UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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STATE OF WEST VIRGINIA, ET AL., :
:
Petitioners, :
:
v. :
: No. 15-1363, et al.
ENVIRONMENTAL PROTECTION AGENCY AND REGINA A. MCCARTHY, ADMINITRATOR, UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, :
:
Respondents. :
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Tuesday, September 27, 2016
Washington, D.C.

The above-entitled matter came on for oral argument pursuant to notice.

BEFORE:

CIRCUIT JUDGES HENDERSON, ROGERS, TATEL, BROWN, GRIFFITH, KAVANAUGH, SRINIVASAN, MILLETT, PILLARD, AND WILKINS

APPEARANCES:

ON BEHALF OF THE PETITIONERS:
ELBERT LIN, ESQ; PETER D. KEISLER, ESQ.; ALLISON D. WOOD, ESQ.; DAVID B. RIVKIN, JR., ESQ.; LAURENCE H. TRIBE, ESQ.; JOHN CAMPBELL BARKER, ESQ.; THOMAS A. LORENZEN, ESQ.; MISHA TSEYTLIN, ESQ.; F. WILLIAM BROWNELL, ESQ.

ON BEHALF OF THE RESPONDENTS:
ERIC HOSTETLER, ESQ.; AMANDA SHAFER BERMAN, ESQ.; NORMAN L. RAVE, JR., ESQ.; BRIAN LYNK, ESQ.

ON BEHALF OF THE INTERVENORS:
KEVIN POLONCARZ, ESQ.; MICHAEL J. MYERS, ESQ.; SEAN DONOHUE, ESQ.

C O N T E N T S

C O N T E N T S (continued)

P R O C E E D I N G S

THE CLERK: Oye, oye, oye, all persons having business before the Honorable, the United States Court of Appeals for the District of Columbia Circuit are admonished to draw near and give their attention for the court is now sitting. God save the United States and this Honorable Court. Be seated please.

Case number 15-1363, et al., State of West Virginia, et al., Petitioners v. Environmental Protection Agency and Regina A. McCarthy, Administrator, United States Environmental Protection Agency.

JUDGE HENDERSON: Good morning. Mr. Lin.

I. All statutory issues other than Section 112 (includes Generation Shifting and State Authority)

ORAL ARGUMENT OF ELBERT LIN, ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. LIN: Good morning, Judge Henderson, and may it please the Court. I am Elbert Lin, Solicitor General for the State of West Virginia here on behalf of the State Petitioners. Before I begin I'd like to briefly explain how Mr. Keisler and I hope to divide our argument time. I would like to focus my time in this part of today's argument on the applicability of the two clear statement canons to the rule; Mr. Keisler will then address whether the rule comports with the text and structure of Section 111(d). We

are both prepared to address the rules violation of the State's authority under Section 111(d).

Your Honors, the EPA has invoked a little used provision of the Clean Air Act that concerns performance standards for existing sources, and used it to require the creation of a new energy economy. This rule is not about improving the performance of existing fossil fuel power plants, rather, it is about shutting them down and replacing them with newly constructed renewable generation --

JUDGE GRIFFITH: Your argument, your major questions doctrine argument turns on this being a transformative change, I think that's the word you all have used, is that right?

MR. LIN: Yes, Your Honor.

JUDGE GRIFFITH: How is it transformative when the change to the coal industry will actually only be a five percent difference between the rule being administered and there being no rule at all? By 2030, apparently 32 percent of power plants will be coal operated without the rule, 27 percent will be coal operated with the rule, that hardly sounds transformative.

MR. LIN: Your Honor, there's two answers to that question, the first is that there will be significant changes in the real world, the U.S. Energy Information Administration, which is the primary federal authority for

energy statistics, has concluded based on their own analysis that the change in the share of energy generation for coal will be from 30 percent to 20 percent under the clean power plant. But the second and more important answer is the transformative nature of this rule does not depend solely on what its, the magnitude of its real world impact, instead, there are four reasons we think this qualifies as a transformative --

JUDGE GRIFFITH: This, I mean, this doesn't sound like *UARG*, though, does it? It doesn't sound like *Brown & Williamson*, these are places where we've been told by the Supreme Court to pay careful attention to the major questions doctrine, and yet in *UARG* you had millions of new sources that were to be regulated, *Brown & Williamson* you had a whole new industry, and now you're talking about a marginal difference, some experts say a five percent difference, your experts say 10 percent difference, by 2030, that doesn't seem to me to be transformative.

MR. LIN: Well, Your Honor, what *UARG* said was that the, what EPA was doing there was going to make the statute that they are relying on unrecognizable to the Congress that enacted it, and that's what's happening here, this --

JUDGE TATEL: But here it's actually -- explain to me why it's unrecognizable, what -- just to pick up on Judge

Griffith's question, what EPA has done here is in *Utility Air* the agency was regulating thousands, maybe millions of new sources that had not been previously regulated. Here these new standards apply only to sources, Section 112 sources that have been regulated for decades, and the only authority that EPA has invoked is to set emission standards, something else it's been doing for decades. In fact, the only thing that seems transformative here is that it's regulating CO2 for the first time, but the Supreme Court did that work in *Massachusetts v. EPA*. So, why is it transformative and innovative? It seems to me like the Agency is simply invoking existing authority, long-established authority, and applying it to existing well regulated plants to regulate a new pollutant.

MR. LIN: Your Honor --

JUDGE TATEL: Why is that transformative?

MR. LIN: -- with respect, we think there is a significant mismatch between what this provision is about, and the way it has been used in the 45 years that it's been around, and this rule for the, all five of the existing source rules under Section --

JUDGE TATEL: The 45 years doesn't help you, I mean, *Massachusetts v. EPA* changed the calculation, it required the EPA to regulate carbon dioxide, it said it's a pollutant, EPA made its finding, endangerment finding, and

it was sustained by this Court. So, the EPA is facing a new situation created by the Court's decision in *Massachusetts v. EPA*, and it simply used existing powers, namely setting emission goals, and applied them to well regulated sources, so what is it exactly that's transformative or dramatic about that?

MR. LIN: Your Honor, what's transformative about it is that this rule is not about conformance, this rule is not about making the operations of these regulated sources better, the emission rates that EPA has set and required under the rule are rates that cannot be met by any individual existing power plant.

JUDGE GRIFFITH: But the statute says best system of emission reduction, right? Congress has delegated to the EPA authority to set standards according to the best system of emission reduction. What is there about this rule that's inconsistent with that? It's an awfully broad grant, one might quarrel with Congress giving so much power to the EPA, but they've done it, what's inconsistent with --

MR. LIN: Well, Your Honor, that's really the question here with respect to *UARG* is there are certain powers that Congress does not implicitly delegate to an agency, and what they are doing here, again, by setting emission rates that cannot be met by any individual existing power plant, they put power plants to --

JUDGE GRIFFITH: Is the system of emission reduction, they've applied to an interlocking system, the grid network, that already shifts between generation sources based on cost. The Government's arguing, as you know, they're just accelerating that, they're just making that easier to do. How is that inconsistent with the best system of emission reduction?

MR. LIN: Well, Your Honor, Mr. Keisler will address in more detail why we believe that the statute unambiguously precludes their interpretation of that term. But my point is simply that what this is doing is very different from what Section 111(d) is about, and the way 111(d) has been used, which is previously it has always been used to set a, use a technology or process to set an emission rate that an individual plant can theoretically achieve. The emission rates that are set here, 1,003 --

JUDGE TATEL: But under your theory of this, your major question theory, we won't get to that, right? Your point is that this Court can't even address this question because of *Utility Air*, correct? That we can't look at what that system of emission reduction means because whether or not the EPA has that authority turns on whether Congress has delegated, and your point is under *Utility Air* it hasn't, right? So, am I right, your point basically is that this is a *Utility Air* case, end of analysis, we don't have to look

at BSER or what it means, correct?

MR. LIN: That's correct, Your Honor.

JUDGE TATEL: Okay. So, but then if we go ahead and get to BSER that's the *Chevron* question which you say we can't reach because of *Utility Air*, correct?

MR. LIN: Well, Your Honor, we're not asking you necessarily to dispense with *Chevron*. *Utility Air Regulatory Group* applied the clear statement rule at step two of *Chevron*, so it could also be viewed as their interpretation of assuming it's --

JUDGE TATEL: That's a good point. Right.

MR. LIN: -- ambiguous is an unreasonable interpretation --

JUDGE TATEL: Right, right.

MR. LIN: -- of the statute precisely because it's the kind of power that we don't think Congress would have implicitly delegated in a provision.

JUDGE TATEL: But what is it the power? I asked you about, you agree, they're only regulating existing regulated plants; they're using emission standards which they've done for years; what is it that Congress didn't delegate, is it the generating shifting? Is that it?

MR. LIN: What Congress didn't delegate is the authority to pass a rule that requires emission rates that can only be met by restructuring the mix of electricity

generation, and that's what this does. Because no individual --

JUDGE PILLARD: I think, Mr. Lin, part of my difficulty is understanding how your argument about the level of deference is distinct from your statutory argument on the merits. I mean, I understand your argument that this is not permissible regulation of sources under Section 111(d), and I hear that you're making that argument, but I don't see that you're getting from that a separate *Chevron* exception. It just doesn't seem like *Brown & Williamson*, or *UARG* in those respects.

MR. LIN: Two answers, Your Honor. First is, as I was saying to Judge Tatel, we don't necessarily think this is an exception to *Chevron*, it could be resolved pre-*Chevron*, but *UARG* itself, and in the second clear statement doctrine that I address, *ABA v. FTC*, this Court applied, again, the clear statement rule at step two of *Chevron*. So, really, what we're talking about is it's a tie-breaker where when you've got, even if you assume that the statute is ambiguous, and we don't think it is, as Mr. Keisler will address, this is the kind of power that is so different from what Section 111(d) is about, and more importantly, this is a kind of power that not even the Federal Energy Regulatory Commission has. I mean, what we're talking about here is a state like West Virginia we use 96 percent of our power from

coal, we get three percent of our power from renewable sources, and one percent of our power from gas, and under the emission rates that they've set our coal fired plants can't meet the, they have two options, the first is to shut down, and the second is to buy credits from new not yet constructed sources, and that's an important part of the rule, the credits can only come from renewable generation that does not presently exist.

JUDGE SRINIVASAN: Can I ask a framing question? So, in *AEP* the Supreme Court said that Congress delegated to EPA the decision whether and how to regulate carbon dioxide emissions from power plants, so that's just a direct quote from *AEP*. So, I take it you wouldn't dispute the notion that this is a decision about how to regulate carbon dioxide emissions from power plants? That what your point is that even though Congress did delegate to EPA the decision of how to regulate carbon dioxide emissions from power plants there are certain ways in which EPA might exercise that how authority then still take it back outside, and anything Congress would have remotely recognized.

MR. LIN: That's exactly right, Your Honor.

JUDGE SRINIVASAN: Yes.

MR. LIN: Both, I think both parts of those questions are being addressed today, the whether and the how.

JUDGE SRINIVASAN: So, you don't dispute that this is a how, that this is a way to, quote, regulate carbon dioxide emissions from power plants, close quote, which is what the Supreme Court said was the authority delegated to the EPA?

MR. LIN: The question is whether this is a permissible how. There are lots of different hows, some hows are permissible under the statute, and some aren't. And we think not only, as Mr. Keisler will say that this is an impermissible how, but that it is a fundamentally different way. But before my time --

JUDGE SRINIVASAN: And you don't think that there's any problem with compliance based on generation shifting, right? In other words, whatever emission rate is arrived at by EPA it would be fine for states and regulated units to comply by generation shifting?

MR. LIN: Well, Your Honor, the Petitioners are somewhat divided on that question, but I think the more important answer is it's not really relevant here because compliance is different from what is permissibly set as the best system of emission reduction under the statute.

JUDGE SRINIVASAN: But in other words, so the reality -- I take the point that the Petitioners are split, so I understand that you're in a bit of a dilemma, but the reality on the ground is that generation shifting may be a

way to come into compliance, but under your view Congress clearly, even though generating shifting can be a way to comply, couldn't have conceivably allowed EPA to take into account the generation shifting that would be used to comply in setting forth the emission guidelines?

MR. LIN: Certainly not under a provision that is about performance standards, that is about improving the operations of particular facilities, and it's not about forcing and requiring the restructuring of the mix of electricity generation. Again, with the -- I see my time has expired. But again, with the example of West Virginia, 96 of our power comes from coal, and this rule is clearly designed to make us use a different mix of electricity generation, which gets to the second independent clear statement rule that we have mentioned in the briefs, which is the *ABA v. FTC*, the *Gregory v. Ashcroft* case --

JUDGE MILLETT: Can I just ask --

MR. LIN: -- this is --

JUDGE MILLETT: I just had a question, though, to be clear. You don't dispute that part of the how that EPA can generally do in regulating emissions includes technology forcing? Do you dispute that?

MR. LIN: That's a, Your Honor, it's a pretty loaded phrase, but yes, I mean, in the sense that --

JUDGE MILLETT: I don't think it's loaded, it's

the Supreme Court's phrase, it's our phrase, it can force technology, technology forcing is part of what they can do.

MR. LIN: Your Honor, in the sense that they can choose technology that is perhaps not in common use, but meets the adequate demonstration standard, yes.

JUDGE HENDERSON: All right. We'll give you some time to reply.

MR. LIN: Thank you, Your Honor.

JUDGE HENDERSON: Mr. Keisler?

ORAL ARGUMENT OF PETER D. KEISLER, ESQ.

ON BEHALF OF THE NON-STATE PETITIONERS

MR. KEISLER: Thank you, Judge Henderson, and may it please the Court, Peter Keisler on behalf of the industry and labor Petitioners. I'd like to focus on why the text of the Clean Air Act can't be read to give EPA the authority it's asserted here, regardless of the standard of review. And at the outset, I'd like to be specific on what EPA contends, what authority it contends Section 111(d) provides it; and then, Judge Griffith, I'd like to address your question about the meaning of system, because here's what the rule actually does, first, as General Lin said, it sets emission standards for existing sources that can't be met by any coal or gas plant, it can't even be met by a new plant constructed to incorporate everything EPA has said is state of the art control technology. And then it forces the

owners of those existing sources to subsidize the building of new wind and solar facilities in order to lower the owner's average emissions across both the existing source, and these new non-sources that it owns or subsidized so as to hit the standard collectively through their combined performance. And the owners --

JUDGE TATEL: Mr. Keisler, can I bring you right to what I think is the heart of the question here? Under *Chevron* the first question we have to ask is has Congress clearly spoken to the question before us, right? And that question is has Congress clearly prohibited the Agency from setting emission standards on the basis of generation shifting, would you agree that's a *Chevron* question?

MR. KEISLER: Yes, Your Honor.

JUDGE TATEL: Okay. And as I understand --

MR. KEISLER: I mean, subject to General Lin's comments, but yes.

JUDGE TATEL: Yes, and as I understand your argument the answer is yes because the statute says that a standard of performance must be for and applicable to a source. But your brief doesn't mention that it's a performance standard for and applicable to a source based on the best system of emission reduction, and for you to prevail you, it seems to me, tell me if you think this is the wrong question, you have to be able to make the argument

that best system of emission reduction unambiguously bars emission standards based on generation shifting, right?

MR. KEISLER: Respectfully, Your Honor, I would say that is the wrong question, and --

JUDGE TATEL: Well, what's the right?

MR. KEISLER: -- and I would say that respectfully to Judge Griffith, too, who also asked about the meaning of the word system. EPA has defined system as any set of measures that works together to reduce emissions. And if that is a system that is not only a broad definition, that is a completely limitless definition.

JUDGE TATEL: Well, excuse me --

MR. KEISLER: But we're not --

JUDGE TATEL: -- I'm sorry. I hate to interrupt, but you, so you are talking about the very issue I raise?

MR. KEISLER: Well, no, but --

JUDGE TATEL: This all turns on the clarity of BSER?

MR. KEISLER: No, I strongly disagree, Your Honor, because this is not a statute that says EPA determines the best system, and then may impose it on whatever parties it deems can most appropriately effectuate the reductions of that system. There are other textual limits in the statute beyond simply the phrase best system of emission reduction, that impose significant limitations on EPA's authority. And

I will just tick off the four that I would focus on very quickly at the outset, and then I will address each of them in whatever detail the Court wants.

But first, a statute that is focused exclusively on performance standards for existing sources contains no power on EPA's part to compel owners of those sources to subsidize other industries and build new renewable facilities. Second, it likewise gives EPA no authority to apply a standard of performance, not to the existing source, but to combinations, to the average performance of combinations of sources, and wind and solar facilities that aren't even sources themselves. Third, the EPA's rule violates the requirement that it use a continuous means of emissions reduction. And fourth, EPA has violated the required that states be permitted to take remaining useful life and other factors into account.

So, to start with the first textual point about the limitation on the word system, EPA itself acknowledges, and this is on page 201 of the Joint Appendix, that its application of the word system is subject to what EPA calls an important limitation. Specifically, EPA says, and we agree, it is limited to measures that can be implemented and applied by the sources themselves. But then --

JUDGE PILLARD: But Mr. Keisler, in the traditional regulation that I assume the validity of which

you wouldn't contest, if a power plant has to buy some kind of a scrubber, or has to do some coal cleaning, or has to do something, in effect one way of characterizing that is that the owner of that plant has to subsidize another industry that's creating coal scrubbers, or that's cleaning coal. I mean, that's an incident of any kind of regulation to say in order to continue to do the thing you're doing now that we've discovered that there are externalities that impose costs on the public at large, yes, you may have to take steps, and if those steps involve other parts of the economy you could say that's subsidizing those parts. But I think that's part of our conventional understanding of how regulation works.

MR. KEISLER: Absolutely, Judge Pillard, and the distinction between the circumstance described in your question about the scrubber, and what's going on here is captured in the statute by Section 111(e). EPA cites 111(e) as the one statutory support for its equation of the owner with the source, for its statement that because it has power to regulate the operations of the source, it has the power to compel the owner to make investments in new facilities. But what Section 111(e) says is exactly the opposite, Section 111(e) says it shall be unlawful for any owner or operator to operate its source in violation of a standard of performance, which confirms that the owner's obligation, as

in the scrubber example Your Honor mentioned, is confined to the operation of the source, which is likewise echoed by the references Judge Tatel made in Section 111(d) to the fact that the standard has to be for and applicable to the source. A standard that --

JUDGE MILLETT: Well, when you talk about source this way, and you rely on the statutory definition, the statutory definition is a building, structure, or facility that's emitting pollution, the source is not the technology inside there, whether it happens to be coal burning, gas burning, using solar power panels, it sounds to me, and maybe I'm wrong, like your definition of source is not that there's a building emitting pollution in the course of producing electricity, but that the source actually includes the particular technology inside that it has to be that facility, that plant in production of electricity has to be able to comply while still burning coal.

MR. KEISLER: Well, I think I would put it a little --

JUDGE MILLETT: That's out of the definition.

MR. KEISLER: -- I think I'd put it a little bit differently, Judge Millett. My point is that the obligations imposed on the buildings, structures, facilities, installations that constitute sources have to be obligations that relate to the operation of the source,

which is why Section 111 --

JUDGE MILLETT: Operation, to make it clear, it's the operation you're referring to the production of electricity or the burning of coal?

MR. KEISLER: Well, it's both, I mean, it produces electricity. But I think it is both, I think it is the entire operation of the building, because when you install a scrubber, to take Judge Pillard's example, you are --

JUDGE MILLETT: But now you're going beyond the statutory text. I mean, it could be, could not -- or what is wrong with EPA looking at this definition and saying yes, you have a power plant that's producing electricity, and the technology you have inside happens to be burning coal. But that source, that building, that power plant that's producing electricity can meet our emission standards by altering the balance of how it creates that electricity within that building, the technology inside the building that's used. Sorry if I wasn't clear.

MR. KEISLER: I think I understand Your Honor's question better. And if I do, it's important, EPA is not saying here, and has never said it can, it's used the phrase redefine a source, it has said we don't have the power to redefine a source. We can't tell a coal plant you have to become a solar plant, and that's not what it sought to do here. The coal plant stays a coal plant, what it does is

tell the owner of the coal plant you have to build a wind farm hundreds of miles away, perhaps, which itself isn't a source at all because it doesn't emit pollutants. And then we're going to apply the standard of performance not to the existing source, but to the average performance of that wind farm and the existing coal plant. So, I have thought of the technology incorporated into the coal plant, and the production of electricity as essentially a unified integrated thing which EPA has the power to regulate.

JUDGE MILLETT: The statutory text doesn't make that linkage that you're making.

MR. KEISLER: Well, I think when they used the word facility Congress was using a broad phrase, in *Chevron* the Supreme Court read it as broad enough to encompass an entire plant, a set of buildings. And I would read facility to include, you know, most of the things that are going on within the buildings and structures that comprise that facility, even if the term building might be thought of as narrower.

JUDGE MILLETT: Yes, but the meeting the standard has to be done by the building, the power plant facility meeting the standard, I guess I'm reacting to your plain language argument, meeting that standard as a matter of plain language doesn't have to be done by the particular technology that's in there for, you know, beginning the

heating up the water for the process of producing electricity.

MR. KEISLER: Well, again, I would go back to the fact that EPA has never said we can tell a coal plant you have to emit at zero, you have to turn yourself into a solar plant, it's always accepted the nature of the source, and that's how the statute functions, it says EPA identifies a source category, and a category can be like fossil fuel plants, and then it regulates the sources within that category. This would be essentially regulating the sources, if I understand Your Honor's question, to turn them into a different category, which is not something we think either the statute or EPA thinks is permitted.

JUDGE TATEL: You don't have a problem with building block one, right? Which bases emission standards on the amount of energy savings that could be produced by technological innovations at the plant, right? That's okay?

MR. KEISLER: Yes, we think EPA has statutory authority.

JUDGE TATEL: Suppose instead of looking globally at all renewable energy as EPA has done, it simply figured out how much solar and wind sources could be installed at existing, on the facilities of existing power plants, it figured that out state by state, and based the emissions standards on that, would that be okay?

MR. KEISLER: I'm having trouble understanding how the solar technology is installed in the actual facility.

JUDGE TATEL: Well, they put panels on the roof, they install windmills at the plant, but they do it all at the source.

MR. KEISLER: I think if it was integrated into the operations of the source in some --

JUDGE TATEL: So, it's not --

MR. KEISLER: -- physical way --

JUDGE TATEL: So, then it's not just the source. Your point is narrower than even, well, it says for and applicable to the source, you're saying no, it's for and applicable to and integral to the source, right?

MR. KEISLER: Well, I'm having trouble --

JUDGE TATEL: And it doesn't say that.

MR. KEISLER: I'm having trouble, Your Honor, understanding the kind of fusion between solar technology and coal technology that your question presupposes?

JUDGE TATEL: Well, it's the same as, it's exactly the same as the generation shifting, except it is limited to the source, in other words, the plants will be able to generate a certain amount of renewable energy, which will serve as internal credits for their emission of carbon, that's all.

MR. KEISLER: I think if --

JUDGE TATEL: It's just limited to the source.

MR. KEISLER: I think if there was, and I may be, it may be my scientific ignorance that is giving me trouble here, but I think if hypothesizing that there is a way for EPA to integrate the technology of solar or wind energy into the operation --

JUDGE TATEL: I'm not talking --

MR. KEISLER: -- of a physical source --

JUDGE TATEL: I'm talking about it having totally separate, but on the source.

MR. KEISLER: Well, if it's totally --

JUDGE TATEL: That's my point. Your argument is is that it has to be applicable to and integral to the source.

MR. KEISLER: If it --

JUDGE TATEL: Part of the equipment at the source, right?

MR. KEISLER: If it simply co-located --

JUDGE TATEL: That's not in the statute.

MR. KEISLER: If it simply co-located with the physical plant, if you parachute in a wind turbine in the middle of the land that the boiler is sitting on then I think I would say no, that is not a source, because a source, as Judge Millett said, is a building, installation, or facility, or structure that emits pollutants, and that

wind turbine doesn't emit any pollutants.

JUDGE MILLETT: But I think you need, I thought your point was that you want the technology within that, because, you know, the role of coal performs a certain function in the production of electricity here, it's just a mechanical, technical aspect of how the plant itself produces electricity. And at least my understanding, and please tell me if I'm wrong, is that at least some power plant, some fossil fuel coal-based plants also have on site the ability to use gas as a backup?

MR. KEISLER: That's correct, Your Honor.

JUDGE MILLETT: And so, let's stay away from solar and just say what could EPA say, some of you have dual coal gas capacity, you're using gas a backup, we want you, I'm going to give you two hypotheticals, respond to both, one would be if you have that technology you need to make gas primary, coal secondary, could they do that?

MR. KEISLER: Yes.

JUDGE MILLETT: And secondly, could they say hey, this is a really good model here, this reduces emissions, all coal plants should have dual coal gas technology, could they do that?

MR. KEISLER: If they met the other, you know, specific statutory requirements of it being achievable and applicably demonstrated, which I think Your Honor is

assuming --

JUDGE MILLETT: Yes.

MR. KEISLER: -- are met, then that would not present the specific statutory problems we are raising here, for several reasons, first, you haven't, you've limited the owner's obligation to how it is operating the source, you haven't compelled the owner to instead invest in building wholly new facilities that are completely independent of the operation of the source. Second, under Your Honor's hypothetical you are still applying the standard of performance to the existing source, it is for and applicable that source, it is measuring the emissions performance of the combined coal gas, or coal solar energy that's being produced. You're not saying instead take the average performance of this existing coal source and that solar plant hundreds of miles away which isn't a source at all, and apply the standard of performance, not to the existing source, but to those two different entities as if they were a single source, as if they were the kind of source Your Honor hypothesized.

JUDGE KAVANAUGH: Does EPA have to set a limit that's achievable at the source itself?

MR. KEISLER: Well, the emission reduction that is achieved by the best system of emission reduction has to be shown to be achievable, the state has separate authority in

establishing the standard of performance to make sure it is achievable for every source within its borders, because it has the authority to relax the standard by taking into account the remaining useful life of the source, and other factors in applying that standard.

JUDGE KAVANAUGH: I thought your point was that EPA is setting limits that are unachievable by the sources?

MR. KEISLER: It is. It is, and that's what it is doing here.

JUDGE KAVANAUGH: That's a statutory problem because the statute's hooked, I thought, on the word achievable, and obviously, there's a federal state angle to this, the whole case is --

MR. KEISLER: Yes.

JUDGE KAVANAUGH: -- you're setting unachievable limits in an effort to drive those sources out of business, or force them to subsidize cleaner sources.

MR. KEISLER: No, no, that's exactly right, Your Honor. The emission limit here is a lever, it's a lever to force the subsidization of the renewable facilities, or to force the setting down, the shutting down of the plant, it cannot be met by any individual facility.

