, or local environmental law or regulation and minimize[] any adverse environmental impacts." *Id.* Moreover, when conflict is unavoidable between the order and an environmental standard, the order "shall expire not later than 90 days after it is issued," unless reauthorized after consultation with the "primary Federal agency with expertise in the environmental interest." *Id.* at § 824a(c)(4).

Thus, when Congress sought to include an authority in the FPA that allows environmental regulations to be overridden, it did so explicitly. Congress recognized the extraordinary nature of the authority, carefully tailored its use to the emergency, and required the minimization of any adverse environmental impact. The plain implication of this language is that Congress did not intend the Commission to possess a more expansive power to override EPA's mandate. *See, e.g.*, *EPA v. EME Homer City Generation*, L.P., 572 U.S. 489, 509–10 (2014) (quoting *Jama v. Immigration and Customs Enforcement*, 543 U.S. 335, 341 (2005) ("We do not lightly assume that Congress has omitted from its adopted text requirements that it nonetheless intends to apply, and our reluctance is even greater when Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest.")). Alongside the Clean Air Act's extensive references to regulation of EGU emissions, the FPA's

emergency provision establishes that Congress was aware of possible tensions between air regulation and electric service, and yet short of wartime or emergencies intended for environmental regulation to proceed.

C. The Broader Statutory Context Bolsters EPA's Clear Authority to Regulate Air Pollution from EGUs

Long before amending section 202(c) of the FPA in 2015, Congress had addressed the relationship between federal environmental and energy regulation. Particularly instructive are the energy and air quality laws enacted by Congress during the energy crisis of the late 1970s. Those statutes establish that Congress recognized the different aims of energy and environmental legislation and the importance of protecting the environment even during energy shortages.

On August 4, 1977, amid heightened concerns of "an increasing shortage of nonrenewable energy resources," Congress established DOE and the Commission in the DOE Organization Act. Pub. L. No. 95-91, 91 Stat. 565 (1977). Congress found that "a strong national energy program" must be "consistent with overall economic, environmental, and social goals." *Id.* at § 101. The legislation required DOE to submit an annual report to Congress to demonstrate, *inter alia*, that national energy needs were being met "with due regard for the protection of the environment." *Id.* at § 657.

Three days later, Congress enhanced EPA's authority to protect and improve air quality by amending the Clean Air Act. Pub. L. No. 95-95, 91 Stat. 685 (1977). This legislation created several new

programs that have been used to regulate pollution from EGUs, including an interstate air pollution authority, *id.* at § 108(a)(4), the Prevention of Significant Deterioration Program, *id.* at § 127, and the Regional Haze Program, *id.* at § 128.

With the energy crisis in mind, Congress directed EPA to consider energy needs when setting emission limitations and implementing air quality strategies. *See*, *e.g.*, *id.* at § 109(b). Congress also authorized the President, upon a Governor's request, to suspend a state air quality plan for up to four months for an energy emergency. *Id.* at § 107(a). This time-limited emergency provision parallels the narrow emergency provision under the FPA and establishes that Congress did not intend for air quality regulations generally to give way to energy concerns.

This history of congressional actions during the late 1970's is telling. Even during an energy crisis, Congress did not override EPA authorities. To the contrary, Congress empowered EPA with additional authority to regulate air pollution from EGUs, and crafted emergency provisions to override that authority only temporarily and under limited circumstances. Congress recognized that air pollution rules would affect decisions to operate EGUs and signaled that, absent an emergency, energy and environmental regulators should work to accommodate the other's distinct statutory aims and missions.