JUDGE KAVANAUGH: It is a, it's an artificial limit in the sense that no one of the regulated sources can actually meet it.

MR. KEISLER: And they won't even under this rule. I mean, just to be very clear, if you have two sources, two coal fired plants, they're operated identically, one owner buys 10 new solar plants, the other owner doesn't, their emissions are exactly the same, but the first owner gets to keep its plant open, the second owner has to shut down because --

JUDGE PILLARD: And I --

JUDGE SRINIVASAN: Does that apply on the compliance side, too? So, if a state chooses to comply by giving credit to a coal plant based on a trading system, or a system where it develops credit based on you could, whether it's an independently owned or a co-owned commonly owned facility that's in a separate place that produces energy more efficiently, and what a state says is to show that Facility A, the coal facility, meets the standard of performance we're going to allow the coal facility to take credit for emissions at another facility, we apply the standard of performance to the coal facility, here's the rate, the effective rate that we take into account, ergo that facility meets the standard, and they submit that to EPA, can a state comply that way?

MR. KEISLER: Well, first of all, Your Honor has described correctly the accounting mechanism here, but it is an accounting mechanism, and that's why Your Honor and EPA

use the word effective rate. It is still the case that that rate isn't describing the emissions performance --

JUDGE SRINIVASAN: The state can't comply that way?

MR. KEISLER: The Petitioners, as General Lin said, have different views on this. But just to be clear on what we all agree on, and what we may not all agree on, all the Petitioners agree that EPA has no authority to impose a system like this one which requires in order to stay open that the owner invest in building other facilities, whether by creating a trading market, or by direct investment, or any other mechanism to require this subsidization.

JUDGE SRINIVASAN: And when you say require you mean inevitably requires, you don't mean it actually de jure requires, you mean de facto requires because --

MR. KEISLER: Well, there's no provision of the rule that says you have to invest, but EPA had to do an analysis to find that its system is, and reductions are achievable, the only basis on which it found that these reductions are achievable is if the owners invest in building other facilities, that is the fulcrum of the rule, that's why EPA says that most of the reductions are going to come from the replacement of existing sources with renewable --

JUDGE SRINIVASAN: Can I ask you --

JUDGE TATEL: So --

JUDGE SRINIVASAN: -- if you could -- I'm sorry, just one quick --

JUDGE TATEL: No, you go.

JUDGE SRINIVASAN: -- follow up? If, I recognize that you're in a dilemma, but if you put the hat on of the states who think that it's okay to comply by virtue of a credit system along the lines that we were just discussing, then doesn't that seem anomalous that it's okay to comply that way within the letter of the statute, but it's not okay for EPA to contemplate a standard of performance that incorporates that?

MR. KEISLER: And I don't want to avoid the question. Let me answer the question directly, Your Honor, which is that those Petitioners who have taken the position before the EPA that states can be allowed to do that believe that the state's authority under their own organic state law to implement a standard of performance does give them room to do something like that, but if Your Honor thinks there's an inconsistency there, if Your Honor thinks that an implication of the argument I'm making here means that states wouldn't be allowed to do that, then that would be an implication, and if that came up in the next case then those Petitioners would not prevail on that argument. What we all agree on is that EPA has no authority to adopt a standard

which compels, and their achievability analysis shows that even though it's not in the C.F.R. it compels an owner to build an entire new fleet, or subsidize the building of a new fleet of wind and solar facilities in order to keep its existing plant open.

JUDGE TATEL: Okay. So, let me just ask this, just, I just want to focus in to make sure I understand. So, the EPA's view is that the performance standard applies to the source, it's applicable to the source, that is the buildings, and the plants, and the smokestacks, and the, but the owner can be required, for example, to sign contracts to buy scrubbers, nobody has a problem with that. EPA's view is that's no different than requiring the owner to buy emission credits, and the core of your argument is there's, EPA does not have the authority to take that step, correct?

MR. KEISLER: That's correct, Your Honor.

JUDGE TATEL: Now, and just tell me what exactly is it in the statute that prohibits that, that speaks, I'm asking a *Chevron I* question, what is it in the statute that speaks directly to that? It can't be for and applicable to, because that's for the performance standard, what is it that bars, what is it that prohibits EPA from requiring the owners to buy carbon, to set an emission standard that might require owners to purchase emission credits? What in the statute exactly prohibits that?

MR. KEISLER: It is the absence --

JUDGE TATEL: That's the *Chevron I* --

MR. KEISLER: And I will cite a couple of statutory provisions on this, but I need to begin with the fact that it is the absence in the statute of any authority to compel the owner to invest. This has to be found somewhere affirmatively in the statute, and the two places that indicate that EPA's contention that it's there are wrong are as follows. First, EPA says that the source includes the owner, but source and owner are separately defined in the statute, owner is not the same thing as the source, owner is defined by its relationship to the source as one who owns, operates, and controls the source. EPA then cites Section 111(e) that as I indicated in my colloquy with Judge Pillard Section 111(e) defines the scope of an owner's responsibility under the statute, and it is limited to the operation of the source, it doesn't extend to investing its money in building a new non-source. And so, both --

JUDGE PILLARD: You're hanging a lot on 111(e), it's not a definition of owner as distinct from source, it's prohibiting operation of sources by owners. And, I mean, throughout the statute we see that when a source has to do something it does it through its owner, so do you have anything stronger?

MR. KEISLER: Well, you know, I guess I would resist the notion that this isn't very strong, but let me, you know, to go back to Judge Tatel's question, and your own question, Your Honor, you know, EPA itself decided it didn't have the authority to force retail customers to conserve energy as part of its system, even though that could be part of a system. Why? Because retail customers aren't sources. EPA says, however, that owners are sources. What is its basis for saying that owners are sources? Owners are not sources under the definitional provisions of the Act, they are defined separately; owners to have, and that one provision is the only provision of Section 111 that indicates there's any obligation that can be imposed on owners, and that is very specifically --

JUDGE MILLETT: Owners are the ones who bring sources into compliance. Owners attach the scrubbers, the sources don't attach the scrubbers --

MR. KEISLER: That's right, Your Honor.

JUDGE MILLETT: -- that's all they're doing.

MR. KEISLER: And that's what 111(e) requires, because 111(e) says it's unlawful for the owner to operate the source in violation of a standard performance, and that in conjunction with the fact that the standard is supposed to be for and applicable to the source to us indicates quite clearly that the standard of performance can only involve

the operation of the source, and --

JUDGE MILLETT: And again, if they -- so, if EPA set an emission limit that could only be met if all coal fired power plants unhooked the coal burners and put in gas units, so the only way it could be met would be if everybody took out the coal and put in a gas unit, would that be permissible?

MR. KEISLER: I don't think that would violate the particular statutory provisions that I've cited here, or be unlawful for the same reason that this is unlawful. Whether it would exceed some other aspect of authority I can't say, but it would not be subject to the argument that I'm making here. And I should emphasize, this isn't really simply a question of semantics or word play, this is very fundamental to Congress' design here. If EPA is limited to identifying what operational or technological changes should be made in the source's operation, then it's operating within its traditional expertise and scope of authority to decide what kinds of things sources should do to control their emissions, and what's most appropriate and effective. But if it can instead direct the owners of sources to invest in particular facilities and then apply the standard performance to the average performance of these new facilities, then it can set an industrial policy for the energy sector, then it can say these are the kinds of

facilities we want built, these are the kind of facilities we want shut down, and we're going to compel the owners to make their investments in order to effectuate that particular vision. And I'm not saying that that particular scenario could be inconceivable for Congress to pass a statute authorizing them to do, what we are saying is that this particular statute, 111(d), which is addressed solely to standards of performance for existing sources to control their emissions isn't that statute which enables EPA instead to --

JUDGE MILLETT: Can I ask you one other thing?

MR. KEISLER: Sure.

JUDGE MILLETT: I'm sorry to interrupt you. You want to finish your sentence first?

MR. KEISLER: No, no, I'm --

JUDGE MILLETT: Okay. Just so I understand this, because there are credit schemes under other parts of the Clean Air Act, there's credit schemes under the NAAQS provisions, there have been credit schemes for, credit trading --

MR. KEISLER: Yes.

JUDGE MILLETT: -- for acid rain, there was one in a mercury rule, is your position that your view here, which is looking at the language we have here, would not be inconsistent with that because those other provisions don't

use source language, they're explicit, but I don't know, how are they okay there in a way, how could one write an opinion here saying you can't do it here that would be consistent with the fact the Clean Air Act itself has this mechanism for compliance, and a lot of other provisions, including just a couple away from 7410?

MR. KEISLER: It does, Your Honor, and let me address the particular statutes Your Honor mentioned very specifically, because they show the difference, and our argument really is very specific to 111(d), which is the only statute EPA proceeded under here. So, EPA cites Title IV, Title IV establishes in the statute what it calls an emission allocation and transfer system, it's a cap and trade mechanism where the number of the cap is set, the number of tons in Title IV itself by Congress. And Section 110 under which the Cross-State Air Pollution Rule, and NOx SIP Call, and those other programs mentioned, that specifically, that specifically authorizes EPA to adopt emission limitations, and other means, measures, and techniques, and defines other means, measures, and techniques to include marketable permits and auctions of emission rights. Section 111(d) doesn't use the phrase other means, measures, or techniques, it just uses the phrase emission limitation and isolation.

JUDGE MILLETT: Does the NAAQS provision have that

statutory language operate on owners/operators, or does it operate on sources, or a source-like word here, a facility word?

MR. KEISLER: I think once you have a statute which authorizes or requires trading then necessarily you are imposing an obligation on the owners by the statute.

JUDGE MILLETT: Textually, what does, that may be necessarily, but textually does that provision have language about essentially directing compliance measures by the owners rather than compliance by or at the source itself?

MR. KEISLER: While I'm not absolutely certain I don't think it does. Where I think that authority becomes implicit is when they include obligations like trading, which can only be executed by the owner . Section 111 doesn't, in contra-distinction to those other statutes, include those things. But Section 111 does use the phrase emission limitation, and that carries with it an additional restriction that EPA has flouted here, and that is emission limitation is defined in the statute as having to reduce emissions by continuous means. Congress added --

JUDGE TATEL: Sorry.

MR. KEISLER: Yes, Your Honor? I'm sorry.

JUDGE TATEL: I just keep thinking about one sentence you said about 10 minutes ago, which is that we need to look for affirmative authority in the statute,

right? It's not just that the statute is silent on this, the statute's silence isn't a delegation, we have to look for affirmative authority in the statute to give EPA the authority to require owners to buy credits, right? But I'm thinking about *Massachusetts v. EPA*, I mean, the same argument was made there, the argument there was that carbon dioxide is not a normal pollutant, it doesn't in itself pollute, its impact on the environment is indirect, it's completely like, unlike ozone or mercury, and the Court rejected that argument and it said the term pollutant, which is comparable to the term BSER here, is sufficiently broad to permit the Agency to include carbon dioxide, and it went on to say that that kind of delegation is critical to ensure that the Agency is able to keep up with changing technology and changing developments. Why isn't that exactly the same thing here? BSER here is like pollutant in *Massachusetts v. EPA*.

MR. KEISLER: We think it's very different, Your Honor. In *Massachusetts v. EPA* the Court construed the term pollutant to include carbon dioxide.

JUDGE TATEL: Right, and that's what --

MR. KEISLER: So --

JUDGE TATEL: -- I'm asking why --

MR. KEISLER: Exactly.

JUDGE TATEL: -- for the same reason wouldn't we

include BSER to include generating shifting for the same reason the Court did there, it's necessary to keep the Clean Air Act up to date and able to deal with new challenges --

MR. KEISLER: Right. And so --

JUDGE TATEL: -- namely, carbon dioxide.

MR. KEISLER: And so, to put it maybe slightly differently than I did 10 minutes ago, although I would stand by the validity of that, as well, the question can be seen as is the EPA correct when it says in the rule that the source includes the owner, that this one statutory term and its authority to regulate that source includes as a legal matter the owner such that EPA's authority to regulate the operations of the source extends to regulating the investments of the owners? That is a legal question which may not depend upon affirmative or negative, is there something it grants, is there something it precludes, is EPA right to equate source and owner? And we would say it can't be right that the source and owner are equated because they're defined separately as distinct entities, and because where the statute does impose obligations on the owner it is limited to the operation of the source, and doesn't extend to the obligations that EPA has imposed here. And I don't know how much more time I have, Your Honor.

JUDGE HENDERSON: Any more questions? We'll give you some time to reply.

JUDGE TATEL: No, I don't have anything more.

MR. KEISLER: Thank you, Your Honor.

JUDGE HENDERSON: Thank you. Mr. Hostetler?

ORAL ARGUMENT OF ERIC HOSTETLER, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. HOSTETLER: May it please the Court, Eric Hostetler for the United States. With me at Counsel Table this morning is Howard Hoffman from EPA.

Your Honors, the Clean Power Plan reflects the eminently reasonable application of the Clean Air Act to address the most urgent environmental threat our nation has ever faced, and this critically important rule secures a readily achievable and moderate degree of carbon dioxide reduction from what are by far the largest sources, and it does so cost effectively, drawing upon the same practices and procedures this industry has already been using for decades to reduce its pollution, and the system of emission reduction applied here is especially proper and sensible because of the unique circumstances. On the one hand a uniquely interconnected and integrated industry that produces an entirely fungible electricity product; and on the other a pollutant that is ubiquitous, well-mixed, and that causes equal harm no matter where it is released, and it is very difficult to contain because a typical plant emits millions of tons of carbon dioxide. But the question

for us is --

JUDGE KAVANAUGH: Yes. The first question is how we review this, what our standard of review is, as you know, and the Supreme Court has consistently told us for 30 years that for major questions, for questions of economic and political significance that Congress has to speak clearly, starting with the *Benzine* (phonetic sp.) case, *Brown & Williamson*, *MCI*, *UARG*, *Gonzales v. Oregon*, with those five is probably the leading cases that have all said for something major Congress needs to specifically authorize it, that's rooted in non-delegation principles, it's rooted in principles of presumed congressional intent. Do you agree that this is a question of economic and political significance?

MR. HOSTETLER: I agree that it's an important case in that it has considerable environmental consequences. I don't think that --

JUDGE GRIFFITH: You said earlier that it's the most urgent --

MR. HOSTETLER: I don't think it has --

JUDGE GRIFFITH: -- of issues. That sounds pretty important.

MR. HOSTETLER: -- any more economic significance than any other Clean Air Act rule-makings which this Court has reviewed, such as the transport rule that was upheld in

Homer City.

JUDGE KAVANAUGH: Got billions of dollars of positive benefits, and billions of dollars of costs over time, tens of billions of costs.

MR. HOSTETLER: But let me address what I think your question is getting at, which is what is the standard of review, and you're asking should the clear statement principle as articulated in *UARG* be applied here, the --

JUDGE KAVANAUGH: *UARG* and a whole series of cases, I don't want to isolate *UARG* as the only case, this is a consistently rooted doctrine in Supreme Court case law going back 35, 40 years.

MR. HOSTETLER: *UARG* and *Brown v. Williamson* are readily distinguishable. This case doesn't involve any new claim of statutory authority, as *AEP* makes clear, Congress assigned responsibility to EPA to address this pollution from these sources under this provision, and as *AEP* makes clear Congress assigned, spoke directly to a regulation in Section 111, it was speaking about this very rule-making.

JUDGE KAVANAUGH: This provision has been used once or twice, arguably, since 1990, it's not a, it's not one of the provisions that commonly used. And the Supreme Court said, you know, when an agency claims to discovery in a long extant statute an unheralded power to regulate a significant portion of the American economy we typically

greet its announcement with a measure of skepticism. We expect Congress to speak clearly if it wishes to assign to an agency decisions of vast economic and political significance, that's *UARG*. That sounds like, I mean, that might have been written with this case in mind, that sounds exactly like this case.

MR. HOSTETLER: Let me try to answer your question in several parts as to why the Clear Statement Rule doesn't apply, okay? First, it's clear from the case law that the Clear Statement principle is the decided exception, not the rule. The general rule as is applied in innumerable Clean Air Act cases it says *Chevron* applies in the usual manner. Second, the Supreme Court --

JUDGE KAVANAUGH: This is a huge -- I'm going to interrupt you there. This is huge case. Take the obvious, it's got huge -- I'm going to continue for a second -- it has huge economic and political significance, Congress is focused on it, the President announces it in the East Room, it has huge international repercussions. It's a big case. Now, Justice Breyer would say, and did in *Brown & Williamson*, that should actually trigger us to be more deferential, but that's not what the majority of the Court has said over time, so for you to convince me that it's, you have to show, I think, on the standard of review, we'll get to what the statute says, you have to show it's not a case

of economic and political significance. I just find that a little hard to swallow.

MR. HOSTETLER: Let me keep going. The Supreme --

JUDGE KAVANAUGH: I'll let you.

MR. HOSTETLER: -- Court in *UARG* and *Brown* has never suggested that there would be a need for clear statement as to the manner of regulation, as to how an agency regulates. It has just identified certain limited circumstances where a clear statement is needed to determine whether an agency has authority to regulate at all. More specifically --

JUDGE GRIFFITH: But you're not dealing with the language that Judge Kavanaugh quoted from Justice Scalia, why doesn't that language fit this case to a tee? Certainly, you can identify factual differences between *UARG* and *Brown & Williamson* and this case, but the general principle that Justice Scalia and the Court announced in *UARG* --

MR. HOSTETLER: *UARG* and *Brown* stand for the principle that you need a clear statement in two very limited kinds of situations, one, a situation like *Brown* where the Agency had no statutory authority at all over subject matter; two, a situation like in *UARG* where the Agency was extending statutory authority to bring in millions of new sources that had never been subject to

regulation before, never been --

JUDGE GRIFFITH: That's the application of the principle in that particular case. You may be cutting the principle a little bit short in terms of the language that was used, it's broad language used in *UARG*, and it seems to fit this case. To add one more thing, it was on NPR this morning, right? Right? It's big news. It's big news.

MR. HOSTETLER: It's an important case, but the argument that Petitioners are making here is quite analogous to the *Brown v. Williamson* argument that you just rejected, or a Panel rejected in the *U.S. Telecom* net neutrality case where in net neutrality you said the Supreme Court had already recognized that the FCC had been delegated the very authority to regulate, and just as the Supreme Court in that case had spoken to the issue, it's spoken to the issue here in *American Electric Power*. Fourth, next, if Petitioners' argument were accepted, and courts were to start applying a clear statement rule in any important case --

JUDGE KAVANAUGH: Not any important case, it's got to fit the language. I mean, even the people, you know, Professors Lazarus, Freeman, Heinsterlin (phonetic sp.) in the wake of *UARG* all wrote these articles that said in essence oh, no, because the major questions doctrine was revived in a context that was going to be harmful for this case. And I'm not saying how we can get to the statute, I'm

just focused on the standard of review here.

MR. HOSTETLER: It would be completely unworkable if the standard of review turned on the degree of regulation. Under that logic, well, if EPA just does a little bit of generation shifting, and we review the case under one standard of review --

JUDGE KAVANAUGH: But now it's fundamentally transforming an industry by telling existing units you in essence have to pay a penalty, a huge financial penalty in order to continue to exist, in order to shift from coal plants to solar and wind plants, at the same time the coal mining industry is in essence greatly harmed, as well. So, I mean, decide yes, this is just an incremental thing in building block two and three strikes me as just not probable.

MR. HOSTETLER: It is incremental. The economic compliance costs that we're talking about here are no more than in many other Clean Air Act rules affecting the power sector.

JUDGE GRIFFITH: What's the comparison, what were the costs here as opposed to the costs in *UARG*?

MR. HOSTETLER: The costs in *UARG* I don't have because that --

JUDGE PILLARD: I think *UARG* was $147 billion, and I think this, the estimates here are one and a half to $8

billion, so it's quite a magnitude of difference in terms of the projected costs.

MR. HOSTETLER: I believe that one comparison you can make is to the cost of the Mercury and Air Toxics Rule, which were considerably higher, the rule that was reviewed in Michigan.

JUDGE TATEL: I don't think, at least in my view I don't think this becomes a *Utility Air* case just because it's big, and just because it affects the environment, or the economy, lots of regulations do that. But what I'm curious to hear is your answer to Mr. Keisler's point, which is that what's transformative here is the technique that EPA has required, that is that it's essentially requiring owners not just to install emission reducing equipment, but it's required them to invest in a dramatically different way than they have up till now, and that's the transformative point, that's what makes in his view this case one that's subject to *Utility Air* that namely that kind of dramatic change in emissions controls is something only Congress can do, how do you respond to that point?

MR. HOSTETLER: I would say that this is far from the first rule for power plans that has been premised in part on generation shifting. Those strategies are particularly suitable for this industry.

JUDGE TATEL: But in those other cases I think Mr.

Keisler's answer to you in those other cases is that in those cases the generation shifting was authorized by Congress.

MR. HOSTETLER: Generation shifting is not directly addressed in Section 110, in the Good Neighbor provision, but yet, in the Transport Rule generation shifting played a very important part in the level of the standards, and let me explain that because I think it's an important principle.

JUDGE TATEL: All right, well, you can, I want you to explain it, but the fact that you can find an earlier example where EPA did this doesn't answer his question, which is that maybe Congress should have approved that, as well. The point is what do you say in view of *Utility Air* about the fact that this emission control technique goes well beyond and is dramatically different from any other, and it's that that requires congressional authorization, am I -- either -- there's a couple of answers to that, it seems, one is the doctrine doesn't even require that, you might say; or you might say I'm wrong that this is, or Mr. Keisler is wrong that this is that dramatically new. What is the answer to his question? His argument is, you know, that's the point that makes me, that's the point I need an answer to from you.

MR. HOSTETLER: If you're asking for your textual

interpretation I'll start --

JUDGE TATEL: No, I'm asking for why it -- I'll try once more. Why isn't the transformative action here, the action that under the *Utility Air* doctrine requires congressional approval, and isn't delegated to an agency, it's the adoption of an emission control technique that requires owners not just to install emission reducing equipment, but actually, to invest differently in their businesses, in different kinds of businesses?

MR. HOSTETLER: Fundamentally --

JUDGE TATEL: Buy carbon credits.

MR. HOSTETLER: -- this rule is about substituting cleaner technologies for dirtier technologies, that's a familiar principle. But ultimately, it turns on the statute, which directs EPA to apply certain specified factors, including examining the industry and determining what has been adequately demonstrated, what the industry is already doing, and here EPA looked to what is going on in the real world, to the 10 states that already have existing state carbon dioxide emission requirements, and EPA determined that in those states what sources are doing to meet their limits is they are shifting generation, from dirtier sources to cleaner sources, that's how those programs are structured. And it was completely reasonable for EPA to adopt the same approach that this industry is

already following in those --

JUDGE BROWN: But hasn't the Administrator himself referred to this rule as transformative? And in fact, said this is an opportunity to invest, this is not about pollution? And if the Environmental Protection Agency is going to get into an area now that is not about pollution, that is in fact about designing the energy generating sector of the economy, isn't that a major question?

MR. HOSTETLER: This rule is all about pollution control, and nothing else. With respect to the word transformative, Petitioners have cited to a bullet point in a White House press release as support for the position that it's transformative. What the Agency actually said, however, is in the record at Joint Appendix 266, and I'm going to quote it, it says reliance on the measures in building blocks two and three is fully consistent with recent changes in current transit and electricity generation, and as a result will be no means entail fundamental redirection of the energy sector. And if you read that White House bullet point carefully they're taking it out of context, what it actually says is that the rule will, quote, drive a more aggressive transformation, the clear implication being that there's already a transformation going on in this industry as a result of cheap natural gas, and as a result of an aging coal fleet,

and so this rule just deepens the trench.

JUDGE KAVANAUGH: Justice O'Connor in *Brown & Williamson* said we should also use our common sense in trying to assess this, and this is an important thing you're trying to achieve, as you say, substituting cleaner technologies for dirtier technologies, and Congress was focused on this, and this is how I think made your questions, it's not just a technicality, it's rooted in separation of powers that Congress in our system of separation of powers should be making the big policy decisions, or we want to be sure they're clearly assigned the big policy decision to the Agency, and this is an ongoing debate in Congress, I mean, it passed the House, it had a lot of support in the Senate, and it just didn't quite get over the finish line.

MR. HOSTETLER: Your Honor, even if you were to apply some kind of clear statement principle, a clear statement is contained in Section 111. What it says is that the best system of emission reduction --

JUDGE KAVANAUGH: It's not a clear statement to set limits that are unachievable by coal plants, and therefore they have to pay huge amounts of money to subsidize solar and wind plants. Obviously, it doesn't have to be that specific, but the idea here, the concept, which by the way, I just want to say, on the policy I understand,

it's laudable, and the Earth is warming, and humans are contributing, and I understand the international collective action problem here, I understand that very well, and I understand the frustration with Congress, I live that, too, everyone understands that. But under our system of separation of powers, and this is why it's so important that we maintain that, Congress is supposed to make the decision. You might say, you know, this Congress is not going to, they're not going to do anything, but that's not how we get to make decisions.

MR. HOSTETLER: What Congress said is that the best system of emission reduction should be implemented, and this is the best system of emission reduction --

JUDGE GRIFFITH: It doesn't help here when the Executive says Congress isn't acting, so we will act.

JUDGE KAVANAUGH: Yes.

JUDGE GRIFFITH: We will act.

JUDGE KAVANAUGH: Repeatedly. Pen and thumb.

JUDGE GRIFFITH: This debate, why isn't this debate --

JUDGE KAVANAUGH: Yes.

JUDGE GRIFFITH: -- going on on the floor of the Senate right now instead of in a courtroom in front of a group of unelected judges, that's the fundamental problem on separation of powers. But your argument is that this

language that Congress in fact delegated this authority to to change the electric industry, and that's a tough argument --

MR. HOSTETLER: I'd love to talk about the statutory text, because when you examine it you find the regulatory approach taken here comports with each and every word in the statutory text. The central term at issue here is the, of course, the definition of standard of performance, and what that says in print and in part is that standards must reflect the degree of emission limitation achievable through the application of the best system of emission reduction adequately demonstrated. EPA hasn't misunderstood any of that, it properly construes the central phrase best system of emission reduction to mean precisely what it says, and to call for the best system of emission reduction adequately demonstrated for this particular pollutant and source category, which in this case is a system that involves having regulated sources replace a small modest amount of their dirty generation with much cleaner generation so as to enable the regulated industry to produce the very same product with a much lower compliance cost than they would have had to bear if they had actually been compelled to install technologies at each and every plant, such as capturing millions of tons of carbon and sequestering it underground. And contrary to Petitioners'

argument, there's nothing in the phrase best system of emission reduction that cabins it geographically to the boundaries of a specific plant. Petitioners' argument is premised on a fiction that a regulated plant is a hermetically sealed island. The word system is a capacious word, it's defined in the dictionary as a set of principles or procedures according to which something is done. It's a means to an end, with the end here being reducing the greenhouse gases that are causing devastating harms.