D. The Commission's Longstanding Administrative Practice Respects EPA's Environmental Authority

Against this backdrop, the Commission has long sought to harmonize Clean Air Act regulations with

its FPA duties, without viewing the regulations as encroaching upon its jurisdiction. The Cross-State Air Pollution Rule, 76 Fed. Reg. 48,207 (Aug. 8, 2011), the Clean Air Interstate Rule, 70 Fed. Reg. 25,162 (May 12, 2005), the Acid Rain Program, 42 U.S.C. §§ 7651–7651o, the NOx SIP Call, 63 Fed. Reg. 57,356 (Oct. 27, 1998), and the Mercury and Air Toxics Standards (MATS), 77 Fed. Reg. 9,303 (Feb. 16, 2012), all regulated pollution from power plants. Compliance with those rules, including the installation of scrubbers or other controls, undoubtedly increased the cost of generating electricity, changed EGU utilization rates, and resulted in decisions to retire units while replacing them with cleaner resources. Yet the Commission has never challenged in court EPA's authority under the Clean Air Act to promulgate these regulations.

An examination of the MATS rule illustrates how the agencies have worked together to achieve important environmental goals while minimizing potential effects on wholesale electricity markets or reliability. MATS required existing coal plants to reduce mercury, acid gases, and other toxic emissions. *See Policy Statement on the Commission's Role Regarding the Environmental Protection Agency's Mercury and Air Toxics Standards*, 139 FERC ¶ 61,131, at P 2 (2012). Affected sources could seek a one-year extension of the compliance start date for reliability reasons. *Id.* The Commission oversees grid reliability, and under section 215 of the FPA has jurisdiction over the "users, owners, and operators of the bulk-power system." 16 U.S.C. § 824o(b)(1). *See generally*, FERC, Reliability Primer 5–6 (2020). EPA agreed to seek the Commission's advice on a case-by-

case basis when considering extension requests, but under MATS was not required to follow it. *Id.* at P 7.

The Commission issued a Policy Statement explaining how it would share its views with EPA on the reliability consequences of prohibiting an EGU from operating because of MATS non-compliance. *Id.* at P 1. Subsequently, the Commission found that it would be necessary to allow several units not in compliance with MATS to continue operations in order to maintain reliability. *See*, *e.g.*, *Commission Comments on Grand River Dam Authority's Request for EPA Administrative Order*, 151 FERC ¶ 61,027, at P 7 (2015); *Commission Comments on Kansas City Board of Public Utilities' Request for EPA Administrative Order*, 149 FERC ¶ 61,138, P 7 (2014). In each instance, EPA considered the Commission's guidance and enabled the EGU's continued operation. *See*, *e.g.*, *In the Matter of Grand River Dam Authority*, AED-CAA-113(a)-2016-0002 (EPA 2016); *In the Matter of Board of Public Utilities of the United Government of Wyandotte/Kansas City, Kansas*, AED-CAA-113(a)-2016-0001 (EPA 2016).

The Commission's experience with MATS informed its collaboration with EPA to provide technical feedback on the CPP. The Commission held four technical conferences to study possible effects of the CPP. *See Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 80 Fed. Reg. 64,662, 64,673 (Oct. 23, 2015). EPA participated in all four conferences. *Id.* at 64,707. Commission staff worked with EPA, and senior EPA officials met with each member of the Commission on more than one occasion. *Id.*; *see also Am. Lung Ass'n*, 985 F.3d at 967 (noting that "EPA developed the Clean Power Plan with input from

other agencies with relevant expertise," including FERC and DOE).

On May 15, 2015, the Commission sent a letter to EPA signed by all five members. Letter from FERC Chair Norman C. Bay and Commissioners Cheryl A. LaFleur, Colette D. Honorable, Philip D. Moeller, and Tony Clark, to EPA Acting Administrator Janet G. McCabe, at 1 (May 15, 2015), https://www.ferc.gov/media/ferc-letter-epapdf. The letter suggested "more flexibility during the early years of compliance," *id.*, and offered to help EPA develop a reliability safety valve and to work with EPA staff to provide reliability monitoring and assistance, *id.* at 4. The Commission recognized that "state authority to propose plans for compliance with the federal Clean Air Act does not depend on, or require, Commission approval." *Id.* at 3. At no point did the Commission's letter allege that the CPP encroached upon its jurisdiction.