And look, Petitioners have offered no reason whatsoever to doubt that the economically efficient and well-demonstrated set of measures applied here were the best system of emission reduction, there were two --

JUDGE PILLARD: But Mr. Hostetler, can you point us to other examples of EPA action under its statutory authorities that regulated performance in a way that made the regulated entity actually stop functioning, or rendered it obsolete?

MR. HOSTETLER: To be clear, this rule doesn't make anyone stop anything, it's projected that in 2030 coal generation will comprise 28 percent of the nation's generation, so there's no stopping --

JUDGE KAVANAUGH: Are there examples? Her question was are there examples?

MR. HOSTETLER: I would point this Court for one

thing to the S*mall Refiner Lead Phase-Down* case where the Court, I don't know whether the word performance was in there, but it was a case involving lead content in gasoline where this Court expressly approved a standard that was, for lead content, which was premised on not every source being able to meet the standards so that some sources would have to go out and buy cleaner lead, or buy credits. That's the exact same thing here, there's precedent for this. And look, just because a provision hasn't been used before often doesn't mean it's inappropriate to use it, you might not use the fire extinguisher in your house until your house is burning down, that doesn't mean you should refrain from using it to put out the fire. And again, generation shifting has been used quite often as an emission reduction strategy already for this industry.

JUDGE MILLETT: Can we just -- what is the difference between technology forcing and generation shifting?

MR. HOSTETLER: I don't think there is a meaningful difference. What we're talking here about is --

JUDGE MILLETT: Now you're buying into that language since technology forcing has long been recognized as something EPA can do, is what makes this generation shifting different that the technology that's being forced here may well involve going outside your operations and

subsidizing the different business as they see?

MR. HOSTETLER: The only thing that's different here is a question of whether the system can extend beyond the geographic boundaries of the plant. Yes, this is technology forcing in that it's encouraging the industry to rely on the cleanest generation methods to produce the very same product.

JUDGE MILLETT: Well, but we need to be clear, I mean, this is different, is it not, in the sense that if you have to subsidize the scrubber industry by putting that technology is, or this piece of equipment, that's one thing, but here you actually have to go, if I'm right, subsidize your competitors, is that right?

MR. HOSTETLER: No, I would disagree with that. To be clear, this rule doesn't require any subsidies. A source is perfectly free to comply, for one thing, this is important, a factual correction I need to make, the record reflects that sources can meet, coal plants can meet this standard through technologies at their plant alone, they could co-fire with natural gas and get there, some sources might be able to use sequestration to get there, so it's not the case that it's technically impossible to meet these limits at the plant if the source wants to. But to answer your question more directly no, this doesn't require subsidies, a plant is perfectly free to itself invest in

more natural gas, or renewable generation, which is hardly subsidizing a competitor. And keep in mind, it's an important part of the record here that the vast majority of fossil generation is owned by diversified companies, some 80 percent that already are invested in natural gas and renewable plants, so you're --

JUDGE SRINIVASAN: Can I ask a terminological question? So, when you say plant it's, you're treating plant as co-terminus with source?

MR. HOSTETLER: Yes, a source is the plant, and to be clear this rule is --

JUDGE SRINIVASAN: So, the question would be if a plant is a source then I guess the question would be is it necessarily outside the bounds of the statute to have compliance based on a source's action vis-à-vis another source? Because the distinction would be well, you can comply based on actions taken by the source itself, or you can comply based on actions that take into account through some mechanism trading, if it's co-ownership it's that, you know, I'm going to reduce emissions at plant, at source A, and increase it at source B, but it takes into account actions at a different source. That's the question, right?

MR. HOSTETLER: The question is whether the system of emission reduction has to be entirely integrated within the physical boundaries of a plant, or can be a broad-based

system of emission reduction that includes using cost efficient market based mechanisms. And there's nothing in the text --

JUDGE PILLARD: We've crossed that bridge, right? Because you can do coal scrubbing, or things off --

MR. HOSTETLER: Yes. Yes, we --

JUDGE PILLARD: -- off site?

MR. HOSTETLER: Exactly. We've crossed that bridge decades ago. And there's nothing in the text of Section 111 that compels EPA to provide maximum compliance flexibility for the purpose of achieving the most minimal degree of emission limitation. Opposing Counsel conceded that many of his clients agreed that they can use generation shifting to comply with the standard. That's a one-sided position. They're kind of like the golfer here who insists that their handicap be calculated as if they only had a putter in the bag when they fully intend to compete against that handicap using the full bag of clubs, including their brand new driver that can hit it 300 yards.

JUDGE SRINIVASAN: Follow up on this point just as a terminological matter, again. If you take -- I understand that you can take into account actions that are off site, because if you purchase technology from a different place, Home Depot, it's not going to be on the plant. But I guess, I'm not saying that this is a difference that matters, but,

necessarily, but it seems like it's a different salient, which is that here it's taking into account actions at a different source, not that the source has to go off site to comply, that couldn't happen, but the argument that's being made is this is different because one source in order to, for the system to work in the way that EPA contemplated it would, would take into account actions at a different source. So, a coal plant has to take into account actions at a wind source, that's the asserted difference.

MR. HOSTETLER: Right. But crediting and trading schemes are commonplace under the Act. They happen all the time. There's nothing particularly unusual here about a source complying with an emission limitation by relying on credits or allowances that it attains from another source that is able to more cost effectively achieve reductions. Not a new concept.

JUDGE KAVANAUGH: But it is a new concept to set a limit that is not achievable by the whole category of sources.

MR. HOSTETLER: To the extent that it's new, it's perfectly sensible because it's responding to the unique circumstances of this pollutant and source --

JUDGE KAVANAUGH: It may be sensible for you, but it's not necessarily sensible if you're the owner of a coal plant, or you work at a coal plant, or you're a coal miner

who is put out of work as a result of this. So, yes, I understand it sounds reasonable to you, but it hasn't been done before to set a limit. Could you set a limit at zero for coal?

MR. HOSTETLER: No, Your Honor, and here's why, because if you set a limit at zero and required 100 percent generation shifting that would fail multiple constraints on EPA's authority, one, it would not be cost-reasonable; two, it would not be protective of the need to ensure electric reliability and fuel diversity. There are, and this is something Petitioners are really overlooking is that there are at least six constraints embedded within Section 111 on EPA's authority that constrain how far any system can go. So, yes, the word system in and of itself very broad and capacious word, however, that word is meaningfully cabined by the surrounding text in numerous ways, just not in the way that Petitioners specifically suggest. There are six constraints, and I'd like to quickly run through those because I think they're important for you to keep in mind, first, the statute directly requires that any system of emission reduction be adequately demonstrated. So, any emission reduction system that isn't already in place and successful within an industry can't be used, and to our knowledge only in the power industry is generation shifting being used on a routine operational basis. Second, the

statute directly requires that any best system take into account costs, so it would be arbitrary and capricious for EPA to shut down an entire industry. That's not what EPA is doing here, the costs are reasonable, and that's an issue we can discuss this afternoon, it's a record issue. Third, the statute directly requires that EPA take into account energy requirements, EPA did so here, this rule will assure reliability. Fourth, Section 111(d) requires that standards be for sources, which means that you can't obtain reductions from somewhere else, like getting offsets by planting forests, you have to get reductions from sources. Fifth, only systems that sources themselves can implement are eligible. And sixth, and this is an important one, only systems that produce exactly the same volume of exactly the same product under EPA's long-standing interpretation are eligible to be considered the best system. So, it's all about producing the same product but more cleanly, that's a very familiar concept.

JUDGE KAVANAUGH: I think they would challenge you on the fourth one, I think, for the sources themselves, I mean, I think that's the key to the case, right?

MR. HOSTETLER: There's no question that the emission reductions that are being achieved here will be from the regulated sources, no one disputes that this is a system of emission reduction that will greatly reduce

carbon. I think Petitioners' point is that they, their view of the statute is that EPA has to regulate and attain emission reductions from each and every source, even if that's monumentally cost inefficient.

JUDGE KAVANAUGH: One other thing on the separation of powers, it's not just a theory, you know, obviously, if Congress does something like this, as they were doing, they can account for the losers, the people who are left behind by something like this, and to do a balanced approach. EPA when it has to single-mindedly focus on the emissions reductions, but there are people, lots of people, you know, lose their jobs, lose their livelihoods, whole communities are going to be left behind, parts of whole states are going to be left behind, and that's why for a big question like this Congress can do things like job training programs, and community college assistance, and welfare assistance, and drug programs for the people who are out of work, and that becomes more of a problem, that's why the separation of powers principle matters, because Congress can look at something like this in a well-rounded approach, and that was the difficulty obviously that happened in the Senate. But for us to do it, for you to do it, all the people who are left behind are just left behind.

MR. HOSTETLER: Your Honor, Congress has made very clear in enacting the Clean Air Act that the control of

pollution threatening public health and welfare is a very important objective, and --

JUDGE ROGERS: And that in itself is a transformative instruction. In other words, there have been a lot of factual assertions here that are not necessarily supported by the record because when you look at what the State Departments on environment are saying and doing it's not consistent with some of the things we've heard here. So, lots of new jobs are created by moving to these less expensive sources, and the grid expert's amicus brief was very helpful it seems to me in describing what's going on and the beauty of the rule. And the states have a major role here in figuring out exactly what's going to happen within their states to each and every one of their sources. So, I want to be clear, is EPA's position that the sort of important statement, transformative rule, initially you said it doesn't apply, but I wonder whether or not the nature of the statutory authorization itself, clean air, clean water, major shift by Congress, re-enacted over the years, that had not limited these very broad phrases, such as best system of emission reduction, who is to make that determination? And then the states decide what happens with each and every one of these sources. So, I want to be clear that your response to Judge Tatel's question, which was piggy-backing on the argument that Mr. Keisler made about forcing investments,

somehow means this rule is different and beyond the authority, because we're not talking about just scrubbers here, we're talking about an industry that is moving, and has moved, and your record shows that in the last 14 years there's been extraordinary reductions, and that the reductions under this rule will continue, but not even at that great pace. So, I need to be clear on this threshold issue what the Agency's position is, if the rule will apply then it's not a problem, the rule doesn't apply and it's not a problem.

MR. HOSTETLER: I'm not sure I fully understand the question, but --

JUDGE ROGERS: The statement --

JUDGE KAVANAUGH: -- the major questions rule --

JUDGE ROGERS: -- so by --

JUDGE HENDERSON: Major questions.

MR. HOSTETLER: Right. Yes, our position is that --

JUDGE ROGERS: -- saying *UARG*, *Brown & Williamson*, *Gonzales*, what were the other two, Brad?

JUDGE KAVANAUGH: *Benzine*.

JUDGE ROGERS: *Benzine*.

JUDGE KAVANAUGH: *MCI*.

JUDGE ROGERS: *MCI*. These are --

JUDGE KAVANAUGH: *Hamdan*. It's a different one.

JUDGE ROGERS: Different in terms of factual scenarios that the significant point for me is the response to Mr. Keisler's point about forcing investments, and isn't that what Congress contemplated, and Judge Millett's question about technology forcing, best system, world move, and the world is different after *Massachusetts v. EPA*, and EPA's determination to move forward.

MR. HOSTETLER: That's correct, Your Honor. And there's nothing inappropriate about a rule that has some market effects, any rule by its very nature for pollution sources is going to raise the operating costs of regulated sources. So, any emission limitation that EPA might have set here would have had some market effects. The fact of the matter is, however, that if EPA had set a rule premised on each coal plant sequestering millions of tons of carbon underground, or changing their coal units to co-fire with gas that would have had far greater market effects, and an adverse effect on the coal industry than this rule has.

JUDGE ROGERS: But the argument would be to this Court if you had done that that you didn't have authority, that the Agency didn't have authority to do that either because one of the factors the Agency has to take into account is cost, and if the cost is prohibitive the Agency can't do that. I mean, we've had that argument in these cases by some of these same attorneys, so I don't think

that's an out here, is it?

MR. HOSTETLER: That's absolutely right, Your Honor. I mean, even -- under any application of Section 111 EPA has to apply very meaningful constraints, and those include adequately considering costs and energy requirements. So, the kind of absurd effects that Petitioners posit cannot happen given those constraints, any rule that was not cost reasonable, or that jeopardized electric liability would be arbitrary and capricious, they're ignoring the meaningful constraints that are within Section 111.

JUDGE BROWN: I have a slightly different question about the clear statement issue. Assuming that a clear statement is needed, why not, why does EPA not rely on Section 115 rather than 111(d) which requires some considerable linguistic gymnastics?

MR. HOSTETLER: EPA relied on Section 111, Your Honor, because the Supreme Court said in *American Electric Power* that that provision speaks directly to the regulation of this pollutant from these sources under this provision. It could hardly be more on point. I'm not in a position to speculate on the potential application or not of Section 115, the Agency didn't address that in this rule, but as *AEP* makes clear, EPA does have authority under 111(d) to regulate these sources, that's a settled issue.

JUDGE MILLETT: And it made that clear notwithstanding that Congress had refused to act time and again on greenhouse gases, which is acknowledged in *Massachusetts v. EPA*, correct?

MR. HOSTETLER: I'm sorry, what was the question?

JUDGE MILLETT: This whole argument about Congress is supposed to be acting, but in both *Massachusetts v. EPA*, and the whole premise of *AEP* was that Congress hadn't acted, but in *Massachusetts v. EPA* the Supreme Court looked at *Brown & Williamson*, said that stuff doesn't apply here because this is just the EPA doing emission limitations. So, I'm feeling, I feel somewhat betwixt and between because I have *Massachusetts v. EPA*, and the *AEP* case you're citing saying go forth, regulate greenhouse gases, and you can do it under 111(d), and that's perfectly consistent with *Brown & Williamson* and whatnot, but then we have the language that Judge Kavanaugh read, which also seems to fit here, and so, how do we reconcile the fact that the Supreme Court was fully aware that Congress was enacting in *Massachusetts v. EPA*, and Congress' inaction is why people wanted to bring public nuisance actions, and they said no, don't bring public nuisance actions, it's the EPA's wheelhouse. But then we have *Utility Air Group*, how do I reconcile those, or how do you reconcile those?

MR. HOSTETLER: Well, for one thing, you know, if

this Court were to adopt Petitioners' proposed interpretation it would make something of a mockery of the decisions in *Massachusetts* and *American Electric Power*, because the alternative that Petitioners say the Agency should have chosen, building block one alone, wouldn't achieve any meaningful reductions from this industry at all, in fact, it might even incentivize greater use of the dirtiest technologies and worsen the problem.

JUDGE KAVANAUGH: But you can't say *AEP* authorized building blocks two and three, they weren't addressing the difference between one?

MR. HOSTETLER: The phrase best system of emission reduction doesn't talk about any particular strategies for reducing emissions, it directs EPA to apply the best system, and we come back to the fact that this is the best system. I haven't heard anything to suggest that it is not the best system. And let's not lose sight of the fact here that the core objective of the Clean Air Act --

JUDGE TATEL: The argument that the Petitioners make, they're willing to even -- I think they, I don't want to speak for them, but I think they would say it might be the best system, but because of its character, because it requires owners to adopt different investment strategies it's a technology that must be approved by Congress, that's their point. That's their bottom line.

MR. HOSTETLER: As the grid experts put it in the amicus brief very well there's really not a terribly meaningful difference between a plant installing a solar panel on its roof. or installing a solar panel, you know, 50 yards away, or installing it wherever it's most cost effective to install it. What this rule does is premised on sources using better technologies to produce the same electricity product, it is holding the regulated industry to improving their technological performance, better performance, not non-performance. But look, let's not lose sight of the fact here that the core objective of the Clean Air Act is to protect public health and welfare, and needless to say, EPA's interpretation is easily more consistent with that objective. EPA's rule assures meaningful carbon dioxide limitation, Petitioners' approach does not, and it's not like trivial environmental risks are at stake here. We agree there has to be balancing that all of those factors have to be weighed and applied, that's a record issue, and we're very comfortable defending EPA's judgments on this record, but there's no reason to believe that Congress intended for the Clean Air Act to leave such a massive air pollution threat entirely unsatisfactorily addressed. Again, it would I think deprive *Massachusetts* and *American Electric Power* of all meaning if you were to do so.

JUDGE HENDERSON: All right. You're out of time. Thank you.

MR. HOSTETLER: Thank you, Your Honors.

JUDGE HENDERSON: Mr. Poloncarz.

ORAL ARGUMENT OF KEVIN POLONCARZ, ESQ.

ON BEHALF OF THE POWER COMPANY INTERVENORS

MR. POLONCARZ: Good morning, Your Honors, and may it please the Court, Kevin Poloncarz for Power Company Intervenors.

I'm here today representing a broad coalition of power companies from across the country. My clients range from some of the nation's largest investor-owned utilities, to smaller municipal agencies that own a mix of coal, gas, and renewables. We're here to defend the rule, and we want to make just a few points.

The main point we want to make is that generating shifting is business as usual for the power sector, it's simply how power companies balance supply and demand to keep the lights on at least cost to consumers; it's also how the power sector has complied with requirements under the Clean Air Act, and under state programs designed specifically to reduce CO2; and it's exactly what Petitioners and my clients asked EPA to authorize as a means of complying with whatever standard should be imposed by states under 111(d). So, Petitioners are off base to contend, as they did in their

reply, that, quote, what some states and companies have chosen to do voluntarily has no bearing on what Congress authorized EPA to require under 111(d). What my clients and the rest of the industry are doing to reduce their emissions has absolutely everything to do with what Congress authorized EPA to require, that's the entire premise of identifying the best system that's been adequately demonstrated.

When you get to the bottom of Mr. Keisler's argument about it needing to be integral to the source Petitioners want to have it both ways, they want to be allowed to use generation shifting in trading to comply with whatever is required under 111(d), but they want to prevent EPA from taking those strategies into account in deciding how high the bar should be set. We don't think the statute mandates that EPA live in a make-believe world, pretend those strategies don't exist, and set the bar no higher than what can be achieved within the bounds of an individual plant. In our view it was perfectly reasonable for EPA to account for generation shifting, and the fact that that's ultimately how the power sector would comply regardless where the bar was set, or whether it was based on more costly on site measures, like CCS or gas co-firing.

JUDGE KAVANAUGH: Do you agree that no coal fired plants can meet the limit?

MR. POLONCARZ: No, we disagree with that, Your Honor, and the record does not reflect that. The record reflects that carbon captured sequestration and gas co-firing are technically feasible and available technologies, but they're much more costly than the generation shifting measures that the power sector has always used to comply with pollution standards, and would invariably use in this instance.

JUDGE MILLETT: Does the -- is it so costly that it then violates the best system limitation that a consideration of costs is it not achievable to do, to meet this limit by carbon sequestration or one of these other options?

MR. POLONCARZ: Your Honor, I believe EPA's record reflects that the cost of those other technologies of on-site measures like gas co-firing and carbon caption sequestration is in line with the cost of other pollution control technologies that have been required in the past. So, I don't believe it necessarily would run afoul of this Court's juris prudence which holds that costs must necessarily be exorbitant in order to be, run afoul of the statute.

I'd like to move on to Petitioners' point about the rule constituting an unlawful subsidy. What they call a subsidy is just really the market consequence of any rule

that requires higher emitting sources to achieve greater reductions than cleaner ones. Because the grid is operated pursuant to the principle of least cost dispatch, and I would commend the grid expert's brief to the Court, again, for a very good description of that, any emission standard that will result in differences in generator's costs, and that will result in the cleaner sources generating more, this is what has happened under existing programs, like the Cross-State Air Pollution Rule, which allowed for trading, as well as other programs, like the mercury air toxic standards, which don't allow for trading. In our view, the rule merely reduces an implied subsidy that has allowed co-fire generation to continue emitting massively greater amounts of CO2 at no cost by requiring or causing the power sector to start accounting for the costs of its emissions, this rule does exactly what *AEP* said the Agency was authorized to do under 111(d).

JUDGE SRINIVASAN: So, is your position basically, so *AEP* says that Congress delegated to EPA the decision of how to regulate carbon dioxide emissions from power plants, and is your perspective based on, and representing the clients that you represent that it's an instinctive response to that immediately to turn to credits and trading, because that's naturally what everybody is going to take into account when there's a regulation of carbon dioxide

emissions from power plants?

MR. POLONCARZ: That's correct, Your Honor. This sector is like no other sector with its interconnection, and it has so much experience using credits and trading because of that, because power can be generated at least cost from sources across the grid. And I see my time is --

JUDGE MILLETT: Forcing people to pay, to subsidize their competitors seems different to me. Why shouldn't, why isn't that different? I mean, that's essentially what you're doing here, you may be a coal powered plant, but you need to actually operate less, and then take your money, your reduced profit margin, and go invest it in people who are creating that power, your competitors, the wind, the solar, folks like that, that seems to me different, quite different, as a matter of -- it's not that you couldn't choose to do it on your own, but as a question of EPA authority.

MR. POLONCARZ: Your Honor, one good point that EPA makes in the record is that most of the owners of fossil units that are affected by this rule also own units that could produce credits already. And so, it's not necessarily the case that they would need to go subsidize by buying credits from their competitors at all, cross-investment is an option, and it's one that my clients have used to reduce their own emissions, and the record reflects that it's used

throughout the industry.

JUDGE KAVANAUGH: The two key words in what you just said were most and necessarily, I mean, not everyone has that option.

MR. POLONCARZ: I don't disagree with you. But I would say that the record reflects that EPA found that the generating shifting measures that are the basis of its best system are available to all different types of utilities in vertically integrated markets, to rural electrical cooperatives, and that finding is worthy of some deference.

JUDGE MILLETT: Where does the record say most?

MR. POLONCARZ: I'm sorry, Your Honor?

JUDGE MILLETT: If you have it later that would be great, or if someone could give it to me later that would be great.

MR. POLONCARZ: I see my time is up.

JUDGE HENDERSON: Thank you.

MR. POLONCARZ: Thank you.

JUDGE HENDERSON: Mr. Myers.

ORAL ARGUMENT OF MICHAEL J. MYERS, ESQ.

ON BEHALF OF THE STATE INTERVENORS

MR. MYERS: Good morning, may it please the Court, Michael Myers for State Intervenors. I'll be addressing some issues of state authority.

EPA's express statutory authority to regulate

pollution allows it to address power plant carbon dioxide emissions through the clean power plant rule, despite effects on state's preferred mix of energy generation for three reasons, it directly regulates pollution without dictating state energy choices; it reasonably incorporates how states and sources are cutting carbon pollution; and it properly reflects federal and state regulation of power plants.

As to the first reason, because the rule is aimed at reducing pollution it falls squarely within EPA's authority, regardless of impacts on down, regardless of downstream effects on state energy mix. The rule focuses on reducing carbon dioxide, it sets overall pollution levels, but does not dictate source specific standards, or how states or their sources will meet those standards. The rules' focus and flexibility demonstrate that it's about limiting pollution, not regulating energy, and as the Supreme Court recently explain in the *FERC v. EPSA* case, whether a federal regulation improperly intrudes on area of state control should be based on what it directly regulates, not downstream effects.

Second, the statute authorizes EPA to consider systems of emission reduction that states and sources have successfully used to reduce CO2 from power plants. The rules' consideration of power plants ability to shift to

cleaner types of generation stem directly from Section 111(a)(1)'s directive that EPA limit pollution to levels that reflect that best system of emission reduction adequately demonstrated. And here there's broad consensus among states, including those opposing the rule, EPA, and industry that shifting to cleaner generation is such a system for reducing power plant carbon pollution. Ten states, those that are part of the regional greenhouse gas initiative and California have successfully reduced CO2 emissions from the power sector by cap and trade systems that rely in part on sources shifting to less carbon-intensive generation. Power plants under that program, the RGGI program, have cut CO2 emissions by 40 percent in eight years. Even states opposed to the rule nonetheless supported emissions averaging or trading through shifting generation as a means of emission reduction compliance, and some of those are listed at J.A. 214 of the preamble. Given that the statute does not limit EPA's consideration to the best technological or on site systems of emission reduction it would have been contrary to black letter administrative law for EPA not to consider this proven method in its best system determination.

Third, the rule properly reflects concurrent federal and state regulation of power plants. States lack exclusive control over generation mix, as exemplified by the

need for federal approval of a hydro-electric project, or the limit on state incentives for new generation to those that don't interfere with federal regulation of the wholesale market. Similarly, state preference over generation choice may be indirectly affected by limits on power plant pollution with interstate effects. EPA must regulate pollution that harms public health and the environment and other states even if those regulations affect a state's preferred generation mix. As set forth in the examples in our brief, page 20 through 22, states are accustomed to dealing with federal regulations that have such an effect. Accepting Petitioners' expansive view of state authority over generation mix by contrast would effectively thwart meaningful regulation of carbon dioxide from power plants, and render Section 111(d), the statutory remedy the Supreme Court recognized in *AEP*, speaks directly to these emissions, a hollow shell. That is not the law.

In conclusion --

JUDGE KAVANAUGH: Why do you think Congress didn't pass something like this?

MR. MYERS: I hate to speculate why Congress does anything in particular, Your Honor, but I think the more important point is here when Congress wrote the best system of emission reduction language into Section 111 it intended to give EPA the ability to address new pollution problems

that developed as time went on, you know, in the words of the Supreme Court, an intentional effort to confer the flexibility necessary to forestall obsolescence. So, EPA has, that's what EPA has done here, and applied a common sense rule similar to what the Supreme Court found to be lawful in the *EME Homer City* case where the Court, or where the Petitioners, many of the same Petitioners here, tried to use different strands of statutory language to hamstring EPA's ability to come up with a cost effective solution to a pollution problem, that's exactly the same type of argument they're making here, and it should be rejected as the Supreme Court rejected it in that case.

JUDGE KAVANAUGH: Actually, the Supreme Court accepted that there were limits on what EPA was doing, it said it just couldn't be facial invalidation of the rule, but allowed as-applied challenges, which were successful.

MR. MYERS: That's correct, Your Honor. But in terms of EPA's approach here, I think Petitioners are trying to do the same type of hamstring of EPA's ability that would, you know, just result in more costly reductions.

If I may conclude, Your Honor? In conclusion, the rule reasonably balances emission reductions, costs, and energy needs in addressing our nation's largest source of carbon pollution, and it does so while respecting state energy choices. We urge the Court to uphold it. Thank you.

JUDGE HENDERSON: Thank you. Mr. Lin, why don't you take two minutes to answer any questions and wrap up your argument on this issue.

ORAL ARGUMENT OF ELBERT LIN, ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. LIN: Thank you, Your Honor. I have three points that I'd like to make. The first is I think what Judge Tatel and Judge Kavanaugh said is exactly right, the point here is not about the drawing a line in terms of how factually transformative this is, the question is for the *UARG* rule how transformative it is as a legal matter. And what they are doing here as has been discussed already this morning, is fundamentally different from the way Section 111(d) has ever been used before, this is about requiring existing fossil fuel power plants --

JUDGE GRIFFITH: We've heard discussion that there's a, going to be a five percent difference in the coal industry, 10 percent difference in the coal industry with our without the rule, you represent the State of West Virginia, what will be the difference there in 2030?

MR. LIN: Well, it also --

JUDGE GRIFFITH: With and without the rule, what percentage of the electric initiative power plants will be coal fired with the rule and without the rule?

MR. LIN: It all depends on what sort of trading

systems end up developing, and so, it would vary. But again, Your Honor, I think the important point here is that it's not about, you know, what the various statistics might be, but it's about the fact that it will require, and it does require some change in the mix of energy generation, and I think that's the important point. You know, Judge Millett, this is not a question of technology forcing, this is about forcing a different mix of electricity generation.

JUDGE KAVANAUGH: What do you with --

JUDGE TATEL: What's your answer to the --

JUDGE KAVANAUGH: -- *Massachusetts v. EPA*? The *Brown & Williamson* argument was raised in *Massachusetts v. EPA*, and I think the Supreme Court recognized that it was a huge issue, but found clarity. Why given that don't we find clarity here, what's the difference?

MR. LIN: Well, Your Honor, I think the answer to that is, and there's been some suggestion that because *Massachusetts v. EPA* changed the landscape that the major questions doctrine applies differently to the Clean Air Act, and I think the answer is *Utility Air Regulatory Group v. EPA*, which is post-that fundamental decision the Supreme Court has found that there are still question that are major questions under the Clean Air Act when EPA is exercising its authority in a fundamental and transformatively different way. And Judge Kavanaugh, you had pointed out, you asked

EPA's Counsel about whether they could zero out a particular kind of energy, and his answer was not that the logical conclusion of this could go there, his answer was simply that there are practical limits on reaching that conclusion right now. This is not a hypothetical situation, if you look at the rule the way they came up with the emission rate of 1,305 is that they applied their hypothetical mix of electricity generation to each of the three interconnections, eastern, western, and Texas, and --

JUDGE KAVANAUGH: I want to get one comment out and get your response to it, and maybe Mr. Keisler, as well, which is I think the implication of a lot of the briefs, the amicus briefs on the other side, is that there's a huge policy imperative here, there's a moral imperative, Pope's involved, got an international imperative, and who are we, I think they would say, as judges to stand in the way of the Executive Branch, the President's effort to deal with all of that. And as to Congress, the separation of powers angle I've raised, I think they would say Congress has tools to respond, they can defund the Government, and they certainly come close to that on occasion, or an agency, or cut appropriations, they can shut down the confirmation process, obviously, they can have and can do that, but they have tools to deal with a President they disagree with. Why should we, this is a Justice Breyer kind of comment, why

should we as judges get in the middle of that given the moral imperative, the policy imperative, the international repercussions? Just a general question, but I think that's hanging in the air, and you need to respond to that.

MR. LIN: Well, Your Honor, I think you've answered your own question, which is the separation of powers. There aren't just two branches that are left to interact with each other, and fight each other using the tools that they have, the third branch is the judiciary, and it is the role of the Court to enforce the limits on the separation of powers, that's why the major questions doctrine is so relevant here.

The second point that I did want to emphasize, Your Honor, I see my time has expired, is that there isn't just the major questions clear statement rule, there is also the federalism clear statement rule, and this rule because it requires a different mix of electricity generation --

JUDGE MILLETT: I'm trying to figure out what the object of this clear statement rule is, and that -- because one of the things that makes this seem very big, and very important for some of the reasons Judge Kavanaugh referenced, is that it's dealing with greenhouse gas emissions, and the threat that they pose under the EPA to the environment, and the regulation of coal fired power plants and their contribution as a major contributing source

to greenhouse gas emissions. Those seem like very big questions, but those are ones the Supreme Court has already said EPA gets to regulate. So, I don't think we get to come in now and say that was a major thing to do, you better have a clear statement from Congress, the Supreme Court didn't require it, we don't get to require it either. And so, what's been identified, I think, is the other aspect that may need a clear statement is this generation shifting, or the requiring, requiring people, requiring these companies to subsidize other forms of energy generation, and what I'm struggling with is I get that that's a big step, how do I know if that's the type of the big step that implicates *Brown & Williamson* all by itself since the greenhouse gas and regulation coal fired plants are off the table? If that requires it, or did that step trigger federalism interest, or is that step just the usual how do you do it mechanism that gets *Chevron*? How do I know it fits in your view rather than the mechanical house that usually gets *Chevron* treatment?

MR. LIN: A couple of answers to that. In terms of the federalism, I think the reason that it applies, triggers the federalism clear statement rule, is because this is like in *ABA v. FTC*, a direct intrusion on our ability to choose the electricity generation that we want. Because the rule is different in kind in that it will

require, and does require some change, it may not be a particular mix, but it does require some change in the mix of electricity generation, that is its purpose --

JUDGE TATEL: Mr. Lin --

MR. LIN: -- that is its effect -- yes?

JUDGE TATEL: -- what, I just want to focus on what you just said. It's best system of emission reduction, we all agree that that's the key term here, and your argument is that's not broad enough to include generation shifting, the other side said it is, what's your response to the argument you just heard from Counsel for the two Intervenors, which is that in fact, because of the nature of the grid that the best system of emission reduction is in fact generation shifting, that that's in fact the way the grid operates, it's a big generation shifting machine. And states and others, and investors, and power companies use it for that very purpose, that is to shift generation to lower cost, less polluting emissions. And that best system is in fact the generation shifting that EPA has adopted, that's what they're telling us.

MR. LIN: Judge Tatel, I would quarrel with the premise of your question. I don't think that the question, at least for what I'm advocating, is different from Mr. Keisler's point, is the question is not whether a best system emission reduction is broad enough to possibly

include what EPA has done here. The question is if the clear statement rules are triggered, which we believe they are because this is --

JUDGE TATEL: Yes.

MR. LIN: -- fundamentally different exercise of power, then there is no clear statement, and they have not pointed either in their briefs or today to any clear statement that would satisfy the standard in *Brown & Williamson*, *UARG* --

JUDGE TATEL: But your point is that even if they're right that this is in fact, generation shifting is in fact because of the nature of the grid the best system because that's where it's operating. If an agency wants to mandate that that operate faster or more effectively that that's a decision only Congress can make, is that your point?

MR. LIN: Setting aside, again, that we actually don't think that it is, falls within the scope of best system of emission reduction, but yes. If in fact you were to conclude that the statute is ambiguous we think there is no clear statement because, and that's required because this is such a dramatic exercise of power. As I was saying to Judge Millett, some change in the mix of electricity generation is required. In the State of West Virginia we use 96 percent coal, maybe that changes to 94, maybe that

changes to 85, maybe that changes to 50, but the point is that we never claimed that we have exclusive authority to determine what our preferred mix of generation is, but it is --

JUDGE MILLETT: Do you agree with Mr. Keisler when he said that what EPA could do, at least without violating the types of objections that are raised here, is to require everybody to pull out their coal burners and put in exclusively gas burners, that that would be within EPA's wheelhouse, do you disagree with that?

MR. LIN: Your Honor, I think that's a -- I would agree with Mr. Keisler's point that that's a different question that, it's different from what they're doing --

JUDGE MILLETT: I know it's a different question, but he said that that would be within EPA's wheelhouse, but that clearly would --

JUDGE KAVANAUGH: Under this section, I think he said.

JUDGE MILLETT: Right. Well, it wouldn't be subject to these types of challenges, he reserved that there may be other challenges that we're not aware of. But if that's not subject to these challenges and yet, that certainly is changing the balance of electrical sources within a state, I'm trying to understand how your argument works. And maybe you just disagree with what he said. I

don't know.

MR. LIN: No, I mean, again, I think, you know, what our point is is we think what this statute can be used for is to improve the operation of a source. And what this does is something that's very different from that, and that's why --

JUDGE MILLETT: If they improve the operation of the source by forcing through the emission limit that said all coal power plants to stop being coal power plants and become gas powered plants, that would be okay, that wouldn't need a clear statement, that wouldn't tread on federalism interests, and the states' control over the balance of energy as you've referenced it here?

MR. LIN: No, Your Honor, I wouldn't agree that that would be, that that wouldn't trigger federalism as I think, again, that's gets to the, you know, what they would be doing there is they will be mandating a change in the mix of electricity generation, and my friend from New York was saying that, you know, we don't have exclusive authority over determining what the mix of electricity generation is, but that's not really the point here.

JUDGE SRINIVASAN: But your argument, I think it has to be, conceptually your argument has to be that Congress needs to have a clear statement in order to enable the EPA to do that? To do --

MR. LIN: Yes, Your Honor.

JUDGE SRINIVASAN: -- what Judge Millett --

MR. LIN: That's right.

JUDGE SRINIVASAN: You think the clear statement principle even applies in that situation.

MR. LIN: I think that's right. And I think, again, what the cases say, what *PG&E* says, and what the other cases from the Supreme Court say is that it's a traditional area of state authority to determine what our mix of electricity generation is. To get back to my example, because this rule requires some change, because at the end of the day we will not be at 96 percent reliance on coal, that is a direct intrusion on an area of traditional state authority. So, while we agree --

JUDGE TATEL: And wouldn't the same consequence flow if EPA had instead of requiring generation shifting required the installation of new more expensive technology at the plant that increased the cost of coal?

MR. LIN: No, Your Honor --

JUDGE TATEL: Under the generation shifting of the way the grid works that means that in West Virginia that coal would become more expensive, and would be called on by the grid less frequently then less expensive, it would have the same effect?

MR. LIN: It's the difference between the direct

intrusion and the indirect effect, right? I mean, under the other kinds of the more run of the mill Clean Air Act regulations that they enact where they require some different kind of technology --

JUDGE TATEL: The effect would be identical. The effect on your state would be identical. It would increase the price of coal, which would reduce that 97 percent to 95 or 93 percent, just by the very nature of the way the grid works?

MR. LIN: The difference is whether or not the rule would require a different mix of electricity generation, versus whether it might or might even be likely to result in a different mix of electricity generation. And what we have here is a rule that requires a different mix of electricity generation. I had one very quick final point.

JUDGE HENDERSON: Very, very quickly.

JUDGE ROGERS: Can I just clarify, just so I understand?

MR. LIN: Yes, Your Honor.

JUDGE ROGERS: So, in setting up the best system even though the statute directs EPA as to what types of things it should look at, your point would be that it should not look at what is happening in West Virginia?

MR. LIN: Your Honor, well, our point is that when the limit on what they can do, and this is Mr. Keisler's

point in terms of the statutory limits, is a best system of emission reduction has to be something that can be implementable at the source to improve the source's operation. So, there are confines, and even EPA admits this, on what our, the permissible ranges, range of systems that they can look at to determine --

JUDGE ROGERS: So, it can't do this regardless of what in fact is going on in West Virginia; and secondly, it can't impose these more expensive on site requirements either, because of the statutory requirement that EPA balance benefits and costs?

MR. LIN: Well, Your Honor, that would be a different statutory problem when it gets to the cost, but it does get to the point that I, the final point I wanted to make in terms of, this is in response to Judge Srinivasan, the difference between compliance measures and what is permissible under the BSER, because it gets to the question of what's happening in the real world. And I just wanted to point out that even EPA has admitted that there is a difference because in the proposed rule they had building block four which went to demand side measures, and Mr. Keisler talked about the retail, to effect retail customers. They concluded that it was unlawful for them to include that as part of the BSER, but they have concluded that they may include that as a compliance measure. So, there is a

difference under the law, and it's something that even EPA does not contest.

JUDGE TATEL: Okay.

JUDGE HENDERSON: All right. Thank you.

MR. LIN: Thank you, Your Honor.

JUDGE HENDERSON: Mr. Keisler, why don't you take a couple of minutes, but don't repeat Mr. Lin, please.

ORAL ARGUMENT OF PETER D. KEISLER, ESQ.

ON BEHALF OF THE NON-STATE PETITIONERS

MR. KEISLER: Thank you, Your Honor, I won't abuse the privilege. I would like to address some questions that Judge Brown and Judge Millett, in particular, addressed to the EPA. First, Judge Brown, what the Administrator says, it's the exact quote, the great thing about this proposal is it really is an investment opportunity, this is not about pollution control, it's about investments, and renewables, and clean energy.

JUDGE ROGERS: You want us to make our decision on the basis of political rhetoric, would you?

MR. KEISLER: Absolutely not, Your Honor, it's because that statement in fact captures what the rule itself does, which is that it measures whether you meet the emission limitation, not by the actual emissions performance of your existing source, but by whether you have sufficiently invested in building new, that's the metric

that's being imposed and that's being measured, and that's what the Administrator's statement captures. And it also captures, Judge Millett --

JUDGE ROGERS: So, what do you think Congress had in mind when it talked about this best system? I mean, that's where you started, as I recall.

MR. KEISLER: That's right. And I think it had in mind achievable standards for existing sources that control their emissions, not unachievable standards that force the investment in building entirely new facilities that aren't even sources regulated under the Act. I mean, Section 111 only extends EPA authority to sources. These new wind and solar facilities --

JUDGE PILLARD: So, Mr. Keisler, Congress has expressed a clear commitment to reducing pollution, and to reducing the externalities on the health and welfare of the nation that air pollution causes, and that's, I mean, you know, it's the Clean Air Act, right?

MR. KEISLER: Of course.

JUDGE PILLARD: And it seems, I'm just struggling with whether it is an implication of your position that you could have an economy in which you have certain sources that are so dirty that they cannot be sufficiently fixed in the way they operate, and other sources that are really clean, and that because the way you read Section 111(d) it imposes

the obligation on the source that in that economy that I'm positing the dirty source is necessarily immunized from regulation under Section 111(d), and that can't be right.

MR. KEISLER: Well, I don't think it's immunized from regulation, there are lots of regulations that will apply --

JUDGE PILLARD: In my hypothesis --

MR. KEISLER: -- but if Your Honor means that it --

JUDGE PILLARD: -- you have a set of sources, and this is my hypothesis, just to simplify it conceptually, that cannot be rendered, you know, that cannot be sufficiently fixed in the way they operate if there's really any cost effective way to do it. But your position is that in that situation it's the very unimmunibility of those sources that would render them not subject to regulations.

MR. KEISLER: Well, it's not the unimmunibility of it, it's the question of what tools Congress has given. We certainly understand that EPA very strongly believes that this rule is important, and necessary, and good policy, and the question as we see it is simply whether Congress has so far given them the tools they need to do what they're doing in the way they're doing. We've talked a lot about different aspects of the *UARG* case, in the *UARG* case the Supreme Court found that notwithstanding the importance of

climate change, notwithstanding the purpose of the Clean Air Act, some of those regulations were unlawful because they exceeded EPA's authority, and that's all we're saying here.

And with respect to the purpose of the Act, it absolutely is to promote the health and welfare of the country, but that same prefatory clause talks about while maintaining the productive capacity. So, there are different values --

JUDGE PILLARD: Right.

MR. KEISLER: -- being balanced here, and Congress determined not only that end purpose, but also the means that EPA currently has to effectuate that purpose, and all we're saying is that those means don't include what's going on here, which I think relates, Judge Millett, to your question about the difference between technology forcing and what EPA calls generation shifting, because there's a world of difference. There are lots of technology forcing rules, none of them achieve their mission reductions by shutting down particular existing sources, or a significant number of them, and forcing them to subsidize their competitors to displace them. None of them, that has never been understood to be technology forcing. And while Mr. Hostetler disagrees with it, that is what the rule says is going on here, J.A. 209, most of the reductions from this rule will come from the replacement of higher generating facilities with lower

generating or zero generating facilities.

JUDGE PILLARD: And you're concerned that because you see that as a subsidy that your clients are being called on to subsidize these other cleaner forms of energy, but isn't it the case that the Clean Air Act represents Congress' judgment that the public, and the health and welfare, and the harm to the health and welfare should not have to subsidize the conduct of dirty burning forms of energy production?

MR. KEISLER: As a general matter, yes, but I can't agree with that at that level of generality. EPA does not have a statutory mandate to eliminate all externalities, and require --

JUDGE PILLARD: No, I'm responding, though, to your notion that when we read this subsection we should find it counter-intuitive given what you're saying is a subsidy effect. And I'm saying well, reading this language it also bears on whether it's reasonable to read it, to examine the other subsidy that's in place if we read it the way you would ask.

MR. KEISLER: Well, whether you call it a subsidy --

JUDGE PILLARD: So, they're really competing.

MR. KEISLER: Well, it's an investment, it's, in terms of an obligation on the owners of regulated entities

to invest their money in building completely new facilities that really is unprecedented. So, the idea that it is a natural outgrowth of concepts and statutory language that's there it really just isn't, there is no precedent that Mr. Hostetler was able to cite for anything like this where a rate is set that everyone knows cannot be met by the existing source, and the, as a --

JUDGE PILLARD: That's contested, but --

MR. KEISLER: Excuse me?

JUDGE PILLARD: I think that's contested whether it's at a rate that everybody agrees cannot be met.

MR. KEISLER: Well, it is lower than the rate that has been assigned to new sources, meaning the new source that incorporates in its design --

JUDGE PILLARD: A new source has to do it right now, and the fossil fueled power plants don't have to do it right now, that's why the numbers are different. That's what they tell us.

MR. KEISLER: I'm sorry, I couldn't hear, Your Honor. I apologize.

JUDGE PILLARD: I'm sorry. The new plants have to do it right now under the rule, that's why their limits are set for what they can do right now, whereas these limits are projected out, I mean, that's the explanation the EPA gives us as to why there's that differential on limits, what is

your --

MR. KEISLER: Well, but the idea is that new plants are going to be built over time, over a period of years, and they will incorporate the, this, the numerical standards are different, 1,400 pounds of carbon per megawatt hour for new sources, 1,305 for existing sources. So, if you started building a new source now the best EPA thinks you can do is build one that a few years from now when it comes into operation will be able to attain 1,400. Existing sources are made more stringent than that, which is clear, clear, conclusive demonstration that that is a standard that no one can be met, if couldn't be met if you started today, building the state of the art plant.

JUDGE KAVANAUGH: The larger point is that it's up to Congress to decide.

MR. KEISLER: Absolutely.

JUDGE KAVANAUGH: And it seems -- and I'll just throw this out, I'm concerned about making sure our decision in the grand sweep of separation of powers is consistent with the past, and consistent with the future, and it seems like what we have here is a thin, people disagree with the adjective, but a thin statute, it wasn't designed with this specifically in mind, but it can be kind of moved around to get here, for some really urgent problem. And thinking in the past, I mean, the prior administration in the national

security realm went through the same thing, and thin statutes trying to defeat an enemy, and the Supreme Court said no in the *Hamdan* case, which I think is highly relevant, Justice Breyer said the dissenters say that today's decision would sorely hamper the President's ability to confront and defeat a new and deadly enemy; the Court's conclusion ultimately rests upon a single ground; Congress has not issued the Executive a blank check; no emergency presents consultation with Congress; judicial insistence upon that consultation does not weaken our nation's ability to deal with danger; strengthens the nation's ability to determine through democratic means how best to do so; the Constitution places its faith in those democratic means. And it seems like we've lived this issue where the most urgent need of our country was identified as a reason to use old statutes that weren't squarely on point to jam new urgent needs into those. And the Supreme Court, Justice Breyer speaking directly to it, war is not a blank check, global warming is not a blank check either for the President.

MR. KEISLER: Right. And as I said, we don't doubt the policy bona fides of the EPA, and cases where there are urgently felt needs can often be the hardest and most challenging, but the real question in this case we think is can you get from a statute about existing sources

to an obligation to build new facilities, can you get from a statute that talks about achievable emission standards to standards that literally cannot be achieved by the individual source.

JUDGE ROGERS: Then let's go back, and I didn't understand you to be making these arguments because you probably know better than I. I mean, the prior administration took the position EPA had no authority to regulate greenhouse gas emissions, all right? The Supreme Court disagreed, so now as I understood it your argument is, maybe I'm misrepresenting, and tell me if I am, but it's simply a matter of technique.

MR. KEISLER: Yes, whether it is, whether the means and tools they're using are within the authority. I agree with Your Honor, carbon is a pollutant under the Act, the Supreme Court has settled that, that's why there are a lot of programs that regulate carbon now.

JUDGE ROGERS: What I need to be clear on is at a global perspective there are a lot of industries using coal, but the record shows these industries are not like the family farmer, these are conglomerates, they're doing many things, they're investing because of their obligation to their stockholders to get something at the lowest price, and the grid expert's brief said why this economic principle is part of the market we're dealing with. So, without knowing

the details of your clients, the record shows that these are not as it were sole source operations, we're way beyond that.

MR. KEISLER: And Mr. Poloncarz, if I pronounced his name correctly, said that, you know, some power companies are certainly expanding onto renewables, and they have affiliates that do this kind of work --

JUDGE ROGERS: Well, you can't survive in this market unless you do that is basically the point, because --

MR. KEISLER: But I --

JUDGE ROGERS: -- the cheapest sources are always going to be utilized first. So, given that reality was EPA, I just need to understand, supposed to just close its eyes to that reality?

MR. KEISLER: No, Your Honor, they don't need to close their eyes to it, but the fact that something is going on voluntarily doesn't mean EPA can ratchet it up three levels and order it. I mean, the fact that private parties are doing some things to some extent doesn't itself provide the legal basis for this rule under the statute.

JUDGE SRINIVASAN: Is that an all or nothing principle so that if EPA thought that a very small number of existing sources would have to engage in, or would predictably engage in generation shifting in order to come into compliance under the standards that the states would

implement, that that itself would be enough, it doesn't matter if it's an extremely small number, that the vast majority of sources could comply based on actions taken at the source itself. Your view is an all or nothing principle that the statute just doesn't --

MR. KEISLER: Well, our point is that the number of sources that would engage in building new renewable facilities is not material to the legal question of does EPA have the authority to compel owners to invest in their facilities.

JUDGE SRINIVASAN: The answer is yes. So, it is all or nothing, so yes.

MR. KEISLER: So, the answer is it's the degree that doesn't really matter because there's a, you know, a statutory limit that we would say would be violated under either circumstance.

JUDGE SRINIVASAN: And so, but if EPA, this will be just one step short, and it said this is achievable by everybody at their own, based on actions they take in their own confines, and they can do it in a cost efficient enough manner that we consider it to be the best system. But we understand that several of them may opt to engage in some sort of generation shifting measure because they'll view it to be more economically feasible to do it that way, that would be okay, because then the best system wouldn't be

predicated on a prediction that in fact, I'm sorry, a requirement that in fact entities would be required to engage in generation shifting, it would just be something sort of an add on of a way to comply.

MR. KEISLER: Some of the Petitioners do believe that states would be able to authorize that add on, not every Petitioner, sorry, believes that, but all of them agree that EPA cannot require that, and the difference is that when you require it you are imposing the obligation on the owner, and you are then applying the standard of performance to this combination of sources and non-sources. And, you know, with respect to technology forcing, Judge Millett, that's always been about new sources, that's always been about the steps the Agency takes to incorporate going forward into design. Congress has always required the Agency to regulate with a much lighter touch on existing sources under 111(d) because they have investment already made, there are communities that already depend on them, and that is why, just a word about the one other portion of the statute we haven't discussed here --

JUDGE MILLETT: Yes, but where is, what is it in 111(d) that you're relying on for that point? I understand that there's only been a fist full of cases under that provision, so as to those samples it wasn't going on, but I'm not sure it's statistically significant, one, because

once the Supreme Court said greenhouse gas emissions, 111(d), go forth, we have to figure out whether past practice is evidence of limitation or just wasn't implicated.

MR. KEISLER: Right. There are very specific differences between the 111(b) provisions on new sources and the 111(d) provisions on existing sources that reflect exactly that congressional purpose, the first is that under 111(b) EPA sets the standards for new sources, under 111(d) states establish the standards for existing sources, and then the statute specifically says that states can take into account the remaining useful life and other factors in applying those standards to existing sources. And what that provision was about, and EPA acknowledges this in its legal memorandum, was codifying the regulations EPA had already adopted to permit states to give variances, to vary from the standards for individual sources when the economic burdens on those sources would be too great. EPA has precluded the states in this rule from meaningfully exercising that authority, and we know why they did it, because they recognized that there was a fundamental incompatibility with a statutory provision that says states can act to prevent individual sources from being prematurely closed due to uneconomic burdens, and they rule whose entire purpose is to prematurely close a significant number of plants by imposing

on economic burdens. But EPA drew the wrong lesson from that incompatibility, the remaining useful life provision is part of the statute, and it was put there because EPA wasn't contemplated to be permitted to adopt regulations which would achieve their emissions reductions by regulating a significant number of existing sources out of the market.

JUDGE HENDERSON: All right, Mr. Keisler, we've got to plow ahead. The next issue is scheduled to take 40 minutes, but I think we, and we were supposed to break at noon, but let's go ahead, and Mr. Lin, you're up again. Mr. Lin?

II. Section 112

ORAL ARGUMENT OF ELBERT LIN, ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. LIN: Judge Henderson, and may it please the Court. Again, before I begin I'd like to explain briefly how Ms. Wood and I hope to use our divided argument time. I will be addressing why the rule is prohibited under the Section 112 exclusion; and Ms. Wood intends to bring to the Court's attention the perspective of the regulated entities.

Your Honors, the text of the Section 112 exclusion is clear, it prohibits the use of Section 111(d) where the source category is already, quote, regulated under Section 112.

JUDGE TATEL: Before you, can we -- let's get the

basics down here. Do you agree we're working from the statutes at large, or the U.S. Code?

MR. LIN: I'm sorry, Your Honor, I missed the first part of your question.

JUDGE TATEL: Are we -- I just want to get the basics down here. Are you operating from the statutes at large, or just from the U.S. Code?

MR. LIN: Your Honor, when I was saying that the text is clear I'm talking about the text in the United States Code.

JUDGE TATEL: Well, so, you don't think -- what about -- I mean, Congress hasn't enacted the U.S. Code, Congress has only enacted the statutes at large, and the case law is pretty clear that, in two respects, number one, if there's a conflict you go with the statutes at large, and in any event, the Congress has not enacted the U.S. Code, so aren't we, don't we have to work with the statutes at large?

MR. LIN: And we believe, Your Honor, that when you look at the statutes at large that what comes out of the statutes at large is the Texas and the United States Code. And, I mean, it's as the office to the law --

JUDGE TATEL: Well, the statutes at large includes both the House and the Senate amendments.

MR. LIN: Yes, Your Honor, it does include two amendments to the same text.