EPA reviewed the Commission's comments and responded by creating a reliability safety valve in the final rule, delaying the start of the program from 2020 to 2022, enabling States to opt for "a more gradual glide path" to compliance by 2030, and forming an interagency group with the Commission and DOE to coordinate reliability assurance efforts. 80 Fed. Reg. at 64,671. In short, the record demonstrates the way in which the Commission respected EPA's authority under the Clean Air Act, while leveraging the Commission's expertise to maintain grid reliability.

E. The Commission Has Ruled That It Lacks Jurisdiction Over the Environmental Attributes of Generation Not Directly Related to the Wholesale Sale of Electricity in Interstate Commerce

The Commission has avoided direct regulation of the environmental aspects of electricity generation. For instance, the Commission has disclaimed authority over emissions allowances that are unbundled from the wholesale sale of electricity in interstate commerce. The Commission has reasoned that "just as a sale or transfer of fuel supplies by a public utility is not subject to direct Commission review under section 205 when the sale or transfer occurs independent of a sale of electric energy in interstate commerce, . . . a sale or transfer of emissions allowances does not constitute a sale of electric energy for resale." *Edison Elec. Inst.*, 69 FERC ¶ 61,344, 1994 WL 701306, at *3 (1994).

Similarly, the Commission has disclaimed authority over renewable energy credits because they are state-created and state-issued instruments that do "not constitute the transmission of electric energy in interstate commerce or the sale of electric energy at wholesale in interstate commerce." *WSPP Inc.*, 139 FERC ¶ 61,061, at P 21 (2012). The Commission noted that an "unbundled REC transaction does not affect wholesale electricity rates, and the charge for the unbundled RECs is not a charge in connection with a wholesale sale of electricity." *Id.* at P 24. Therefore, the Commission has not asserted jurisdiction over the environmental attributes of generation. This is precisely where EPA's authority lies.

II. The FPA Cannot Be Used to Shield States from EPA's Regulation of Pollution Under the Clean Air Act

Just as EPA's regulation of greenhouse gases or any other air pollution under the Clean Air Act does not intrude upon Commission authority, it does not intrude upon that of the States. Under the FPA, the Commission is charged with ensuring just and reasonable rates. But in carrying out this obligation "[t]he *Commission* . . . shall not have jurisdiction . . . over facilities used for the generation of electric energy." 16 U.S.C. § 824(b)(1) (emphasis added). This limit in the FPA on the Commission's jurisdiction, however, cannot be read to restrict other federal agencies from acting under their own statutory authorities. EPA's mission under the Clean Air Act is not the same as the Commission's, and constraints on the Commission's authority over wholesale markets are beside the point.

The CPP did not seek to regulate generation of electricity or to direct policy choices about generation; rather, it set emission limitations that took into account the availability of cleaner generation resources. *See* 80 Fed. Reg. at 64,707. In doing so, the CPP tracked the cooperative federalism structure of the Clean Air Act. EPA sets emission guidelines for existing sources of pollution, based on its determination of the best system of emission reduction (BSER). 42 U.S.C. § 7411(d). States then establish enforceable standards of performance on the covered sources in their jurisdiction and determine how sources will demonstrate compliance. *Id.* at § 7411(d)(1).

Whether the BSER can be based on generation shifting is a question under the Clean Air Act, not the FPA. However, the CPP afforded States broad flexibility to implement programs that reflected local needs and interests. States were not required to rely solely on the generation shifting strategies comprising the BSER "or even at all." 80 Fed. Reg. at 64,723. If they wished, States could retain existing coal units and invest in carbon capture and sequestration—which Wyoming is doing even in the absence of the CPP. *See* Steve Inskeep, *Wyoming is Among the States Spending Millions to Promote Carbon Capture*, NPR (Sept. 7, 2021), https://www.npr.org/2021/09/07/1034719342/wyoming-is-among-the-states-spending-millions-to-promote-carbon-capture. States could direct conversion of coal units to fire natural gas. 80 Fed. Reg. at 64,756. States could also craft trading approaches, through which EGUs could purchase emission rate credits or allowances and continue operating. *See, e.g.*, *id.* at 64,836.