JUDGE TATEL: Right.

MR. LIN: And as we explain --

JUDGE TATEL: And since the U.S. Code only includes one don't we look to the statutes at large to decide this case?

MR. LIN: And when you look at the statutes at large you see that there is one amendment that we believe is a substantive amendment, and one amendment that is a conforming amendment, and that's not --

JUDGE ROGERS: So, weren't they both responding to the amendment to Section 112 where Congress decided it would identify the list of HAPs that EPA had to be regulated, so both the House and the Senate were responding to that, and making conforming amendments.

MR. LIN: Your Honor, what we think is that the --

JUDGE ROGERS: Is there anything to indicate Congress was doing anything else, and no committee hearings, there's no committee report, no conference reports, no floor debate? That's all we know.

MR. LIN: Your Honor, there's two parts to answering that question, the first is whether the Senate amendment is a conforming amendment; and the second is whether the House amendment is a substantive amendment.

JUDGE ROGERS: I know, and I wonder you cite the House Legislative Council Memo, but why are we entitled to

label one conforming, and the other substantive when the bodies themselves haven't done that?

MR. LIN: Excuse me, we cite --

JUDGE ROGERS: For a parentheses in the amendment, or the number of words in the amendment that makes the difference? I don't think so, because an amendment could simply say insert the word not. That's hardly just a conforming, or it could be conforming, but it could be substantive, right?

MR. LIN: Right. And Your Honor, there are a number of different indicators that we think help explain why one of the amendments to the substantive amendment one is the conforming amendment.

JUDGE TATEL: But can we start from the proposition that --

JUDGE KAVANAUGH: The terminology, why is the terminology --

JUDGE TATEL: -- both amendments were passed by both houses, right?

MR. LIN: Yes, Your Honor.

JUDGE TATEL: The Senate passed both amendments, and the House passed both amendments, correct?

MR. LIN: That's correct, Your Honor.

JUDGE KAVANAUGH: I thought the --

JUDGE TATEL: So, what is it that, what is it

that, what is it in your view that requires us to rely on the House amendment rather than some other way to look at the bill? If I believe we work with the statutes at large what is it that, and if both houses pass both what is it that requires us to pick the House first?

MR. LIN: Well, what you return to is the fact that one is a substantive amendment, and one is --

JUDGE KAVANAUGH: But the Senate receded.

MR. LIN: That is also true.

JUDGE KAVANAUGH: That's a -- your substantive conforming amendment will, is a hall of mirrors, and I've been through all of them, and you need a stiff drink after going through every amendment that's been cited in the footnotes in the briefs. There's an earlier/later possible rule, although it's not for everyone, if you play that out; and the substantive conforming thing doesn't play out, I mean, why do we need that? The Senate -- here's what we have, we have two provisions that are both passed and both signed by the President, they're conflicting, at least conflicting in intent, however you label them. When that circumstances happens you have a scrivener's error. When you have a scrivener's error everyone, including Justice Scalia, would look at the legislative history. When you look at the legislative history the Senate expressly receded on this exact provision.

MR. LIN: Right. So, you're referring to the Chaffey Backus comment --

JUDGE KAVANAUGH: Yes.

MR. LIN: -- right? And they say that the Senate receded on the amendment, so I think that that's right.

JUDGE TATEL: Don't we also look at --

JUDGE SRINIVASAN: Didn't they recede subject to an amendment? I thought that if you look at the conference report that they're referring to they said that the Senate recedes from its disagreement to the amendment of the House to the text of the bill, and agree to the same with an amendment as follows, and then I thought that the amendment as follows includes both provisions.

JUDGE TATEL: Right.

JUDGE SRINIVASAN: So, aren't we right back to where we started, because yes, they receded, but subject to an amendment, and the amendment includes both the House provision and the Senate.

JUDGE KAVANAUGH: That's the conference report. In the statement on the floor that's in the Congressional Record they specifically recede on this exact provision.

JUDGE SRINIVASAN: And just to finish my thought, which is I think the statement on the floor is the next day, and it's referring back to the conference report that the prior, it is the prior day. So, it seems to me that when

we're trying to understand what the statement on the floor is we looked at the conference report that the statement, people who uttered the statement were referring to. And if you look to the report, the report includes both. And if you think there's a difference with the statement the next day I take the point, but doesn't the conference report that the statement is referring to include both?

MR. LIN: It does. But what the statement says is that they specifically recede to the amendment in 108, and 108, and in the description there it says that 108 is amending Section 111 for both new and existing sources. So --

JUDGE SRINIVASAN: Wait, wait. What did they say? Because I think that they're referring back to the scope of the recession, if that's the right word, in the conference report. They're just describing what happened in the conference report, as I understand it. Am I not understanding it correctly?

MR. LIN: Well, what the statement says is that the Senate recedes to the House with respect to Section 108 of the Bill, and so that -- and yes. So, and it gets to what Judge Kavanaugh was saying, which is that Section 302, which comes much later in the Bill, should have been stricken in accordance with the recession to the House's amendment, which was in Section 108, and you end up with

this drafting error, which is the way EPA has described it.

JUDGE PILLARD: But I think we're not understanding the recession the way you are.

JUDGE SRINIVASAN: And maybe I have it wrong, but I thought that the floor statement is describing the recession that occurred in the conference report, I thought the floor statement is describing to everybody what happened in the conference report, and what happened in the conference report was a recession subject to an amendment that included both. But maybe I'm misunderstanding the context.

MR. LIN: Your Honor, the way that I understand the statement is that it describes that the Senate receded to the House with respect to Section 108 of the Act, and that is the provision in the 1990 amendments that amended the exclusion in the way that is reflected currently in the United States Code.

JUDGE SRINIVASAN: So, I guess your provision, position, then, is that the conference report itself has a scrivener's error.

MR. LIN: Which ended up being what was passed.

JUDGE KAVANAUGH: Right.

MR. LIN: Right.

JUDGE KAVANAUGH: Of course it does because --

MR. LIN: Right.

JUDGE KAVANAUGH: -- that's what's in the statutes at large, and so we, the question is whether we have zero to look at in terms of legislative history, or we have something, and we have something, we have the Backus Chaffey statement which expressly recedes on this provision. Now, maybe that was a mistake, but that's all we have.

MR. LIN: It speaks to -- Judge Srinivasan, I think the point is that the, this piece of legislative history speaks to whether the Senate amendment was a clerical error. In other words, it reflects that the Senate intended to recede to the House's amendment, and although the later conforming amendment, which is categorized with a number of other clerical edits under the heading conforming amendment, whether that was intended to have been struck. And that is the point, so I think that there are a number of different things to look at, one of them is that, but the other is there is legislative history reflected in the debate over the expansion of Section 112 by the 1990 amendments, and there is, and the concern with having sources categories that are regulated under Section 112 also be regulated under Section 111(d). Those debates are also bolstered by a number of other statutory provisions that were enacted in --

JUDGE ROGERS: But weren't they referring to the air pollutant?

MR. LIN: They were referring to, the debates that I'm referring to, we're talking about say Section 112(n)(1)(A).

JUDGE ROGERS: So, if source A has emissions of carbon, and it also has emissions of mercury are you telling me they can't be regulated under different sections, 111(d) and 112?

MR. LIN: Yes, Your Honor, under the text of the Senate amendment, which we believe is the amendment --

JUDGE ROGERS: What I'm trying to understand is where is the indication by Congress that it intended to create this loophole whereby a source, once it's regulated for carbon, cannot be regulated for mercury; and secondly, either on the House floor, the Senate floor, in any committee report, that I don't find. And that's why even if you're left with the House amendment, you're left with an amendment that in your view would exclude EPA from regulating a source under 111(d) if it's also regulated under 112, even if they're entirely different pollutants.

MR. LIN: Right. And the answer to your question, Your Honor, is that, as I was saying, there is legislative history relating to the expansion of Section 112 --

JUDGE ROGERS: But there's nothing on this point I'm addressing, is there?

MR. LIN: There is. There is, in terms of being

concerned about Section 112 being overlaid on top of other regulations, and more --

JUDGE ROGERS: As to the air pollutant, that's what I'm trying to get you to focus on, because that's, it says air pollutant, and then it has all of these qualifiers. So, you can't regulate the same air pollutant if it's already regulated under another section, that's quite different than saying you can't regulate the source at all once it's regulated for one pollutant.

MR. LIN: Well, Your Honor, there are other statutory provisions that were enacted at the time that impose this same either/or limitation, one of them is Section 129 of the Clean Air Act which speaks to solid waste incinerators, and it specifically says that those can only be regulated under Section 111(d).

JUDGE ROGERS: But I'm in 111(d) and 112, all right? And there, Congress is talking about the air pollutant, and that's where I don't understand what you have that would support the House adopting what you call a substantive amendment over which there is absolutely no debate by Congress to suggest it intended to create this giant loophole which basically wipes out 111(d).

MR. LIN: Well, Your Honor --

JUDGE ROGERS: Don't we need some indication --

MR. LIN: We do.

JUDGE ROGERS: -- as to what Congress intended? And I don't mean duplication in the sense of if a source is regulated for one pollutant it can't be regulated for another pollutant that is also emits.

MR. LIN: Well, Your Honor, to finish the point on Section 129, it's not that it's, I mean, it is a different part of the Clean Air Act, but it specifically refers to regulating solid waste incinerators under Section 111(d), and not --

JUDGE ROGERS: I'm ready to grant that maybe in other sections there's some very clear language. What I'm focusing on now is the 1990 amendment saying that EPA had dragged its feet, and so rather than wait for EPA to list the hazardous air pollutants, Congress went ahead and did it, and so, there were provisions that had to be, and I want to get into this language, debate, but had to be conformed, and that's what you're dealing with with this House amendment.

MR. LIN: Well, Your Honor, the fact that there are other provisions that are clear, that make clear that Congress was concerned about, again, under Section 129 what they're talking about there is they specifically precluded incinerators from being regulated under Section 112, and specifically required them to be regulated under Section 111(d). So, my point is there is statutory context and

evidence that Congress was concerned about having the same source regulated under both Section 111(d) and Section 112.

JUDGE ROGERS: And where do I find --

JUDGE PILLARD: But that's a little -- excuse me, Judy, do you want to follow up?

JUDGE ROGERS: No, go ahead.

JUDGE PILLARD: If Congress wanted to avoid double regulation why would it have just made it depend on the timing? It seems like if EPA regulates a source category under 111 first, then it can also regulate it under 112 under your reading?

MR. LIN: Right. And, Your Honor, that just reflects that there is a difference between laying a national standard over a varied, as Mr. Keisler, varied state by state standards under Section 111(d), as opposed to layering a Section 111(d) standard over a uniform national standard under 112. Section 112 --

JUDGE PILLARD: Why is that different? Like, if we take an example, I take it you're saying that if you have a source category that's emitting let's say HAPs, and it's regulated for that, and it's emitting like mercury, so you have a source that's emitting mercury, it's emitting criteria pollution, like sulfur dioxide, and EPA wants to, let's say it's a landfill, they want to go after it under 111(d) for landfill gases, your view is that if it's done

the 112 regulation first it can't go after the landfill gases, but if it's done the landfill gases first then the exclusion doesn't apply because it can turn around and regulate under 112.

MR. LIN: Your Honor, that's what the text says, and we think that it, again, I think it reflects two-fold, two things, one, I think it reflects that in 1990 when Congress greatly expanded Section 112 it wanted to make sure that it wasn't upsetting 111(d) rules that were already in place, so there's a grandfathering effect there.

JUDGE PILLARD: Why would it be upsetting rules already in place? They're regulating two different types of pollutants.

MR. LIN: Well, that's what, I think you might be referring to Section 112(d)(7), that's what it says is it preserves the Section 111(d) regulations, it says that 112 doesn't supersede what's already there.

JUDGE TATEL: Let me get at the history slightly differently at the risk of repeating. Prior to 1990, prior to 1990 the only pollutants excluded from 112(d) were listed HAPs, that's number one; and number two, 112(d) was viewed as providing a basis for regulating all pollutants not regulated as HAPs or NAAQS, that's the pre-1990 law. Is there any indication in the legislative history that Congress intended to change either of those? Because that's

the effect on applying the House amendment the way you want to, it eliminates both of those.

MR. LIN: Well, what happened in, I think it sort of gets back to what Congress did in 1990 when it changed Section 112 --

JUDGE TATEL: That's not the question I was asking you. I was asking you whether since the effect of applying the House amendment the way you would like to is to change two fundamental aspects of pre-1990 regulation, namely that the only pollutants excluded from Section 111(d) were listed HAPs, and that 111(d) was viewed as a way to regulate all pollutants not regulated by, not, not, that were not HAPs or NAAQS. This changes both of them, yet there's nothing in the legislative history suggesting that that's what Congress wanted to do, especially since, as Judge Rogers pointed out, the whole purpose of the statute was to strengthen the Clean Air Act, not weaken it.

MR. LIN: What it changes in the exclusions is it changes the exclusion with respect to Section 112 from a pollutant based exclusion to a source category based exclusion.

JUDGE KAVANAUGH: So, if a source, I don't want to interrupt your answer, but --

JUDGE TATEL: No.

JUDGE KAVANAUGH: -- if a source category was not

regulated under 112, which was possible certainly for you to use because they were going to the study, three-year study, could the source category under the House amendment and the position you adopt, could the source category be regulated under 111(d) for carbon and for HAPs?

MR. LIN: Yes, Your Honor.

JUDGE KAVANAUGH: Okay.

MR. LIN: And that's the difference. So, it changed it from --

JUDGE KAVANAUGH: The point of the House amendment in trying to orient ourselves, I think, is the House amendment was very pro-regulatory under 111(d) in the event that EPA did not choose to regulate a source category including EGUs under 112. On the other hand, it was anti-duplicative in the sense of if they are regulated under 112 this is your theory, I think the language is very convoluted, by the way, I'll just point that out --

JUDGE TATEL: No kidding.

JUDGE KAVANAUGH: -- at best. The second thing I want to orient you on is wasn't this in the President's original proposal, this language?

MR. LIN: It was.

JUDGE KAVANAUGH: So, it kind of was there the whole time for the whole consideration of the Clean Air Act in 1989 and '90, correct?

MR. LIN: Yes.

JUDGE KAVANAUGH: That doesn't necessarily tell us what it means, I just want to -- not as we sometimes see the tucked in at midnight kind of provision.

MR. LIN: No, and to sort of --

JUDGE PILLARD: I just -- go ahead.

MR. LIN: I just wanted to respond to Judge Kavanaugh's point really quickly, which is that I think the point you're getting at is right, it's that the exclusion was not, it wasn't narrowed, it was changed, it was simply changed in its focus to track the change that happened in Section 112.

JUDGE KAVANAUGH: Then they respond it doesn't make sense to have a category based exclusion beyond HAPs, and they say it's almost absurd, they don't quite use that word, but to leave a gap that would mean that you couldn't be regulated under 111(d) for non-HAPs.

MR. LIN: Well, and the thing to remember there is that HAPs and, is that the Section 112 provision in terms of the coverage of pollutants was also greatly expanded in 1990. And so, they talk about, they use the distinction between HAPs and non-HAPs, but that's based on an understanding pre-1990. The definition of pollutants covered by Section 112 in 1990 was expanded such that it is quite similar to, if not co-extensive with the definition of

pollutants covered by Section 111(d). So, it does --

JUDGE KAVANAUGH: This language is so convoluted, though. Judge Rogers is exactly right to point out that it talks about the pollutant first, and then has the three kind of sub-part exclusions, and spent a lot of time trying to figure that out.

MR. LIN: It does, but if we're talking about the text really there's only one part of the text that's in dispute here, and that's the meaning of the phrase regulated under Section 112. EPA has alleged ambiguities based on the and and the or, they have alleged ambiguities based on the nots, but in the, at the end of the day they have conceded that none of those alleged ambiguities are reasonable readings of the statute.

JUDGE KAVANAUGH: So, any air pollutant which is not emitted from a source category which is regulated, I mean, that's the --

JUDGE ROGERS: That's the point.

JUDGE KAVANAUGH: That's the point that Judge Rogers I think was making about the convoluted. In other words, if the House amendment, I'm, as you heard, I'm with you on the idea that the House amendment applies, I'm struggling with what the House amendment means and whether therefore does it kick into a land of deference just on the House amendment alone, not on the Scialava (phonetic sp.)

sense, but on the House amendment alone.

MR. LIN: Well, I do think that there's a point that's worth, that's important to emphasize here, and that's that even if Your Honors, you believe that both the House and the Senate amendment need to be given equal weight, the way to --

JUDGE KAVANAUGH: But that's not the point.

MR. LIN: No, no, but -- right. But for the rest of the Court --

JUDGE KAVANAUGH: Forget the Senate amendment, at least for my questions.

JUDGE TATEL: How would you do that? Why don't you keep going? I'm interested to hear how you would do that.

JUDGE KAVANAUGH: The House amendment, the law of the House amendment is convoluted.

JUDGE TATEL: Right. Why don't you do that. Keep going.

MR. LIN: For the rest of the -- I'm sorry, Your Honor -- for the rest of the Court --

JUDGE HENDERSON: Let's let Counsel --

JUDGE TATEL: Okay.

JUDGE HENDERSON: -- state his position.

JUDGE TATEL: All right.

MR. LIN: Thank you --

JUDGE ROGERS: Thank you.

MR. LIN: -- Your Honor. For those who believe that the Senate amendment and the House amendment deserve equal weight, which I understand is not you, Judge Kavanaugh, and I agree with your position, the way to reconcile those is if they are not irreconcilable, which we don't think they are, because we think both limitations can be implemented, is to give both amendments maximum effect, and that's the case that EPA itself cites, *Citizens v. Spencer County* from this Court that says when you have two provisions you need to give, and both of them apply to the same thing, or they are in some conflict, you need to give them both maximum effect, and here --

JUDGE KAVANAUGH: Yes, I mean, that's the one thing we can be pretty sure Congress did not want.

MR. LIN: That's right, but --

JUDGE KAVANAUGH: Because that's just maximum exclusion, which I understand why you want that, but that's not really, I don't think that works. I mean, I understand the textual argument, but, again, we have a scrivener's error, I think. I've said my peace on that.

MR. LIN: But, Your Honor, I think that if we have the two amendments there has to be a way to deal with them, right? If one of them is --

JUDGE SRINIVASAN: But why is it maximum exclusion

and not a maximum of inclusion? I'm not quite -- even if we go down the road to this point in the flow chart it seems like one provision says the Administrator shall prescribe regulations for pollutants A and B, the other provision says the Administrator shall prescribe regulations for air pollutant A, and if you put those together the Administrator shall prescribe regulations for A and B. It seems like it's inclusive rather than exclusive if you try to glob them together.

MR. LIN: Well, what we're talking about, Your Honor, is the two amendments that apply only to the exclusion, so what is the scope of the exclusion, right?

JUDGE SRINIVASAN: But if the statute just doesn't read that way, it said, it's a mandate to prescribe regulations to deal with an air pollutant, and then what we're talking about is what's the corpus of air pollutants that are encompassed within the mandate, and one provision says it's a mandate to cover a lot of air pollutants, another one say it's a mandate to cover some subset of those air pollutants, and it just seems like if you glob the two of them together, and I take the point that this is an artificial exercise, but just, you know, we're in a situation in which my hypothesis, Congress never intended for this to happen this way anywhere, so if we're in the land where we're trying to glob them together it seems like

you glob them together and what you get is inclusion in the sense that you take the broadest mandate because it envelopes all the air pollutants.

MR. LIN: But the part that we're talking about, the particular part of Section 111(d) that's at issue is not the mandate, but the carve out from the mandate. So, it's any air pollutant which is not the following, and --

JUDGE SRINIVASAN: But all the carve out does is it tells you which pollutants are covered, and the provision is -- I agree, if the provision said here's what you can't regulate, if it says the EPA cannot regulate A, and then the other version would say you cannot regulate A or B, then if you glob them together you can't regulate either. But the way the provision is framed is you must regulate A, and you must regulate A and B, and when you put those two together it's a mandate to regulate both.

MR. LIN: I think it's a -- Your Honor, I would disagree with the way you're constructing it. I think it's you must regulate A, that is not B, or that is not C, and I think when you're figuring, when you're trying to give maximum effect to the not B and not C the way to do that if they're non-reconcilable is to put it together as not B and C. And so --

JUDGE MILLETT: Now, why isn't, because putting them together gives no effect to the 112(b) people because

they were saying only regulated under 112(b), and that's just getting blown out of the water under your reading. Why isn't the reading that we should be doing here since we have the least common denominator, all right? We know that as to the Senate, and this is what, it went through the House, went through the Senate, signed by the President, was a determination that the things that are already regulated under 7412(b) should not be regulated under 111(d), that's consistent with pollutants. And the House said things under 7412, which includes 7412(b), so the common denominator that went through House, Senate, and was signed by the President, was the things that are regulated under 7412(b) won't be, the pollutants that are regulated under 7412(b) won't be regulated under 111(d), that's the one thing everybody agreed on, why isn't that where we should land?

MR. LIN: I think, Your Honor, it's the same disagreement that we have with what Judge Srinivasan is saying, which is that --

JUDGE MILLETT: Mine is textually, what went through that everybody agreed on, and that's the one area of agreement.

MR. LIN: Because that's not --

JUDGE MILLETT: The inclusion or exclusion thing.

MR. LIN: Because that's not, that's not the way that, that conflicting amendments are dealt with under the

case law, and certainly under this Court's case law. The question is how you give both of the provisions maximum effect, and to do that because they are both exclusions you give both exclusions maximum effect, but I --

JUDGE MILLETT: You can't give the -- because the maximum effect of the Senate version was as to air pollutants under 7412(b), that's what that text means, that's why you're so resistant to it, that's why they want -- and to say that you're excluding that, and we're excluding more is to actually ignore, and to take all the meaning out of the 7412(b) restriction that the Senate passed. So, you're not, I understand your rule of trying to give effect, but you're not giving effect to the confinement to 7412(b).

MR. LIN: Your Honor, I think, I mean, I think what we do is we give both limitations effect. But fundamentally our point is --

JUDGE MILLETT: How does your reading -- maybe I'm just not understanding, how does your reading give effect to the Senate's determination that only as to pollutants regulated under 7412(b), because that's what 7412(b) means, it means the pollutants regulated on that list, how do you give effect to that determination that that's as big a carve out as we want, and no bigger, how does your reading do that?

MR. LIN: Well, what we read it as is that the

Senate amendment preserved the original exclusion, which was carving out hazardous air pollutants listed under 112(b) from regulation under Section 111(d). The House amendment carves out source categories that are regulated under Section 112 from being regulated under Section 111(d). And our view is that under the case law that says that you have to give maximum effect to both, and because these are limitations --

JUDGE KAVANAUGH: But you can't, to the extent Judge Millett is saying that the Senate amendment means exclude this, and exclude only this, you're giving effect to this exclude this, you're not giving effect to the exclude only this, but you can't give effect to the exclude only this without ignoring the House amendment.

JUDGE MILLETT: No, not giving effect to theirs. Yes.

JUDGE KAVANAUGH: Right?

JUDGE MILLETT: So, the least common denominator.

JUDGE BROWN: Would it help to look at --

JUDGE KAVANAUGH: I don't think it's overstepped.

JUDGE BROWN: -- one of these as focused on pollution, and the other as focused on source, and then you could reconcile them?

MR. LIN: But I think it gets back to the question as to why we think the House amendment is the substantive

amendment, because it was making a change that, it was making a change from being a pollutant focused --

JUDGE KAVANAUGH: To pick up on Judge Millett, the Senate amendment is keeping the status quo, and that's very substantive, too.

MR. LIN: But I think that --

JUDGE KAVANAUGH: I just think the substantive conforming thing, I understand the title, but I think that's not, that's slippery.

MR. LIN: But Your Honor, I think that there's --

JUDGE TATEL: Yes, can you just help me with one question as part of Judge -- if we go with the House amendment like you want to, does the Senate amendment play any, in other words, would it be any different if there weren't a Senate amendment? What would be the difference between relying on the House amendment, as you say, if the Senate amendment were not in the statutes at large, and relying on the Senate, on the House amendment with the Senate amendment and the statutes at large? In other words, does it play any role at all in your thinking about the effect of the House amendment?

MR. LIN: It plays no effect at all because --

JUDGE TATEL: None at all?

MR. LIN: Right, because we think, as EPA said back in 2005, that the Senate amendment is a drafting error,

that it was meant -- and to get to your point, Judge Kavanaugh, I think that there is danger in --

JUDGE HENDERSON: All right. We've got to stop and let Ms. Wood take her time.

MR. LIN: Of course, thank you, Your Honor.

ORAL ARGUMENT OF ALLISON D. WOOD, ESQ.

ON BEHALF OF THE NON-STATE PETITIONERS

MS. WOOD: Thank you, Judge Henderson, may it please the Court, my name is Allison Wood and I represent the non-state Petitioners. I'd like to, today, talk about why, and I think this will go to a lot of the questions that many of you had, why it in fact makes sense that the House amendment is in fact substantive and why the Senate amendment was merely, you know, a conforming amendment that made no sense, and why when you look at that in the context of what is going on 1990 in terms of how power plants were going to be regulated you can see that in fact it does make sense, the version that is the House version, and excluding source categories.

JUDGE KAVANAUGH: Both versions make sense.

MS. WOOD: Well, actually, I think, you know, and that's one of the questions here, and that's Judge Millett's point, she says it makes sense that you would just, you know, keep with the status quo and exclude hazardous air pollutants. But in fact, if you think about what is going

on in 1990 that doesn't make sense, because what's happening in 1990 is 112 is expanded greatly, and Congress lists 189 new pollutants that are going to be hazardous air pollutants. Before that you have only a handful of pollutants, maybe four or five. If you exclude all hazardous air pollutants there would have been a significant period of time where those hazardous air pollutants could not have been regulated at all under the old language because it would have said under 111(d) you can't regulate criteria air pollutants, those are the NAAQS pollutants, and you can't regulate HAPs, you have this whole big huge list. And in the meantime, EPA has to go through with this long list, and it has to identify what are the major source categories, and it has to come up with and promulgate regulations to, you know, regulate the emissions of the hazardous air pollutants from those major categories. You would have had a significant period of time where you could not have regulated those under 111(d). Under the House language, by changing it to source category you could in fact regulate for a period of time those pollutants under the 111(d) program. And then going to --

JUDGE PILLARD: I'm not following that. Isn't the so-called exclusion triggered by 112 an exclusion where it's regulated?

MS. WOOD: It, you know --

JUDGE PILLARD: So, it has to be regulated before that even would kick in, even under your view, no?

MS. WOOD: That's exactly right. So, that's my point, because the exclusion is sources regulated it wouldn't be regulated in this period of time where they had just been listed, the exclusion wouldn't apply, you could regulate the hazardous air pollutants under 111(d).

JUDGE PILLARD: And then you're saying any --

MS. WOOD: And then once --

JUDGE PILLARD: -- regulation that is going to take place under 111(d) has to skedaddle in and take priority happened during that period because after that it won't be --

MS. WOOD: Well, what happened is --

JUDGE PILLARD: -- and then --

MS. WOOD: -- if you had, if you came in and you regulated under 111(d) for that period of time, and then you now identify source categories under 112 to the extent there were an overlap between the source category you're regulating under 111(d) and what you're regulating under 112, you then, you can move that way, that is, you know, in fact permissible under 112(d)(7), so in other words you would have, you could now regulate more under 112.

JUDGE PILLARD: It doesn't make sense to me because we're talking about apples and oranges, the double

regulation point, it's can you regulate a landfill for landfill gas, and then also for the mercury, so landfill gas under 111(d), and then also for mercury under 112, and you're saying sure you can do that, but you can't regulate it for mercury and then turn around and regulate it for landfill gas, I take that to be your position, and I don't understand how that makes sense.

MS. WOOD: Well, you -- what I was trying to explain was how you could give, you know, why the one --

JUDGE PILLARD: Is that, though? That is the result of your position?

MS. WOOD: That can be the result, yes. But when you look at --

JUDGE PILLARD: In fact, it would have to be the result.

MS. WOOD: -- what's going on with 112 --

JUDGE PILLARD: Wait, wait. In fact, it would have to be the result, no?

MS. WOOD: Yes. And, that, you know, once a source category is regulated under 112, you know, you can't then regulate the source category for --

JUDGE PILLARD: I mean, for other pollutants.

MS. WOOD: -- other pollutants, that is how we read it.

JUDGE SRINIVASAN: Can I just ask one, why doesn't

the plain text seems to be doing even more than that under the House version, which is that if a source category is regulated under 112, then any pollutant emitted by that source category can't be regulated as to any source category because the text focuses on the air pollutant, it's not focused on the source. So, it sounds like if you could take a hypothetical, landfills emit CO2, suppose that we haven't done anything, EPA hasn't done anything yet with power plants, once landfills are regulated under 112 for anything, we know they emit CO2, and the plain text of the House version would disable EPA from regulating CO2 as to any source category because it's the air pollutant.

MS. WOOD: You could still regulate CO2 from the landfills under 111(b), the new sources.

JUDGE SRINIVASAN: Yes. So, under 111(d), you're right, I'm focused on 111(d), so for existing sources, for existing power plants --

MS. WOOD: But for the existing no, under our reading you would not be able to.

JUDGE SRINIVASAN: Okay. So, you would go to air pollutant and not just source category, it goes all the way to air pollutant. Yes.

JUDGE ROGERS: What effect does 112(d)(7) have? That was also passed in 1990.

MS. WOOD: Right, and that is, you know, exactly

what I was talking about, if you started with 111 you can move toward 112, which 112 is the most draconian, you know, level of regulation, the most stringent that you get under the Clean Air Act. And it would make sense, as well, that a source category that is regulated under this very, very stringent program would be excluded from 111(d), it might be viewed as unnecessary. And one of the things that --

JUDGE ROGERS: But 112(7) specifically says, 112, quote, shall not be interpreted, construed, or applied to diminish or replace the requirements of a more stringent condition limitation pursuant to Section 111.

MS. WOOD: And that's correct, if you already had a 111(d) rule it would not be replaced by 112.

JUDGE MILLETT: It doesn't say existing. It doesn't say existing rules, in there.

MS. WOOD: And obviously, we've already discussed that the exclusion doesn't apply to 111(b) new sources, so certainly that's also meant to not displace anything under 111(b) for new sources.

JUDGE TATEL: What sense does it make to allow regulation of CO2 for new sources, but not existing sources?

MS. WOOD: Well --

JUDGE TATEL: That's the result of your position, right?

MS. WOOD: Yes.

JUDGE TATEL: Why does that make, I mean, what possible sense does that make? Why would Congress have thought about that?

MS. WOOD: Because once a source category is regulated under 112, which I was trying to explain is so very stringent --

JUDGE TATEL: No, but you're --

MS. WOOD: -- the idea was not to pile on.

JUDGE TATEL: -- not answering my question. My question is what's the policy reason for doing that? Since Congress wanted all pollutants regulated why would it -- okay, I could see you making, --

MS. WOOD: I actually --

JUDGE TATEL: -- so we're not going to regulate carbon dioxide at all, but you agree that carbon dioxide can be regulated, carbon dioxide emissions can be regulated under --

MS. WOOD: Under --

JUDGE TATEL: -- new sources, but not for existing sources --

MS. WOOD: Correct.

JUDGE TATEL: -- and I just don't understand why Congress would, particularly since 112(d) requires the Agency to take account of costs and achievability, I could understand the standards would be different for new and

existing, but why, what possible policy reason is there to exclude existing sources when you're going to regulate new sources?

MS. WOOD: There's different kind of levels of pollutants, so to speak, and so you have criteria air pollutants --

JUDGE TATEL: No, no, no. I'm just talking about carbon dioxide.

MS. WOOD: -- and then you have hazardous air pollutants.

JUDGE TATEL: Just carbon dioxide.

MS. WOOD: But what I'm trying --

JUDGE TATEL: Carbon dioxide --

MS. WOOD: -- to explain is CO2 at this point --

JUDGE TATEL: Carbon dioxide emissions --

MS. WOOD: -- is neither a criteria --

JUDGE TATEL: -- carbon dioxide emissions --

MS. WOOD: -- air pollutant --

JUDGE TATEL: -- from new sources aren't any different than carbon dioxide emissions from existing sources. I'm talking about the same pollutant.

MS. WOOD: Right, and --

JUDGE TATEL: What's the reason, I just want what's the reason for regulating one and not the other?

MS. WOOD: Because for these lower category of

pollutants that are neither criteria air pollutants nor hazardous we can require from a brand new source which is being constructed from the grown up, and it is easier to employ the control technologies than it is for an existing --

JUDGE TATEL: That's an argument for treating, for having different standards for the two sources, and in fact, 112 requires taking account of costs and achievability, so you might not be able to limit carbon dioxide emission from existing sources as extensively as you can for new sources. I got that. But under your theory you can't regulate existing sources at all.

MS. WOOD: No, you can regulate -- and there are plenty of existing sources, you know, there are existing source categories that are regulated under 111(d).

JUDGE TATEL: What about carbon dioxide?

JUDGE PILLARD: That makes it even stranger, because if they're regulated under 111(d) under your reading of the statute you're only able to be so regulated because that regulation got on the books before a 112 regulation.

MS. WOOD: There are some categories that are regulated under 111(d) that were, you know, that could be regulated under 111(d) that were delisted from 112. And the other thing to remember here is that EPA --

JUDGE PILLARD: We're talking about different --

MS. WOOD: -- had a choice --

JUDGE PILLARD: -- pollutants. Why would it be that a source emitting mercury, and admittedly, that's probably costly to abate, and it's a heavy regulation, as you say, it's a serious pollutant and a serious regulation, because it is so regulated that makes it not a candidate for regulation for its CO2 emissions? I just don't see the logic of that.

MS. WOOD: When you look at the legislative history one of the concerns was that in what you were requiring existing plants to do under Section 112 was so draconian that we were not going to double-regulate. There is testimony --

JUDGE PILLARD: What double regulations? Like, I'm going to make you go on the right side of the road, and I'm going to make you go the speed limit, is that --

MS. WOOD: But once you have, you know, and this is a very small universe of pollutants that we're talking about here. Yes, CO2 falls into this universe right now.

JUDGE PILLARD: Yes.

MS. WOOD: But, you know --

JUDGE KAVANAUGH: I mean, I've been trying to figure out what Congress was thinking, too, because this is in the President's original proposal, and obviously, the three-year delay for EGUs has been very controversial,

presumably this was a trade off, right? They got the three-year delay, and they got this, under this theory, I'm not saying I agree with this, by the way, but I think this is the theory, they got a trade off of the three-year delay, which turned into, you know, 22 years, and then they got the trade off of if we subject you to the draconian limitations, as you describe it, under 112, you could be regulated under 108, but not under 111(d).

MS. WOOD: Right. And indeed, when you see --

JUDGE KAVANAUGH: Getting a policy rationale for it is not necessarily easy, but getting a how does Congress work rationale is pretty easy.

MS. WOOD: Right. And you have to realize, too, that, you know, here what we're talking about is that there was a lot of debate within EPA as to whether to regulate power plants under 111(d), mercury emissions under 111(d) or 112. Initially, they did it under 111(d), they regulated mercury emissions, found them under the Clean Air Mercury rule. This Court vacates that rule in *New Jersey v. EPA*, but doesn't do it saying you can't regulate under 111(d), what it says is you improperly delisted under 112. So, at that point, EPA had a choice, it could have gone through the proper delisting provisions, and done the delisting properly, and then regulated under 111(d). It chose not to do that, instead it chose to promulgate the Mercury and Air

Toxic Standards and regulate these sources under Section 112. And by doing that --

JUDGE MILLETT: I just have a fact question.

MS. WOOD: -- it triggered the exclusion.

JUDGE MILLETT: I just have one fact question to make sure I've got it right, and that is is there any coal fired power plant that is not regulated under 112? That's not emitting hazardous air pollutants?

MS. WOOD: You have to, you know, hit the major thresholds, but I believe they all call for coal fired plants, too.

JUDGE MILLETT: They are all being regulated under 112?

MS. WOOD: I may be incorrect on that, but --

JUDGE TATEL: One of the Amicus briefs says that, I think it's the Billings brief, it says that Section 112 sources are already double regulated, and they mention acid rain and NAAQS, is that accurate?

MS. WOOD: Yes, they have to comply with both NAAQS and acid rain, but you also see in the legislative history, and let me get the actual Joint Appendix cite where the EPA Administrator talked about regulating under Section 112 in the acid rain program, and said that that would be ridiculous because it would be, it's too hard for existing sources.

JUDGE KAVANAUGH: Well, I looked at that quote, I'm not sure that's really speaking to this exact issue --

MS. WOOD: Okay.

JUDGE KAVANAUGH: -- to say that.

MS. WOOD: And just so people know what we're talking about later, this is Joint Appendix 4119.

JUDGE HENDERSON: All right. Thank you.

MS. WOOD: Thank you.

JUDGE HENDERSON: Ms. Berman. It's possible to have another interpretation of 111 and 112, I think you'll probably give it to us.

ORAL ARGUMENT OF AMANDA SHAFER BERMAN, ESQ.

ON BEHALF OF THE RESPONDENTS

MS. BERMAN: Good afternoon, Your Honors, Amanda Berman for the United States. With me at counsel table is Scott Jordan.

Congress did not unambiguously bar EPA from addressing different pollution problems under the Section 111 and 112 programs in 1990. To begin with, we have the two amendments to the relevant text, Sections 108(g) and 302(a) of the 1990 amendments. The latter of those, which we call the Senate amendment, plainly allows regulation of non-hazardous pollutants like carbon dioxide. So long as this Court gives some effect to both amendments, we win. The only way that Petitioners win this issue is if they get

you to ignore an active statutory text and adopt one very particular interpretation of what remains.

JUDGE MILLETT: Does the U.S. Government, not just this case, but does the U.S. Government have a position on how to reconcile something like this where at least in my view you can't give effect to both, because this could, and I asked the U.S. Government the question because that could in one case it might help, in one case it might hurt, and so I really -- but you all may encounter this more than any other litigating entity, is there a position of the U.S. on what we do? Is it least common denominator, is it maximization, minimization, what is it?

MS. BERMAN: Well, I think what we do, what EPA did, and what this Court approved in the *Citizens to Save Spencer County* case where EPA dealing with two conflicting amendments, the 1977 Clean Air Act amendments, which were conceived in separate houses and never reconciled when the Act was given birth, could be describing this situation, EPA devised a middle course, and this Court said it was the greater wisdom for EPA to do that. EPA has the expertise in regard to this statute to look at how this program, 111(d), fits with the other four programs, and has looked at that, and we think that the better reading of both, and I do believe it's the better reading of the House amendment alone, even, is a hazardous pollutant specific reading.

JUDGE KAVANAUGH: The established practice, if you go through all the examples cited in the Peabody briefs, and the Petitioners' briefs, you, the Law Revision Council seems to always execute the first one in order of the earlier one. There's one exception to that that I found going through them all. That seems to be one of the practices. There also seems to be a substantive conforming thing flying around, but making heads of tails of that I found impossible, so, but the earlier/later practice of the Law Revision Council, see, and the Law Revision Council is the statutory officer of Congress and delegated authority, are we not supposed to pay attention to that? I'm putting aside the Senate recession here, but --

MS. BERMAN: No, as the Supreme Court said in *U.S. v. Weldon* a change by the codifier gets no weight. If the construction of the U.S. Code that's not enacted into positive law is necessary --

JUDGE KAVANAUGH: But it's an established, if it's an established practice, and I don't know the answer to this, and I have Judge Millett's concern, as well, if the established practice well known, although I'm not sure who really pays attention to these things that are at large, but anyway the established practice well known is to --

JUDGE PILLARD: If we don't, nobody does.

JUDGE KAVANAUGH: Yes. The earlier one that

you're not buying --

MS. BERMAN: No, I'm not.

JUDGE KAVANAUGH: -- you can't buy it.

MS. BERMAN: I'm sorry, Your Honor --

JUDGE KAVANAUGH: You can't buy it.

MS. BERMAN: -- I'm not. The OLRC isn't that kind of creature, it's not making substantive judgments about what Congress meant.

JUDGE KAVANAUGH: Oh, yes. Oh, it is. It is, it's making huge judgments. I didn't quite realize how powerful it is, but this case is a good example, but --

MS. BERMAN: Well, it does this mechanical thing where it executes one and not the other hand working, but where it matters --

JUDGE KAVANAUGH: For the mechanical it actually, going through them all requires pretty delicate sense of judgment, and understanding how the statutes fit together is required, too.

MS. BERMAN: I'm not trying to insult the office here. I'm just saying that the office doesn't get to reconcile these two, it, you know, it has that practice, but we have some other cannons that point other directions here. If we really think there's a conflict, then, you know, one cannon tells us this is what I'll call the Scalia-Garner cannon, that we go back to the pre-1990 state of affairs, we

ignore both.

JUDGE KAVANAUGH: Here, you have --

JUDGE ROGERS: True.

JUDGE KAVANAUGH: -- put aside the practice of the Law Revision Council on the substantive conforming, or the earlier/later, here, fortunately, I think, we don't have to get to that problem because we have the Senate speaking directly to receding to the House amendment. Do you, you disagree with that?

MS. BERMAN: I strongly disagree with that. I think you are reading way too much into that recede statement, Your Honor. That recede statement is in a Senate Manager's report, which in *EDF v. EPA*, a 1996 case I believe, this Court said that that very report just cannot overcome the language of the statute.

JUDGE KAVANAUGH: Yes, we also said in that footnote that we give it weight, though.

MS. BERMAN: Well, yes, but there the statement was much more on point, here, this recede statement I really don't think it's on point, Judge Kavanaugh. I mean, it's talking about 108 generally, not 108(g) specifically, and if you look at 108 it --

JUDGE KAVANAUGH: But it specifically carves out a couple of examples where they're going to not recede to the House. I mean, this wasn't just a blanket recession, this

was we recede on most of the things, but not all the things.

MS. BERMAN: I believe that the one that Petitioners cited in their brief, the statement on the Senate floor was a more blanket statement about 108.

JUDGE SRINIVASAN: When you say recede statement --

JUDGE KAVANAUGH: The Senate recedes except that with respect to the requirement regarding judicial review of reports, the House recedes to the Senate, and with respect to transportation planning, the House recedes to the Senate with certain modifications.

MS. BERMAN: Your Honor, there's --

JUDGE KAVANAUGH: This was a considered decision by the managers, at least, or whoever's, you know, in the room, to weaken, we'll take five and you get two, and, you know, we've been in rooms like that where you, and that's what they announce on the floor of the Senate, and given that that's the best thing we have why not follow that?

MS. BERMAN: Because, as this Court said in *EDF*, that statement didn't reflect the opinions of all the conferees, it wasn't adopted by all of them, and --

JUDGE KAVANAUGH: That's true of, you sound like Justice Scalia now, that's true of all legislative history, but Justice Scalia would say even I, Justice Scalia in a scrivener's error case would look at legislative history to

try to resolve the absurdity, you know?

MS. BERMAN: I just think this recede statement is not probative. Recede just means that they no longer have an issue with that section, and of course, it tells us nothing about Section 302(a), and what we know about 302(a) is that it was enacted into law, where there's an inconsistency we have to go back to the statutes at large.

JUDGE MILLETT: Can we avoid this by having to pick sides in this very difficult battle by saying that at least when you have this situation, and both of them actually have pretty substantive import, whichever one you choose, and even with the House amendment in there I find the meaning of 111(d)'s exclusion inscrutable, ambiguous. Could we just -- is it within the Agency's realm of deference under *Chevron* in navigating the conceded House text to factor in, to figure out whether it means pollutants or sources, can they factor in the existence of the Senate amendment within the framework of their *Chevron* deference?

MS. BERMAN: I think it's absolutely within the Agency's wheelhouse to do that, and indeed, the Agency did that here. It interpreted the House amendment, it looked at the fact that the House amendment, the phrase added emitted from a source category which is regulated under Section 112 of this title, regulated is an ambiguous term that we know from cases like *Rush Prudential* has to be interpreted in

light of the object of regulation. Here, the objection of regulation is Section, is hazardous pollutants, because that's the only thing Section 112 regulates. And then the whole phrase modifies the antecedent term air pollutant, which as Justice Scalia told us in *Utility Air Regulatory Group* has to be interpreted in light of the context, in light of the program you're talking about. Here the program that they're talking about in this provision is the hazardous air pollutants program. And interpreting terms like these in context this is what we do every day in both language and law. Suppose there were an ordinance that said the fire chief shall annually inspect each building, unless such building has been inspected by County authorities. Now, under a hyper-literal reading the fire chief could decline to inspect if the County Health Inspector has been there, but none of us would read the ordinance that way, there's an implicit contextual limitation, the fire chief can forego inspection only if the County fire authorities have already been there. And I think the House amendment functions in exactly the same way as that. And this contextual reading is not only reasonable, I believe it is the best reading of this ambiguous text. Unlike Petitioners reading it squares with the statutory scheme which we know was intended to ensure that there were no gaps in the three core programs coverage of dangerous pollutants. It also

squares with the statute's purpose, of course, of protecting health and welfare.

JUDGE TATEL: Could you just tell us how is it consistent with the language of the House amendment? Could you just explain that to me the Agency's view? Emitted from a source category, how is the Agency's view consistent with that language?

MS. BERMAN: Emitted from a source category which is regulated under Section 112 of this title.

JUDGE TATEL: Yes.

MS. BERMAN: We believe the best reading of that is regulated in regard to its hazardous pollutant emissions, because we have to look at the context, the context is the 112 program specifically.

JUDGE TATEL: Is that any different than where we would end up if we accepted the Senate amendment?

MS. BERMAN: There is slight potential daylight between the two in regard to a hypothetical future question that's not presented here, and that is what if we have a scenario where we have a listed 112 pollutant, but for some reason EPA doesn't regulate, doesn't actually regulate that pollutant under 112, in that situation one could read the House amendment as trying to say well, for that category, that very narrow category EPA's potential to regulate under 111(d) may be preserved, but we don't have to answer that

tough question here.

JUDGE KAVANAUGH: That's the key. That's pretty critical, the House amendment would have allowed under the reading of that, I should say under the reading of the House amendment altered by the other side the House amendment would allow regulation of EGUs for HAPs and carbon under 111(d) if the EGUs were not regulated under 112, which was an uncertain thing at the time of enactment.

MS. BERMAN: That's true, Your Honor. But remember that Petitioners' theory of this language goes much more --

JUDGE KAVANAUGH: As under --

MS. BERMAN: -- broadly to all source categories.

JUDGE KAVANAUGH: Whereas, under your reading if EGUs were not regulated under 112 then they could have been regulated under 111(d) for HAPs.

MS. BERMAN: Under our theory if EGUs --

JUDGE KAVANAUGH: Were not regulated under 112 after --

MS. BERMAN: Then they could theoretically be regulated under 111(d) for HAPs, if they are not regulated under 112. That's a reading of the House amendment only. EPA hasn't taken the step of saying what do we do with the Senate amendment in that context because that's not presented here. This is the easy question, this is is this

a hazardous pollutant --

JUDGE KAVANAUGH: Then the fork in the road was regulation of EGUs under 112, and the House amendment reading which was in the President George H.W. Bush's original proposal would have still allowed then regulation of the EGUs not just for other things, but for HAPs themselves. It was a, I mean, pro-regulatory in some respects. Again, the fork in the road is whether EGUs were going to be regulated under 112.

MS. BERMAN: But in all of these circumstances back in 2005 when the Agency took that position and attempted to delist under 112 everybody agreed that the exception worked in a hazardous pollutant specific way.

JUDGE KAVANAUGH: Yes.

MS. BERMAN: Nobody ever talked about it applying to non-hazardous specific pollutants.

JUDGE TATEL: If I think, if I'm not convinced by the Agency's interpretation of the House language, either because I don't think that it's entitled to *Chevron* deference, or I just think it's plain unreasonable, then what is your view? The only place I found where the Agency tried to interpret both amendments, that is in the statutes at large, both amendments, is at page 92 of your brief where you say that if we have to give way to both then EPA can regulate under 111(d) if it's not a listed HAP, that's the

Senate amendment, or if it is that the source is not regulated under Section 112. Is that --

MS. BERMAN: I'm sorry, Judge Tatel, I don't think I followed the question there.

JUDGE TATEL: I was asking if I don't buy your argument about the House amendment, and I think we have to reconcile the two amendments, the only place I found the Agency offering us anything about that is at page 92 of the brief.

MS. BERMAN: Ninety-two.

JUDGE TATEL: Is that right?

MS. BERMAN: Well, I think --

JUDGE TATEL: I mean, your whole argument so far today has been to defend the Agency's interpretation of the House amendment, correct?

MS. BERMAN: But we also did, and I believe we did cover this in our brief, said that if you think that there is an irreconcilable conflict --

JUDGE TATEL: Yes.

MS. BERMAN: -- and first we should -- so, there are three questions that we think we should proceed through here.

JUDGE TATEL: Well, not in -- my question was if I don't buy your argument about what the House amendment means, that's my question.

MS. BERMAN: Okay. So, you don't buy --
JUDGE TATEL: Then what do I do?
MS. BERMAN: If you think there is a conflict between the House amendment --
JUDGE TATEL: No, no.
MS. BERMAN: -- and the Senate amendment?
JUDGE TATEL: No, no. I just don't accept --
MS. BERMAN: Meaning you don't buy our --
JUDGE TATEL: -- I don't accept EPA's interpretation of the House amendment. I think it's unreasonable, even if you get *Chevron* deference I think it's unreasonable. Now, what do I do? Where do I go from there?
MS. BERMAN: Well, so, I assume that means you buy Petitioners' interpretation of the House amendment, but then we still have --
JUDGE TATEL: No, I don't accept theirs either.
MS. BERMAN: -- to deal with the Senate amendment, and what --
JUDGE TATEL: I don't accept their either. These are all hypotheticals.
MS. BERMAN: Okay.
JUDGE TATEL: Where do I go?
MS. BERMAN: Well, here's what we think you should, that the Agency should be able to do, and did do, is to draw that reasonable middle course that was talked about

in *Spencer County* is to figure out what's --

JUDGE TATEL: But what has it done that? Where has it done that?

MS. BERMAN: -- the common denominator here, as Judge Millett pointed earlier.

JUDGE TATEL: Where has it done that in this case?

MS. BERMAN: Sorry?

JUDGE TATEL: Where has it done that in this case?

MS. BERMAN: Well, I would point you to going back to the preamble of the rule itself, footnote 294 the EPA talks about its sort of backup interpretation in the sense of how the two should be reconciled if the House is thought to point the other direction than the Senate amendment. And it refers back to what it said in the proposed rule, which is, you know, the explanation that was given in 2005 and has been repeated again is that, you know, even if you think that they're pointing in opposite directions, the most reasonable reading is this middle course, and a large part of the reason that the Agency's has always thought it was reasonable is because we don't think that Congress was trying to do this dramatic thing in 1990 that Petitioners say it was trying to do, essentially gut 111(d). You know, there's absolutely no evidence of that in the legislative --

JUDGE KAVANAUGH: I'm going to resist the gut language because it could have been a real pro-regulatory

thing. I mean, that's the hook. So, the word gut I don't think is fair because you don't know when 1990 when it's enacted whether EGUs are going to be regulated under 112, that's the key.

MS. BERMAN: Judge Kavanaugh, you're overlooking something very important here, and that is their interpretation goes way beyond EGUs, it applies to all --

JUDGE KAVANAUGH: Yes.

MS. BERMAN: -- source categories.

JUDGE KAVANAUGH: I agree. I agree.

MS. BERMAN: And EPA has very little --

JUDGE KAVANAUGH: I'm aware.

MS. BERMAN: -- discretion, it has no discretion not to regulate under 112 in regard to anything besides EGUs, so this would have had a very dramatic downsizing I'll say, I won't say gut, of the 111(d) program, and this is a core statutory program we're talking about. I mean, the adage from Whitman about elephants and mouse holes is overused, but, I mean, the House amendment and this recedes term is a heck of a mouse hole to hide a complete downsizing of a core statutory program.

JUDGE MILLETT: Can I ask, I just have a question about the word regulated in 111(d) and this language that we're talking about. It sounds like you're reading regulated there as meaning actually regulated by the EPA as

opposed to regulated by the statute, covered by the statute. If you read it as regulated by the statute, covered by the statute, so regulated under 7412 as a statutory matter, then would it not include EGUs when you have a provision in 7412(n) that says here's this whole scheme, now, Secretary, start studying these folks and figure out what's necessary and appropriate, is that a form of statutory regulation of EGUs?

MS. BERMAN: I think it could be. I haven't thought of that argument, but I think that's another potential reading of this incredibly ambiguous text. You know, Petitioners have theorized that Congress may have been trying to prevent double regulation here, but regulating different pollutants under different programs isn't double regulation, that's like saying if you check your brakes in your car you don't need to worry about the oil. And also, it's at odds with the facts on the ground, Congress has already regulated power plants under at least five other programs beyond the hazardous air pollutant program, so we know Congress doesn't have an issue with regulating the source category.

JUDGE KAVANAUGH: Correct me if I'm wrong on the facts here, EPA has never regulated a source category under 111(d) that is regulated under 112?

MS. BERMAN: Municipal solid waste landfills are

regulated under both. Now, what Petitioners would say is that EPA did its 111 regulation first, and then it followed up with the hazardous regulations.