In any event, EPA was acting under its Clean Air Act authority, not the Commission's FPA authority. The CPP's aim and target was reducing carbon emissions, not setting wholesale rates. And the plain language of the FPA that limits the Commission's authority over States—*i.e.*, the reservation for generation—does not apply to EPA. Consistent with previous Clean Air Act standards, the CPP would certainly have influenced state regulators, utilities, and merchant generators in their decisions to run, retire, or change the operation of EGUs.

This is not prohibited under the FPA, and *amici* who served as state utility regulators have ample experience integrating federal and state air

regulations with the operation of generation in a State. Moreover, "[i]nterstate air pollution is not an area of traditional state regulation." *Am. Lung. Ass'n*, 985 F.3d at 968. No State has the jurisdiction to tackle a national or transnational problem. State regulators are usually pragmatic about federal pollution regulation. They recognize that "'[a]ir pollution is transient, heedless of state boundaries,' particularly where the pollutants are greenhouse bases, which have little if any localized effect but great cumulative impact." *Id.* at 969 (quoting *EME Homer City Generation, L.P.*, 572 U.S. at 496).

"[F]ederalism concerns do not bar the United States government from addressing areas of *federal* concern just because its actions have incidental effects on areas of state power." *Id.* (citing *Elec. Power Supply Ass'n*, 577 U.S. at 279–86). When the Clean Air Act prescribes a process for regulating emissions from existing sources, state regulators engage in the important work of making compliance plans to establish, implement, and enforce standards of performance. They appreciate that "States remain equally free to choose the compliance measures that best fit the needs of their State and industry." *Id.* at 970. This is an example of cooperative federalism, not the usurpation of state authority.

III. The Energy Transition is Profound and Ongoing

This Court has noted that "[w]hile the Congresses that drafted . . . [the Clean Air Act] might not have appreciated the possibility that burning fossil fuels could lead to global warming, they did understand that without regulatory flexibility, changing circumstances and scientific developments would

soon render the Clean Air Act obsolete." *Massachusetts*, 549 U.S. at 532 (discussing Clean Air Act § 202(a)(1)). Here, the circumstances are changing in a profound way that underscores the need for "regulatory flexibility" consistent with congressional intent. Innovation, economic forces, state and federal public policy, and consumer preferences are already driving significant decarbonization of the power sector.

The history of the CPP itself provides a dramatic example of the change sweeping through the power sector. In 2015, EPA proposed the CPP could achieve a 32 percent reduction in national power sector carbon emissions from 2005 levels by 2030. 80 Fed. Reg. at 64,665. Two years later, in 2017, EPA's proposed repeal raised concerns that the CPP "threaten[s] to impose massive costs on the power sector and consumers" and harm the "national interest in affordable, reliable electricity." *Repeal of Carbon Pollution Emission Guidelines for Existing Stationary Sources: Electric Utility Generating Units*, 82 Fed. Reg. 48,035, 48,038 (Oct 16, 2017). The CPP was never implemented. Yet in the very year that EPA proposed to repeal the CPP, carbon emissions from the power sector fell 28 percent below 2005 levels, without any apparent harm to consumers, reliability, or the public interest. *See* U.S. Energy Info. Admin., *Monthly Energy Review December 2021*, at Table 11.6. What is more, by the end of 2019, the United States had, at a national level, achieved

emissions reductions equal to those that the States were projected to achieve under the CPP.[2]