JUDGE KAVANAUGH: Never regulated -- unless I'm wrong on the facts and correct me, they've never regulated under 111(d) after a source category has been regulated under 112, that doesn't mean you lose, I mean, but it's a fact.

MS. BERMAN: No, it's a fact, but I want to point you to one thing in the municipal hazardous waste landfill regulation that I think is important, and that is that the Agency specifically talked about in a line a potential future regulation of non-hazardous components of landfill gas under 111. Let me see if I can find the Joint Appendix site for that, quickly. Yes, this is at Joint Appendix 4284, it might start on 83 and continue through 84. It says some components of landfill gas are not hazardous pollutants listed under 112, and thus will not be regulated under 112, and it was suggesting that those could still be regulated under 111. So, again, the Agency has always viewed this exception in 111(d) as a hazardous pollutant specific exception.

JUDGE BROWN: Okay. Can I ask you, then, why the Agency chose to initially delist when they were contemplating the mercury rule under *New Jersey v. EPA*?

Because that makes it seems like you were reading the statute in the same way that the Petitioners are, am I wrong about that?

MS. BERMAN: With respect, Your Honor, you are wrong, the reading EPA reached in 2005 at the end of the day was the same one it reached here. EPA concluded that it could regulate under 111(d) there because it had delisted under 112. And so the source category and the pollutant were no longer regulated under 112. But the conversation was always about can hazardous pollutants be regulated under 111 where they haven't been regulated under 112. Nobody ever suggested, and in fact, Petitioners agreed with EPA's reconciliation of the two amendments to the contrary, nobody ever agreed with this House amendment only version that we're hearing now.

JUDGE KAVANAUGH: Well, our opinion, and this is more a debater's point because it's just a statement in the opinion, but the *New Jersey* opinion does say because coal fired EGUs are listed sources under Section 112.

JUDGE ROGERS: In a clause that must be read in context.

JUDGE KAVANAUGH: I agree. That's why I led with it's more a debater's point, but the reason I bring it up, and it's in the Supreme Court footnote seven of *AEP*, too, is it's not crazy to look at this and think this is a category

exclusion, not a pollutant exclusion. I understand your arguments to the contrary, but I don't think it's nuts since we see it in footnote seven of *AEP*, as well.

MS. BERMAN: You know, it's not nuts, but I think it falls under what was said recently by the Supreme Court in *Sturgeon v. Frost* that, you know, a reading may be plausible in the abstract, but it's ultimately inconsistent with both the text and the context of the statute as a whole, and that's where we are here, Your Honor.

JUDGE HENDERSON: All right. Thank you. Mr. Donohue?

ORAL ARGUMENT OF SEAN DONOHUE, ESQ.

ON BEHALF OF THE ENVIRONMENTAL INTERVENORS

MR. DONOHUE: May it please the Court, Sean Donohue for 15 environmental and public health organization Intervenors.

Petitioners' interpretation would annul the traditional core function of Section 111(d) to protect the public from dangerous pollutants that aren't covered by the criteria, or hazardous air pollutant programs, that has always been a critical, structural feature of the Act, all the way back to 1970, and its importance is not measured by the number of times it's been used, like a fire extinguisher, or a failsafe, its importance is that if there is a dangerous pollutant that's not appropriate for

treatment under those other programs it's there, and the Petitioners certainly wouldn't say that Section 112 with its 10-ton threshold for regulation is inappropriate, they would be back here saying EPA can't regulate under that.

JUDGE KAVANAUGH: When you say that I think you were going to give us examples, not you, but I was expecting examples of past things that were done that couldn't have been done, or --

MR. DONOHUE: Right.

JUDGE KAVANAUGH: -- future pollutants that --

MR. DONOHUE: Right.

JUDGE KAVANAUGH: -- you have examples of. But going past we only have the landfills, going future I haven't heard any specific examples --

MR. DONOHUE: Right. I think --

JUDGE KAVANAUGH: -- and I'm sure there are some.

MR. DONOHUE: -- the other programs do capture most pollutants, but CO2 is different in some important ways, including volume, that's *Massachusetts v. EPA*, the argument that maybe this whole enterprise, but much of this case insists in trying to re-litigate and read it as that basic judgment. This case in various respects is an attack on the principle, or the *Massachusetts* holding that the Clean Air Act applies to greenhouse gases.

The same 1990 amendments on which Petitioners rely

expressly address the relationship between Section 112 standards and Section 111 requirements, and they refute Petitioners' theory on the availability of a specific textual provision that tells you how to interpret this relationship, should be very important, particularly given the difficulty of this statutory hodge-podge we've been discussing. And as Judge Rogers recited, Section 112 instructs that no emission standard under Section 112 shall be interpreted, construed, or applied to diminish or replace requirements under Section 111. It directly contradicts Petitioners' account of the 1990 Congress' intent, and it forecloses interpreting 112 standards to annul Section 111(d) for virtually all existing sources, as would be the consequence of the Petitioners' reading. And EPA in the preamble at Joint Appendix 195 pointed to 112(d)(7) and said that shows that 111(d) standards were not intended to roll back protections against dangerous but non-hazardous pollutants, and that's what we have here. None of EPA's prior interpretations have said that the effectiveness cross-reference is to foreclose regulation under 111(d) of such --

JUDGE TATEL: So, then what, Mr. Donohue, what --

MR. DONOHUE: -- non --

JUDGE TATEL: -- do you do with these two conflicting amendments then?

MR. DONOHUE: We think that the House amendment, even if it were the only text that we have, the only reasonable reading is that EPA can regulate non-hazardous pollutants, that it read in context that language is restricted to hazardous pollutants that are actually regulated that Congress was trying to distinguish --

JUDGE TATEL: Which is exactly like the Senate amendment in effect.

MR. DONOHUE: I'm sorry?

JUDGE TATEL: It's exactly like the Senate amendment in effect?

MR. DONOHUE: No.

JUDGE TATEL: No?

MR. DONOHUE: No, there's a different effect. The Senate amendment --

JUDGE TATEL: What's the difference?

MR. DONOHUE: -- basically says any listed HAP --

JUDGE TATEL: Yes.

MR. DONOHUE: -- whether or not regulated, is --

JUDGE TATEL: Right.

MR. DONOHUE: -- foreclosed in --

JUDGE TATEL: And under your view?

MR. DONOHUE: -- the House version, the House version says it has to be both listed and actually regulated. And, but at no point in the House language is

there a requirement to read that to effect non-hazardous air pollutants. I mean, we think the *American Electric Power*, footnote seven is completely consistent because the Court, with that view that, that universe that we're talking about is only hazardous pollutants, and we're distinguishing in the House language between those that are regulated, which are off the table for 111(d) regulation, and those that are not, which potentially had EPA not found endangerment, I'm sorry, appropriateness and necessity under 112, that could have been power plants, there are also some other categories, 112(n)(4) --

JUDGE KAVANAUGH: The power plants, if I understand what you just said power plants under your reading of the House amendment if they hadn't been regulated under 112 could have been regulated for HAPs under 111(d)?

MR. DONOHUE: For both, under both.

JUDGE KAVANAUGH: Right, right.

MR. DONOHUE: We think that --

JUDGE KAVANAUGH: That's why the House amendment is not just this Neanderthal provision that it's characterized as now, it --

MR. DONOHUE: Right.

JUDGE KAVANAUGH: -- potentially allowed --

MR. DONOHUE: It was intended to strengthen 111(d) and broaden it to capture these unregulated HAPs, but the

purpose was not to sort of eliminate what was always the core, which are dangerous, non-hazardous, non-criteria pollutants, that was never the intent of the House or the Senate, and think EPA has reasonably read the House amendment to have that effect, and so it's not even necessary to look at the Senate amendment which also is unambiguously allows regulation here. We think the kind of ambiguity that is found --

JUDGE TATEL: So, just so I totally understand, you're not taking a position on the whole question about whether the Senate has ceded to the House, your argument is that properly interpreting the House amendment allows regulation of carbon dioxide under 111, 12, right?

MR. DONOHUE: If we --

JUDGE TATEL: As would reading the House amendment literally, is that --

MR. DONOHUE: We think that -- well, the term literal in relation to the House amendment is a fraught term.

JUDGE TATEL: I mean the Senate amendment. Sorry, no one --

MR. DONOHUE: Okay. Sorry.

JUDGE TATEL: -- would use the word literal with the House amendment.

MR. DONOHUE: Right. Right.

JUDGE TATEL: I meant Senate amendment.

MR. DONOHUE: All right. Well, actually, people have used the term literal in --

JUDGE TATEL: It's almost lunchtime, you know.

MR. DONOHUE: Yes.

JUDGE TATEL: I mixed them up.

MR. DONOHUE: Yes, I got a bad slot.

JUDGE TATEL: Yes.

MR. DONOHUE: Yes. So, we think that we are in the ven diagram when we are in the core --

JUDGE TATEL: Yes.

MR. DONOHUE: -- that both amendments that there was never any intent, this is the whole purpose of 111(d) --

JUDGE TATEL: Right.

MR. DONOHUE: -- and Congress did not intend to --

JUDGE TATEL: Okay.

MR. DONOHUE: -- annul it in the 1990 amendments, which as --

JUDGE TATEL: Right.

MR. DONOHUE: -- Judge Tatel noted are famously about strengthening environmental protection. The kind of ambiguity that we see in the House amendment is a familiar one. In the *UARG* case the Supreme Court noted many times in the Act in which the term any air pollutant is used, but in context EPA has read it more narrowly to mean any regulated

air pollutant, or any air pollutant that causes visibility problems, and you don't find that in the term air pollutant itself, which is broad and defined, in fact, we find it in the context, and obviously there are numerous examples where context informs reading, that's part of plain meaning statutory construction.

JUDGE HENDERSON: All right. Your time is up, Mr. Donohue.

MR. DONOHUE: Okay.

JUDGE HENDERSON: We have to move on.

MR. DONOHUE: Thank you, very much.

JUDGE HENDERSON: All right. Mr. Lin, two minutes.

ORAL ARGUMENT OF ELBERT LIN, ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. LIN: Thank you, Your Honor. Just two points, the first is I don't think, even if this Court doesn't agree that the text is clear, so I would start with the text before I turn to the amendments, the text in the Code, EPA has not offered a reading of the House amendment or the text in the U.S. Code that makes any sense. They argue that the phrase emitted from a source category which is regulated under Section 112, modifies the phrase any air pollutant, but that's just not true. The statutory language is any air pollutant which is not emitted from a source category

regulated under Section 112. So, what's modifying any air pollutant is, which is not emitted from a source category regulated under Section 112, and if you accept their reading then --

JUDGE MILLETT: Does your position mean, I take it your position means that EPA just cannot regulate greenhouse gases from coal powered units?

MR. LIN: No, that's not, Your Honor, because --

JUDGE MILLETT: They're all going to be regulated under 7412, all, every single one of those I was told are going to be regulated under 7412, so there's nothing EPA can do.

MR. LIN: No, Your Honor, that's not true. First, they could delist, power plants they could withdraw their 112 regulation and regulate power plants under Section 111(d), the exclusion would not apply then; or, as we've discussed, there's the, they have themselves suggested that carbon dioxide might be regulated under Section 112. Now, we disagree with that, and that's --

JUDGE TATEL: Do you think if it were regulated as a NAAQ?

JUDGE KAVANAUGH: You'd be opposing --

MR. LIN: I'm sorry, Your Honor?

JUDGE TATEL: Carbon dioxide be --

JUDGE KAVANAUGH: You'd be opposing that big time.

JUDGE TATEL: -- regulated as a NAAQ? Could it?

MR. LIN: I'm sorry, Your Honor?

JUDGE TATEL: Could carbon dioxide be regulated as a NAAQ?

MR. LIN: Could carbon dioxide be regulated as a criteria pollutant?

JUDGE TATEL: Yes. Yes.

MR. LIN: That would be, they would have to make that showing in a separate case.

JUDGE TATEL: But wouldn't that create an enormous *Air Utility* problem? I mean, you'd be regulating every source in the country, wouldn't you?

MR. LIN: Your Honor, there would be other difficulties that we would raise if they were to do that.

JUDGE TATEL: You sure would, and I -- yes, I mean, absolutely, that would be a no-brainer under *Air Utility*, I just can't imagine how that would survive.

JUDGE MILLETT: What I can't figure out is --

JUDGE TATEL: Well with *Utility Air*.

MR. LIN: But to --

JUDGE TATEL: Excuse me.

JUDGE KAVANAUGH: Your point is --

JUDGE TATEL: Excuse me.

JUDGE KAVANAUGH: -- that Congress can pass a statute, isn't that your point?

JUDGE TATEL: Right, right.

MR. LIN: Yes, Your Honor.

JUDGE KAVANAUGH: Yes. And the answer to Judge Millett is that's right --

JUDGE TATEL: Yes.

JUDGE KAVANAUGH: -- they could not be regulated, but that's for Congress.

MR. LIN: They could not be regulated if they maintain their Section 112 regulation.

JUDGE KAVANAUGH: They're not delisted.

MR. LIN: But as we know --

JUDGE MILLETT: Bait and switch with *AEP*, right? The Supreme, the people who are suing power plants, fossil fuel powered power plants, and for these very greenhouse gas emissions, and the Supreme Court said no, no, no, no, you can't bring those common law nuisance lawsuits because this is an EPA's wheelhouse to regulate. And now we're told it's not in EPA's wheelhouse to regulate, so does that throw you back in the land of having to just deal with all your greenhouse gases to the common law nuisance actions?

MR. LIN: With respect, Your Honor, I don't think this is a bait and switch, I don't think there's anything inconsistent about our position in *AEP*, or about our position here and the decision in *AEP*, what the Supreme Court found in *AEP* was that there was displacement because

Congress had delegated to EPA a decision-making scheme, and that decision-making scheme includes the question whether and how to regulate carbon dioxide from --

JUDGE MILLETT: Yes, but do you honestly think the Supreme Court's answer would have been the same had you, or the Solicitor General, or someone stood up in front of the Supreme Court and said actually, Congress has forbidden the EPA to regulate greenhouse gas emissions?

MR. LIN: Well, there's a reason, Your Honor, why footnote seven is there. The Supreme Court knew perfectly well that there were limitations on what EPA could do under Section 111(d).

JUDGE MILLETT: The whole, this is a whole enchilada limitation. The whole rationale is you guys don't regulate this through nuisance suits because this is meant to dealt with through this regulatory process, that's where Congress put it, and now if the answer is actually, Congress didn't put it there, that's what that little footnote means, that Congress didn't --

JUDGE KAVANAUGH: The footnote's huge.

JUDGE MILLETT: Right. The footnote guts, it appears to be gutting rationale for the entire Supreme Court decision.

MR. LIN: Well, Your Honor, that's not -- the position that we're taking is not that, we're not saying

they can't do this, we're saying that they can make a choice, which is what the Supreme Court said in *AEP*.

JUDGE KAVANAUGH: The Supreme Court did say that, that footnote seven really taken literally, advise the use of the word, totally supports your position.

MR. LIN: That's right, Your Honor. And --

JUDGE KAVANAUGH: Even though it may not, you know, again, that can be kind of a debater's point because I'm not sure they were thinking about this, but they did put in there you can regulate under 111(d), or actually, you can't regulate CO2 under 111(d) if the 112 exclusion kicks in, though. I mean, footnote seven is very helpful to you.

MR. LIN: And also, Justice Millett, to answer your question more directly, we are contending in a separate case before this Court that the Section 112 regulation is unlawful, and if we were to prevail there then this disability on their ability to regulate under Section 111(d) would be lifted. So, we're not taking the position that they can't do this --

JUDGE MILLETT: Can we just hold this case until we resolve that one?

MR. LIN: No, Your Honor, but --

JUDGE MILLETT: Why not? But this could all be a moot point.

MR. LIN: There are other issues in this case

other than the Section 112 exclusion. Thank you, Your Honor.

JUDGE HENDERSON: Two minutes.

ORAL ARGUMENT OF ALLISON D. WOOD, ESQ.

ON BEHALF OF THE NON-STATE PETITIONERS

MS. WOOD: Very quickly. I'm acutely aware I'm standing between us and lunch.

This is not an, this case is not an attack on *Massachusetts v. EPA*, this is, as Judge Srinivasan identified earlier today, this is a question, not a question of whether, it's a question of how. And I think, you know, that's important to keep in mind. It's also important to keep in mind that existing power plants are not getting a free ride under the Clean Air Act if you read the Section 112 exclusion the way Petitioners argue it should be read. Existing power plants are currently regulated under the pre-construction, prevention of significant deterioration program, that includes CO2. There is also pending a regulation to regulate CO2 from new modified and reconstructed sources under Section 111(b), and while that regulation is the subject of petitions for review before this Court, none of the issues in that case involve the authority of EPA to regulate CO2 from those sources. Thank you.

JUDGE HENDERSON: Thank you. We'll take a break

till 2:30.

(Whereupon, at 1:08 p.m. a luncheon recess was taken.)

THE CLERK: This Honorable Court is again in session. Be seated, please.

JUDGE HENDERSON: All right. Now with the constitutional issues, so Mr. Rivkin.

III. Constitutional Issues

ORAL ARGUMENT OF DAVID B. RIVKIN, JR., ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. RIVKIN: Good afternoon, Judge Henderson, and may it please the Court, I'm David Rivkin on behalf of State Petitioners. I will address the federalism constitutional issues and Professor Larry Tribe will tackle our constitutional issues. The clean power plan unconstitutionally commandeers states because it gives them no choice, no choice at all but to implement the federal policy of generation shifting, which EPA cannot implement on its own. This is because unlike the case in a traditional cooperative federalism scheme EPA has no statutory authority to deal with virtually 90 percent of all the issues relating to regeneration and distribution of electricity. For that reason the rule commandeers thousands of state officials to carry out their work tens of thousands of hours to carry out this federal policy.

Now, EPA recognized very clearly that it cannot implement the generating shifting federal policy by itself by pointing out in four different places, actually, five, once in the preamble, and four places in the rule, that it relies on states to exercise their traditional responsibility to maintain reliability. Whether or not states promulgate the SIP.

JUDGE KAVANAUGH: So, if Congress did exactly this, they couldn't under your theory because it's unconstitutional?

MR. RIVKIN: That is correct, Judge Kavanaugh, except for one thing, in a way accountability, if Congress enacted precisely the same rule the accountability would be somewhat more enhanced because everybody would know what Congress is doing. But yes.

JUDGE GRIFFITH: Was this an issue of accountability, or, I thought it was an issue of commandeering and coercion?

MR. RIVKIN: Judge Griffith, the Supreme Court juris prudence, particularly *New York* and *Prince* (phonetic sp.) and other federalism cases teach us that the two cardinal virtues of federalism is to, diffusion of power to ensure that no much authority is aggregated in a single set of hands, but the other thing particularly, Justice Kennedy's juris prudence of this era teaches us that

accountability is absolutely essential, that people have to understand who is doing what to them.

JUDGE GRIFFITH: To who are the state commandeered by this?

MR. RIVKIN: We are, if the record submitted, or generated during the rule-making, Judge Griffith, indicates that you have commandeering of both legislatures, which of course isn't exactly the teaching of *New York*, as well as commandeering of regulatory officials in the Executive Branch.

If I may briefly unpack what exactly states would have to do. EPA makes us think that all that would happen here is a bunch of private individuals are going to come to the states and ask them to approve particular facilities. Even that is commandeering enough because that's exactly the situation in *Prince* where private parties came to chief law enforcement officers and asked them to perform certain functions, but much more is at stake here. Apropos, Judge Tatel's observations about the integrated nature of a grid earlier today, the grid is a very intricate beast requiring for it to function enormous amount of planning to come, and to given the only party given the lack of preemptive authority on the part of Federal Government, the only other agency of the states. If I can briefly unpack it for you.

So, great deal of integrated resource planning

would go into figuring out how to integrate both renewable fuel facilities, as well as new natural gas facilities into the existing grid in a way that preserves their liability and minimizes the impacts and affordability. There has to be a great deal of planning, all of it would be followed by execution where it states also for both parties. But just to finish the planning part, planning for new transmission infrastructure to integrate the renewable fuel facility or power facilities and gas fired facilities because without that it would not go into delivering electricity to anybody.

Another part, very important, planning for renewed natural gas pipelines because you're not going to be able to operate new natural gas fired plants that really would be the mainstay of the base load fleet.

JUDGE GRIFFITH: How is that different from state officials reacting to any federal initiative? I mean, there's planning that has to go on when the Federal Government --

MR. RIVKIN: I appreciate this question, Judge Griffith. There's enormous constitutional significance in the Federal Government exercising its preamble authority in other areas, and producing unavoidable consequences, even if unavoidable consequences --

JUDGE TATEL: Well, let me just give you an example, to follow up on Judge Griffith's question. Suppose

under your theory, actually, I think the EPA uses this example in its brief, wouldn't the Americans with Disabilities Act be unconstitutional? I mean, it requires individuals and companies to build ramps, install elevators, do all kinds of things, and all of that requires zoning, and building permits, and all kinds of actions by state and local agencies that deal with, you know, the intricate plan of streets, and how a town is set up, what's the difference?

MR. RIVKIN: Judge Tatel, we understand that unavoidable consequences of the exercise of federal power. The best way to answer you is to quote roughly, a rough paraphrase from *Prince* where the Court said --

JUDGE TATEL: Wait, could you just answer my question? What's the difference between this case and --

MR. RIVKIN: Yes.

JUDGE TATEL: -- the ADA example? Both statutes require action by state authorities.

MR. RIVKIN: The difference that --

JUDGE TATEL: So, what's the difference?

MR. RIVKIN: If the key constitutional difference, Judge Tatel, but in our case the object of this rule is to administer the functioning of state government. In the ADA case the purpose of this rule is to bring about certain results in the private sector, and any consequences of our state government --

JUDGE TATEL: No, no.

MR. RIVKIN: -- which exist are purely incidental. It makes enormous difference, commandeering doctrine would make no sense unless it meant one thing, the purpose of an exercise is to direct the functioning of state entities, state officials, state legislatures, so as to shift accountability for unavoidable consequences, good or bad, of an exercise.

JUDGE TATEL: Well, that's exactly what happens in my hypothetical, it forces state agencies to use their police power to issue permits, zoning changes, and other things, and they're not politically accountable for that.

MR. RIVKIN: I understand, Judge Tatel.

JUDGE TATEL: So, what's the difference?

MR. RIVKIN: The key difference in this rule, just like in *New York* and *Prince*, the Federal Government is telling the officials of a co-equal sovereign that they intend, expect, and desire for them to engage in the task of generating shifting, which is within the sweet spot of their police powers, which the Federal Government has not preempted them, unlike in *Hodel*. In your hypothetical the Federal Government is accomplishing certain results, and it has consequences for the states, the states would indeed exercise their power, it is the subtle --

JUDGE TATEL: The same thing here, the Federal

Government is issuing environmental emission standards, and that has indirect consequences for state regulation, just like in the ADA case.

MR. RIVKIN: Your Honor --

JUDGE TATEL: Isn't that --

MR. RIVKIN: -- the purpose of an exercise, which sometimes may be difficult to infer, we have no problem here, in any situation where the Federal Government explicitly tells states that legislative or regulatory tasks have to be undertaken, the anti-commandeering cannon, which is per se --

JUDGE TATEL: Where did it do that here?

MR. RIVKIN: It does it in five places in this rule, it doesn't use exactly the same language as *New York* and *Prince* --

JUDGE TATEL: Yes, I didn't think so, I couldn't find it. Where does it tell the states that they have to do something?

MR. RIVKIN: It says in, throughout the rule which states are expected to exercise their traditional responsibility to maintain electric liability. It mentions in four places in the rule what the states are supposed to do, and for example just to quote from --

JUDGE MILLETT: It says expected, not required. Expected, not required, it's a predictive statement.

MR. RIVKIN: I'm glad you asked this question, Judge Millett, let me put it this way, given a respect for a rule of law, when officials of a co-equal sovereign, Federal Government, tell the officials of another co-equal sovereign, that they are going to destroy, which is destroy a portion of existing energy infrastructure where they say we cannot replace it, only you can, and we expect you to replace it, and a failure to replace would --

JUDGE MILLETT: Where does it say you have to replace anything, as opposed to industry might have to change something?

MR. RIVKIN: Let me paraphrase slightly my response to one of your colleagues, Judge Millett, grid can only be created through a concerted action, like state regulators, given its highly intricate nature, the notion that you can throw a grid together --

JUDGE MILLETT: Collective state regulators, correct? That's not something that a single state does, collectively state regulators create the grid.

MR. RIVKIN: No.

JUDGE MILLETT: The grid --

MR. RIVKIN: No.

JUDGE MILLETT: -- doesn't belong to any single state.

MR. RIVKIN: Both, Judge Millett, both actions

take place, each state plans its own grid, but state regulators also can cooperate sometimes to play original grids or national grid. But the notion that EPA puts forward that all that would happen here is the state can sit back and allow private parties to come in is risible. Let me give you a perfect example. The state regulators have a responsibility to ensure sufficient fuel diversity, so that the fuel that is cheapest today, that would be put forward by private individuals because, no disrespect to the market but all they want to do is to make money, that is officially, that fuel diversity is preserved so as to be resilient to future changes in prices. They have to be ensured that there's a sufficient balance between close to low generation, versus long distance generation, because transmission is inherently liable. In the great state of Oklahoma, for example, because of tornadoes, transmission cannot be, you cannot rely solely on long distance generation. The great state of Florida mentioned in their comments that because natural gas pipelines tend to run from the Gulf of Mexico they cannot rely too, too much on the natural gas fired generation because of tropical storms. All of those things are highly states --

JUDGE MILLETT: But is this mandated or choices? Is this choice? I mean, it seems to me like this is, what you're saying is there's an interstate highway system, and

as a result when states maintain their roads as a practical matter they hook them up to the interstate highway system, they have maintenance responsibilities as to that, and it's going to be driven, probably influenced, and certainly expected and encouraged from the federal level, but at the end of the day it's not required. Your people may require you to do it, but it's not required.

MR. RIVKIN: It is not an apropos analogy because, for example, to use Florida as an example, Florida mentions in its comments that they roughly have 68 megawatts of misloaded capacity, what they can import from out of state is 3.8 megawatts, less than five percent. States cannot, no state can ever abandon the unique and distinctive responsibility at the height of their police power for structuring their own grid, and the fact that they do it day in and day out, according to their own desiderata, or according to the impacts of market force it's entirely constitutional and objectionable. A federal mandate tasking them in very clear and compelling language to undertake those responsibilities is the worst example of commandeering from a standpoint, commandeering is a --

JUDGE MILLETT: If Congress passed a law, if Congress just passed a law that banned the use of coal power, coal based power, fossil fuel based power --

MR. RIVKIN: Banned?