Those reductions resulted from a rapidly changing generation mix. When the CPP was issued in 2015, U.S. electricity was approximately 33 percent natural gas, 33 percent coal, 19 percent nuclear, 13 percent renewable energy, and 1 percent petroleum. *See* NREL, *Electricity Generation Baseline Report*, at ix (2017). By 2020, the generation mix had shifted to 40 percent natural gas, 19 percent coal, 20 percent nuclear, 20 percent renewable energy, and 1 percent petroleum. *See* U.S. Energy Info. Admin., *Electricity Explained: Electricity Generation, Capacity, and Sales in the United States* (Mar. 18, 2021), https://www.eia.gov/energyexplained/electricity/electricity-in-the-us-generation-capacity-and-sales.php. About 20 percent of U.S. coal capacity retired from 2015 to 2020. *See* Taylor Kuykendall et al., *Slated Retirements to Cut US Coal Fleet to Less Than Half 2015 Capacity by 2035*, S&P Global (July 29, 2021), https://www.spglobal.com/marketintelligence/en/news-insights/latest-news-headlines/slated-retirements-to-cut-us-coal-fleet-to-less-than-half-2015-capacity-by-2035-65741012. By 2020, for the first time, renewable capacity exceeded coal capacity on the grid. FERC, *Office of Energy Projects Infrastructure Update for May 2019* (July 2019). The levelized cost of on-shore wind and utility-scale solar resources has

---

[2] *Id.* According to Table 11.6, the electric power sector emitted 2416 million metric tons of carbon emissions in 2005, 1743 million metric tons in 2017, and 1620 million metric tons in 2019. Thus, emissions fell 28 percent in 2017 and 33 percent in 2019 from 2005 levels.

plummeted over the last decade, and they are cheaper than coal and natural gas generation on an unsubsidized basis. *See* Lazard, *Lazard's Levelized Cost of Energy Analysis – Version 15.0*, at 8 (Oct. 2021).

The Commission, the North American Electric Reliability Corporation (NERC), regional grid operators, and state public utility commissions have managed this rapid energy transition while maintaining reliable and affordable wholesale electricity. In 2018, the Commission rejected a DOE proposed rulemaking to subsidize coal and nuclear plants, noting that "extensive comments submitted by the RTOs/ISOs [Regional Transmission Organizations/Independent System Operators] do not point to any past or planned generator retirements that may be a threat to grid resilience." *See Order Terminating Rulemaking Proceeding, Initiating New Proceeding, and Establishing Additional Procedures*, 162 FERC ¶ 61,102, at P 15 (2018). In its most recent reliability assessment, NERC found that despite challenges, including the pandemic, extreme weather, cyber security, supply chain issues, and the grid's transformation, "the BPS [Bulk Power System] continued to perform well since most metrics that are within an operator's control show a continual improvement or remain stable." *See* NERC, *State of Reliability 2021*, at vii (Aug. 2021).

Regional Transmission Organizations and Independent System Operators, which serve two-thirds of U.S. load, *see* FERC, *Energy Primer: A Handbook of Energy Market Basics* 39 (Apr. 2020), have been able to reliably integrate ever higher amounts of renewable energy. On April 24, 2021, the California ISO set a record by serving 94.5 percent of

demand with renewable energy. *See* Sammy Roth, *California Just Hit 95% Renewable Energy. Will Other States Come Along for the Ride?*, LA Times (Apr. 29, 2021), https://www.latimes.com/environment/newsletter/2021-04-29/solar-power-water-canals-california-climate-change-boiling-point. The Southwest Power Pool set its own record, meeting 84.2 percent of demand with renewable energy on March 29, 2021. *See* Tyler Stoff, *How Southwest Power Pool Sets Renewable Records Daily*, ACORE (Apr. 8, 2021), https://acore.org/how-southwest-power-pool-sets-renewable-records-daily/.

As the generation mix shifted from coal to natural gas and renewables, wholesale electricity prices fell "substantially" from 2008 to 2017. *See* Andrew D. Mills et al., Lawrence Berkeley National Laboratory, *Impact of Wind, Solar, and other Factors on Wholesale Power Prices* 5 (2019). In 2020, average wholesale electricity prices reached their lowest level since the beginning of the twenty-first century. Joachim Seel et al., *Plentiful Electricity Turns Wholesale Prices Negative*, Advances in Applied Energy 4 (2021). The shale gas boom, the addition of low-marginal-cost renewables, average efficiency heat rate gains of thermal plants, and modest demand growth have all contributed to the low prices. *Id.*

State policies have played a strong role in the ongoing decarbonization of the power industry, as have the economics of low natural gas prices and renewable energy. Federal air pollution regulation dovetails with these policies and market trends. Thirty-eight States and the District of Columbia have Renewable Portfolio Standards or Renewable Portfolio Goals. *See* U.S. Energy Info. Admin., *Renewable Energy Explained: Portfolio Standards*

(June 29, 2021), https://www.eia.gov/energyexplained/renewable-sources/portfolio-standards.php. Twelve States and the District of Columbia will require 100 percent clean energy by mid-century. *Id.* An increasing number of electric utilities have also announced plans to provide 100 percent clean energy or zero carbon emissions by mid-century. *See* Jeff St. John, *The 5 Biggest US Utilities Committing to Zero Carbon Emissions by 2050*, Greentech Media (Sept. 16, 2020), https://www.greentechmedia.com/articles/read/the-5-biggest-u.s-utilities-committing-to-zero-carbon-emissions-by-mid-century.

At the federal level, the production tax credit and investment tax credit have incentivized the development of renewable resources and promoted generation shifting. Moreover, the Commission has long supported the development of competition in wholesale markets and efficient price formation. As demand response, energy storage, and distributed energy resources have developed, the Commission has removed barriers to their participation in wholesale markets. *See Demand Response Compensation in Organized Wholesale Energy Markets*, Order No. 745, 134 FERC ¶ 61,187, *order on reh'g and clarification*, Order No. 745-A, 137 FERC ¶ 61,215 (2011), *reh'g denied*, Order No. 745-B, 138 FERC ¶ 61,148 (2012), *vacated sub nom. Elec. Power Supply Ass'n v. FERC*, 753 F.3d 216 (D.C. Cir. 2014), *rev'd & remanded sub nom. FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260 (2016); *Electric Storage Participation in Markets Operated by Regional Transmission Organizations and Independent System Operators*, Order No. 841, 162 FERC ¶ 61,127 (2018), *order on reh'g*, Order No. 841-A, 167 FERC ¶ 61,154 (2019), *aff'd sub nom. Nat'l Ass'n of Regulatory Util.*

Comm'rs v. FERC, 964 F.3d 1177 (D.C. Cir. 2020); *Participation of Distributed Energy Resource Aggregations in Markets Operated by Regional Transmission Organizations and Independent System* Operators, Order No. 2222, 85 Fed. Reg. 67,094 (Oct. 21, 2020), 172 FERC ¶ 61,247 (2020), *corrected*, 85 Fed. Reg. 68,450 (Oct. 29, 2020), *order on reh'g*, Order No. 2222-A, 174 FERC ¶ 61,197 (2021).

All of this highlights the fact that the power sector is in the midst of a rapid and profound transformation. The power of innovation, economic forces, public policy, and consumer preference is driving the transformation. Neither the CPP nor the ACE Rule is in effect, and EPA has not issued a replacement plan. The power sector today is far different than the one EPA examined in 2015, which undermines the necessity or relevance of reviewing a rule that has been vacated and not yet been replaced. This Court should preserve the "regulatory flexibility" that Congress intended EPA to have to address "changing circumstances and scientific developments." *Massachusetts*, 549 U.S. at 532.

CONCLUSION

For the foregoing reasons, the decision below should be affirmed.

Respectfully submitted,

STEPHEN E. ROADY
Counsel of Record
EMMA C. WELLBAUM
DUKE UNIVERSITY SCHOOL OF LAW
210 Science Drive
Box 90360
Durham NC 27708
(202) 257-9114
steve.roady@duke.edu

Counsel for Amici Curiae

January 25, 2022