JUDGE MILLETT: -- they just banned it --

MR. RIVKIN: That statute --

JUDGE MILLETT: -- would that be unconstitutional commandeering?

MR. RIVKIN: That statute, Judge Millett, would create some constitutional issues, but it would have one virtue, at least it would produce accountability, second --

JUDGE MILLETT: No, so the question is doesn't that cause the exact same commandeering consequences that you're raising here, you're going to have to change your own internal grid, you're going to have to change your supplies?

MR. RIVKIN: We have --

JUDGE MILLETT: How would the consequences be different?

MR. RIVKIN: I understand. If I may, our case is stronger precisely because of an unambiguous indication in this rule, but the Federal Government lacks the ability to undertake those tasks. Congress could have actually given EPA or some other agency preemptive authority, like in *Hodel*, to take over the entire field, they did not.

JUDGE TATEL: That was true in my hypothetical, too. The Federal Government can't do permits for curb cuts, or for any other changes required for the Americans with Disabilities Act.

MR. RIVKIN: Judge Tatel --

JUDGE TATEL: They can't, the Government does not have the authority to do that, compliance with the ADA can only occur if states exercise their police power to provide the necessary permits.

MR. RIVKIN: I go back to, and if I may, an additional point, I go back to a point about incidental impacts, and intentional impacts. The essence of commandeering is seeking a desired outcome in terms of federal policy by utilizing the machinery of the states.

JUDGE TATEL: I don't mean to beat a dead horse --

MR. RIVKIN: That is --

JUDGE TATEL: -- but that's the purpose of the ADA.

MR. RIVKIN: No, the purpose of APA, Judge Tatel --

JUDGE TATEL: But they did, the ADA --

MR. RIVKIN: -- is to produce --

JUDGE TATEL: -- Congress passed the ADA requiring these changes, that's what they wanted, just like the EPA here is trying to control emissions of pollution, and both EPA here and Congress with the ADA knew full well that it could not be accomplished without the states exercising their police and zoning and other but --

MR. RIVKIN: But --

JUDGE TATEL: -- it couldn't happen.

MR. RIVKIN: -- the goal in Americans with Disabilities Act is to produce certain changes regard to the private sector. I have no doubt that the goal is present here. But if I may, Judge Tatel, the goal here is far more profound, the goal here is to change the energy infrastructure of the states, it is not just an admission rule. We heard a concession from my colleague from EPA, Mr. Hostetler, this morning, and I quote who said this rule is about substituting cleaner technology for dirtier technology, that means changing the grid, the grid that only states can change and maintain. It is a fundamental difference in quality, and in kind --

JUDGE MILLETT: Does that mean changing the grid or changing --

MR. RIVKIN: -- and not just in quantity.

JUDGE MILLETT: -- does that -- I have taken that to mean changing the sources of power, the types of power generation being used to feed electricity into the grid, is that different from what you're talking about?

MR. RIVKIN: Forgive me.

JUDGE MILLETT: Sorry. No, I had understood that comment to be that what this rule does is certainly heavily encouraged that require changing the forms of power generation that feed electricity into the grid.

MR. RIVKIN: It is that which is sufficiently

objective, but it's more than that, apropos of my point about grid being a very, a very carefully calibrated mechanism. The essence of its mechanism is integration. You can put together a bunch of facilities that would do nobody any good either on a day to day basis, but particularly on days of peak demand, days flagged by natural disasters. The only indispensible party can do reintegration of the states, EPA knows it, EPA acknowledges, EPA expects the states to perform, and apropos my response to Judge Tatel, it is that unique sliver of desire to seize state agencies that produces such disjunctive, such unconstitutional results, and if it were not true then the entire Supreme Court's anti-commandeering juris prudence would make no sense. Let me also add that we do have an anti-coercion argument because --

JUDGE MILLETT: And anti what?

MR. RIVKIN: An anti-coercion argument, which is the teaching of *Steward Machine*, *South Dakota v. Dole*, and *FIB*. The situation we have is much more of a gun to the head than the palpable collapse of a Medicaid system, and issue NFIB because to be, aside from the state's police power responsibility to maintain reliable service for their citizens, states themselves, Judge Millett, would not be able to go on as functioning, ongoing concerns if we don't have access to reliable and affordable electricity, state

offices would close, state prisons would close, they would be unable to dispatch fire and rescue services. So, we have unprecedented mix of commandeering and coercion, and if that's not true the entire Supreme Court juris prudence in this area has been nurtured for at least --

JUDGE MILLETT: Your state get energy from sources outside the state?

MR. RIVKIN: I made the point, Judge Millett, regard to Florida, the opportunity to import power is a contributing factor to the state's integrative, essential job, but it never can substitute for it, for one thing, no state, no sovereign would entirely rely on somebody else.

JUDGE MILLETT: I'm not saying that, I'm just asking whether it is a self-sufficient, internal grid, or whether in fact it's an interstate, interconnected grid?

MR. RIVKIN: We do know one thing, the State of Texas, for example, is entire, it's an island of its own, it's entirely decoupled from a grid. Virtually every single state, I mentioned the ratio in Florida, I mentioned a concern about resilience, and if we have a natural disaster you want to have a sufficient amount of close to load generation, and not to get technical, but in order to maintain the viability of a grid you need to have a sufficient amount of base load capacity that by definition has to be within your generating footprint. There is both

technical reasons and political reasons and constitutional reasons that you never totally make it impossible for EPA to carry out what it set out to do, and it's not even pretending to do anything otherwise, it is clearly directly state officials in multiple places to perform those tasks, and that is commandeering, that is the only thing that commandeering means.

JUDGE HENDERSON: All right. Thank you, Mr. Rivkin. Professor Tribe.

ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.

ON BEHALF OF THE NON-STATE PETITIONERS

MR. TRIBE: May it please the Court. I was thinking of Judge Tatel's question, I don't think there's anything unconstitutional about the Americans with Disabilities Act. But if Congress had been unable to pass it, as it was unable to enact -- excuse me, thank you -- enable to enact a nationwide cap and trade system when the Senate wouldn't go along with the House, and if instead of that some agency with relatively limited previous powers in a related area were to tell the states each of you must pass a mini-ADA, you have some room to maneuver, but if you don't pass it then, although Congress failed to enact an Americans with Disabilities Act, we will simply exercise preemptive power and put it in place.

JUDGE TATEL: Well, but the EPA here was acting

pursuant to the Clean Air Act --

MR. TRIBE: Well, that's right --

JUDGE TATEL: -- and it's directed that it --

MR. TRIBE: -- and the question is --

JUDGE TATEL: -- it's directed that it set goals for the states to set performance standards, it was acting pursuant to a federal statute. This morning we had a lot of arguments about whether it was, whether the regulations comply with the statute, but are you saying that even if the regulations comply with the statute then the Clean Air Act is unconstitutional?

MR. TRIBE: No. What I am saying is that in a case like *New York v. United States* even though Congress could have taken over the area of radioactive control all by itself, the Court was concerned not just with the effect, but with what some call the etiquette of federalism because of accountability, it said that if a state like New York is given an ostensible choice, either take title to the radioactive waste, or regulate in accord with our standards, that's an impermissible choice, even though it had a choice. The fallback if the State of New York did nothing was not that the Government would come in and take over, in fact, it's simply that it would not allow New York to free ride and dump its nuclear waste in other states that were assuming their responsibilities. Here, the fallback is very

different, that is the states are given a theoretical formal choice, but if they do not exercise it in accord with the EPA's goals there is a draconian alternative, and the states are warned in no uncertain terms that they will be worse off if they don't comply.

But my point is really less to talk about horizontal federalism, I think you avoid all of those issues which are serious issues, that is vertical federalism, my point is not to talk about vertical separation of powers, because I think that under the horizontal separation of powers, and the role of the three federal branches, this action by the EPA is impermissible, and for separation of powers reasons that came up occasionally in the morning, and you don't have to face the issue of how to make sense of the anti-commandeering doctrine of a case like *New York v. U.S.* against the backdrop of contingent preemption. The reason that I do not think that the EPA is acting within the bounds of an executive agency has very much to do with the Clean Air Act that you're referring to, Judge Tatel, and the way it is written. It's not written in a way that's perfectly ideal for the regulation of CO2, let's admit it, and I think members of this Court have suggested that there's a kind of bait and switch going on, that is the Supreme Court in *AEP v. Connecticut* said that the Federal Government has decided to set up an agency to deal with all forms of air pollution,

including we now understanding air pollution of a ubiquitous kind, like CO2, and that's where the solution must be found. There was no promise that 111 would necessarily solve everything, there was a question at the time of exactly what the scope of this little used provision, 111(d), would be. It has only been used five times for limited localized problems, only one since 1990, and the question of whether you would be able to do it without delisting sources of power generation under 112 was very much alive. The *Mercury* case in this Court was in the immediate background, so when the *AEP* Court in a six to one ruling wrote that footnote seven, which very clearly, as I think Judge Kavanaugh recognized, if we take it seriously, and I think we should, though it's only a footnote it was an important part of the decision, the Court said that if the source category is regulated under 112 then you cannot regulate that category even with respect --

JUDGE TATEL: But say it --

MR. TRIBE: -- to a non-HAP under 111(d).

JUDGE TATEL: -- didn't it also say if it was regulated under the --

MR. TRIBE: I'm sorry?

JUDGE TATEL: It also said if it was regulated as a HAP under the criteria program.

MR. TRIBE: Well, if you --

JUDGE TATEL: That's what it says.

MR. TRIBE: -- read the, if you read the text of footnote seven it says EPA may not employ 111(d) if existing stationary sources of the pollutant in question are regulated, sources are regulated under the national ambient air quality standard program, or the hazardous air pollutants program. I mean, taking literally what that means is that you have to make a choice, and it's not as crazy a choice as some of those that have been posited, you know, for example, a state telling somebody you have to fix your brakes or your rear headlights, but the state can't make you do both. This isn't like that, it's quite sensible, though it may not be ideal, to require an Executive agency of the Federal Government to make a choice whether to proceed under national standards under 112, or to direct the states to regulate under 111(d) for existing plants. No, some people say well, that leaves a gap, what if the pollutant is not a hazardous air pollutant, and you're not going to go through the process of classifying CO2 as hazardous, though perhaps that could be done, but one person's gap is another person's choice. I mean, this Court in *RDC v. EPA* in 2014, in the cement plant case, and three years earlier, Judge Tatel, in your opinion dealing with ozone made it clear that even if this Court believes, or certainly the EPA believes that it's unwise to create a

situation where something is not going to be easily covered there is a solution, and the solution is to go to Congress, because I think implicitly it was recognized earlier the structural principles of our Government can't depend on this Court's evaluation of whether Congress is being productive or not, in fact, that was what happened in 1990 --

JUDGE MILLETT: So, I'm still having trouble --

MR. TRIBE: -- with respect to stratospheric ozone --

JUDGE MILLETT: I'm still having trouble reconciling this with what actually happened in the *AEP* case in the Supreme Court. In the wake of *Massachusetts v. EPA* saying you've got to regulate these greenhouse gases, and people were bringing public nuisance actions because nothing had happened by Congress, and the Supreme Court's answer, yes, there's that footnote, but the Supreme Court's answer was that there is a federal agency empowered to make these regulatory decisions. Now, whether EPA could have decided no, we're not going to do it consistent with *Massachusetts v. EPA* is a very different answer than saying displacement was the word the Supreme Court was using. This is taken over, it's displaced by this scheme, and it wasn't a congressional scheme, it was that EPA has the authority to make that decision. And now we're told you don't, that in fact it had no authority whatsoever to make any decision

here it had already made.

MR. TRIBE: But Judge Millett, the issue before the Court was not the interpretation of the intricate scheme of intersection between 111(d) and 112, it was the fact that Congress had decided to create under the Clean Air Act an agency with responsibility for all air pollution, including CO2. The Court stopped quite short of saying and that problem has been solved by the design of this law, it has no gaps --

JUDGE MILLETT: The problem there was power plant greenhouse gases --

MR. TRIBE: Yes.

JUDGE MILLETT: -- in *AEP*, power plant greenhouse gases --

MR. TRIBE: And then --

JUDGE MILLETT: -- and the answer that we're being told is that as to power plant greenhouse gases, those can't be regulated by EPA, I mean, the delisting is an extremely difficult, and I'm not sure that statutory elements could be met, I'm not sure it's even a conceivable option here. And so, you're being told --

MR. TRIBE: But there are --

JUDGE MILLETT: -- the whole reason you can't bring your public nuisance action is because they will make the judgment whether and how to take care of it, and now

we're told they can't. That's the reasoning, the whole thrust of the decision.

MR. TRIBE: I understand the passion, but I don't think the reasoning quite works. It seems to me that under Section 115 it's quite possible that CO2 could be dealt with, that section is specifically designed to deal with international pollution. It's also true that 111(b) applies not only to completely new plants, but to plants that are upgraded after June 18th, 2014, and a great many are in that category. In fact, something like 95 percent of the standards promulgated under 111 are under 111(b), which has no exception for Section 212. So, I don't think it would be a case of the Court saying well, we're looked carefully, although it's not an issue in this case, at which parts of 111 we'll be able to use --

JUDGE SRINIVASAN: It did say, the Court did say, and most relevant here, 7411(d) then requires regulation of existing sources. So, you're of course right that there's other provisions that are potentially in play, but the way the Court framed it was that the most relevant provision was 7411(d) as to existing sources.

MR. TRIBE: And then said but of course that can't be used if the source is one in a source category that's dealt with under 112, that's inescapable. And in fact, it wasn't just that the Court, you know, said that as a

throwaway, or in light of the *Mercury* case without thinking about it, if you look at the language, the House language of 111(d) to read it the way the EPA now reads it after years of not reading it that way you'd have to absolutely erase the language, a source category which is regulated under Section 112 of this title. If you cross out those words at the end of 111(d)(1)(A)(i) the law would mean exactly the same thing under the Government's interpretation. And yet, the Court has repeatedly said that an interpretation of a statute which completely nullifies a significant part of it is not likely to be undertaken, I mean, you don't need much of a clear statement rule to say that just the racing language of a statute won't do, that is why --

JUDGE PILLARD: But Professor Tribe, those, the cases you are referring to are not cases in which you have the two --

MR. TRIBE: Right.

JUDGE PILLARD: -- separate provisions, both of which are equally authoritative, and we've spent a lot of time on that this morning.

MR. TRIBE: And that's exactly --

JUDGE PILLARD: But those cases are not --

MR. TRIBE: -- what I'm going to turn to. That's what I think the reason that the separation of powers adds more than just the usual gloss to a pure statutory argument

is precisely that the EPA finally decided it has to assert a *Chevron*-like authority not to interpret ambiguous language in the statute, which in itself wouldn't be enough to trigger *Chevron*, you need a delegation, but it needs to invoke *Chevron* to assert this novel power, which is essentially legislatively, as Whitman said, to take two different statutes, or at least two different versions of a statute and decide which one to make the law of the United States, that is not something that Congress ever set the EPA up to do, it's not the enactment parliamentary agency, it's not even the energy policy agency, it's the Environmental Protection Agency, that task of deciding what to make the law is really not subject to *Chevron*. And in particular in this case saying that the Senate had a distinctly separate version is a bit of an exaggeration, I mean, Judge Kavanaugh --

JUDGE MILLETT: We don't let the --

MR. TRIBE: -- has already pointed out --

JUDGE MILLETT: We don't let the EPA pick what the statutory text is between these competing versions, but if we take even the U.S. Code version and we look at it, and we say it's utterly confusing, is there any separation of powers problem with saying it's ambiguous text, even taking the text as --

MR. TRIBE: But I don't see the ambiguity.

JUDGE MILLETT: You may not, but if I did --

MR. TRIBE: If you do. Okay.

JUDGE MILLETT: -- saw the ambiguity, and I don't think I'm alone in that, we saw the ambiguity, and so the Agency gets to apply *Chevron*, its *Chevron* authority to interpret ambiguity in the House version of the language, that's not a separation of powers problem --

MR. TRIBE: Well, first of all --

JUDGE MILLETT: -- and it's not a factor in the Senate amendment.

MR. TRIBE: It's interesting that the first time they ever suggested that the House language was ambiguous after all these years was in the final rule that they promulgated in this case. Until then everybody said it may not be brilliantly written, but it's quite clear that a source category is regulated under 112, you have to deregulate it, which is what they failed to do with *Mercury* before you can regulate it as an existing source under 111(d). It was very clear. Now, I think inventing ambiguity, manufacturing it in order to give an agency power over a choice that Congress didn't really give it, that raises serious separation of powers considerations, and they are aggravated in this case by the fact that it's not an ordinary choice, when you add it to the broad definition of the best emission reduction system, which you were

struggling with this morning, you have a simultaneous contraction of an exception that Congress wrote for plants that are categories of sources that are regulated under 112, and an expansion of the normal meaning of source category. There's a dilemma that they face in that regard, and as they suggest --

JUDGE TATEL: Professor Tribe --

MR. TRIBE: -- it's -- I'm sorry.

JUDGE TATEL: I just wanted to ask you a question about I guess both your constitutional argument, and your statutory argument, and a sentence in your brief. And earlier you said that EPA has only regulated two pollutants under 111(d), and in your brief you distinguish it this way, and I want to ask you about the significance of this sentence. You say as compared to those you say none of them, that is the pollutants that are regulated under 111(d), concerned a ubiquitous substance like CO2 benign in itself, emitted from sources across the nation, and indeed, the globe, rather than from discreet local sources. And then you go on and say atmospheric CO2 is the intermingled result of all human activity and Mother Nature. My question is, is that critical, does that description of carbon dioxide affect your analysis of either the constitutional or the statutory issue?

MR. TRIBE: I think it sets the background against

which it is not surprising that Congress did not anticipate that the law would be used in quite this way, and I --

JUDGE TATEL: Right.

MR. TRIBE: -- don't read *AEP* as promising --

JUDGE TATEL: But with the Supreme Court having ruled that carbon dioxide is a pollutant --

MR. TRIBE: Right, and --

JUDGE TATEL: -- and EPA having made the endangerment finding then this is irrelevant, isn't it? What's this got to do with the constitutional analysis? If it has something to do with it I'd like to understand what it is.

MR. TRIBE: What it has to do with is that a law that was originally designed to deal mostly with highly specific, localized problems from identifiable sources is not naturally adapted --

JUDGE TATEL: Okay.

MR. TRIBE: -- to dealing with so ubiquitous a pollutant.

JUDGE TATEL: Okay. But our, but the question before us --

MR. TRIBE: And that suggests --

JUDGE TATEL: -- is still, our question before us is still how to deal with a pollutant under the statute, correct?

MR. TRIBE: Yes. Well, it's about how --

JUDGE TATEL: Statutory issue and the Constitution question.

MR. TRIBE: Well, there's no question that an air pollutant includes CO2. There is, however, under *UARG* a question of how it's permissible under the statute as written to regulate it, and is it permissible to regulate it under 111(d) --

JUDGE TATEL: But that's because it's a pollutant that's emitted by a source regulated as a HAP, not because it's a --

MR. TRIBE: Well, it might affect --

JUDGE TATEL: -- intermingled result of all human activity and Mother Nature, I mean --

MR. TRIBE: No, that is fair. I mean, I suppose as a --

JUDGE TATEL: Right.

MR. TRIBE: -- critique of that draft I accept it, but I don't think --

JUDGE TATEL: I wasn't criticizing it, I was wondering whether it related to how we should think about the constitutional issue.

MR. TRIBE: Only in that you should be --

JUDGE TATEL: And I gather your answer is it shouldn't.

MR. TRIBE: -- less surprised by what some people call a gap, that is this is a case, if our whole atmosphere here were not poisoned by the fact that Congress can't seem to do anything we would be saying that's the natural way to fix this up, to deal with this ubiquitous modern problem.

JUDGE TATEL: Well, maybe the way it handled this is just proof that it shouldn't be doing anything, right?

MR. TRIBE: That it shouldn't, and this Court's mandate to get Congress to move would be rather challenging to write.

JUDGE TATEL: Yes.

JUDGE HENDERSON: All right, Professor Tribe, you're over your time. So --

MR. TRIBE: Okay.

JUDGE HENDERSON: -- thank you.

MR. TRIBE: Well, can I reserve any for a rebuttal? Thanks.

JUDGE HENDERSON: Ms. Berman?

ORAL ARGUMENT OF AMANDA SHAFER BERMAN, ESQ.

ON BEHALF OF THE RESPONDENTS

MS. BERMAN: Petitioners' Tenth Amendment claim is entirely unmoored from the governing case law. Neither the Supreme Court nor this Court have ever held that giving states a choice between regulating in a field and federal preemption is a problem. To the contrary, we have *Hodel*, we

have this Court's decision in *Mississippi Commission* that established that if you give states that choice it's a permissible exercise of cooperative federalism. And we know from *FERC v. Mississippi* that this rule applies to utilities, as well. The choice may sometimes be a difficult one as the Court characterized it in *Mississippi*, but it's not an unconstitutionally coercive one.

By way of contrast, cases where the Supreme Court has found a Tenth Amendment violation all involve federal laws or rules that didn't give states that choice, but rather required them to take affirmative action to implement the federal policy. For example, in *Prince* the Brady Act required state law enforcement to establish a national background check system. In *Train* (phonetic sp.), state officials had to establish and implement a vehicle retrofit testing system, and the one provision that was found to be a Tenth Amendment issue in *New York*, as my opponent said, required states to actually take title to radioactive waste, they could choose between regulating or taking title, an affirmative action. Here, states have the classic cooperative federalism choice of regulating power plants' carbon dioxide emissions themselves through a state plan, or declining to do so, in which case EPA regulates private sources directly through a federal plan. If states choose that latter option there are no sanctions, there are no

penalties, unlike in cases like *NFIB*. This is bread and butter cooperative federalism, and it is indistinguishable from the criteria pollutant program at issue in the *Mississippi Commission* case.

Now, in a desperate --

JUDGE KAVANAUGH: I think they're saying there's more than that, not necessarily unconstitutionally more, but more in the sense of that the states are going to have to do a lot to help restructure the source of energy supply electricity in their states, and switch it from so it's more than just the usual, I think they're saying.

MS. BERMAN: Well, but it isn't, that's the problem. So, what they say states are going to have to do in their brief, they cited three things, deal with new permit applications, make siting decisions, and decommission plants. First of all, it's kind of a premature argument because we don't actually have a federal plan yet for any state, we don't know what will actually be required based on what sources might do pursuant to such a plan, and what they might ask state regulators. But even let's set that aside for a second, these sorts of ancillary regulatory action just don't give rise to Tenth Amendment issues. This is the normal result of private entities like power plants, or car companies, or banks being subject to dual sovereignty. You know, Petitioners made a lot of this one line from the

preamble of the rule about states' responsibility to maintain a reliable electric system. To begin with, this is from a background section entitled additional context, it's describing, just describing the regulatory framework in which states operate, and in fact, what it actually says is that numerous entities have both the capability and the responsibility to maintain a reliable system, it lists FERC, DOE, state public utility commissions, ISOs, RTOs, those two are private entities, and other planning authorities, and NERC, all contribute to ensuring the reliability of the electric system. And then it goes on to note that critical to the function are the dispatch tools that are used by RTOs, and ISOs, private entities. So, this passage wasn't really about states having to do things at all, it's a background description of the very complex regulatory framework that EPA was dealing with here, and it's reasonable for the Agency to take that complex regulatory framework into account when it's designing air emissions regulations.

You know, if Petitioners are right, as the Court has already pointed out, Congress itself could not take action to require power plants to reduce greenhouse gas emissions, and indeed, I think their argument would take down much of the Clean Air Act, because there's nothing about the clean power plants' interaction with state

regulatory processes that's any different than any other air pollution standard for this sector.

JUDGE MILLETT: Well, I take their argument to be that maybe *Gregory v. Ashcroft* is the better principle here, and that is look, we all know that if this comes into play we're going to have to do a lot because our job is to keep the power running. This strikes at the heart of a state, if it doesn't have power running where it needs to go, it can't function, it's got no choice, it can't sit on the sidelines, it is going to as a direct result have to, I take it as his argument, get in there, re-jigger the grid, make sure everything is balanced, it can't leave you in control of the plug, it's got to come in and do it with you. And this is the heart of state operations in sort of a *Gregory* sense.

MS. BERMAN: And Your Honor, the problem with this argument is that it has no basis in this record. There is just nothing that supports this idea that there are going to be blackouts, and jails closing, and a parade of other horribles if a state doesn't actively intercede to make a federal plan work. The only thing they cite is that statement about, that statement I just read, which is a very background vanilla statement. To the extent they think these things are going to happen from an actual federal plan being imposed for a state, well, there will be an opportunity for any federal plan to be challenged in this

Court.

JUDGE KAVANAUGH: Won't states have to do quite a bit, though, to oversee, direct, manage the restructuring of the electricity supply in the state? No? You're not --

MS. BERMAN: I don't think that's really a fair statement. Under the federal plan as we'll take it as proposed sources are directly regulated, it's anticipated that they'll engage in trading, the federal government will set a whole platform --

JUDGE KAVANAUGH: But if the coal plants --

MS. BERMAN: -- to allow that.

JUDGE KAVANAUGH: I'm sorry to interrupt. Go ahead.

MS. BERMAN: That was --

JUDGE KAVANAUGH: Okay. If the coal plants go out of business, or some of them do as they already are starting to do, then the state's going to have to do something if it's going to serve its citizens, to find alternative supplies of electricity for the citizens, and that's going to be a busy process.

MS. BERMAN: The burden under a federal plan is placed directly on the regulated source. And if a source under the existing regulatory scheme as I understand it, including federal reliability regulation, if a source asks to decommission it actually has to find a way to replace the

power that's being lost. So, there is a very complex regulatory mechanism that, you know, ensures reliability, and I think EPA just reasonably pointed to the existence of that, that it wasn't saying states are going to have to step in and make sure the lights don't go out. At the very least, we just don't have the record evidence for that in this rule or this record.

JUDGE KAVANAUGH: Do you agree that maintaining the electricity supply is one of the traditional police functions, police power functions of the states?

MS. BERMAN: Yes and no. States have an important role, but as I just mentioned there are at this point a number of other federal regulatory schemes in play, and there are also these non-state actors, like RTOs, and ISOs, and they all work together to do this. So, states --

JUDGE KAVANAUGH: So, where --

MS. BERMAN: -- definitely have a role, but, you know, there's a real difference between requiring state actors to take new affirmative actions and just sort of assuming they're going to go on doing the regulation they already do.

JUDGE KAVANAUGH: From their perspective it's the inevitable consequence, and I think they argue it's unconstitutional, but they also argue, I think, and maybe this has more roots as Judge Millett was saying in the case

law that at least there needs to be a clear statement, *Bond* certainly suggests that when you are altering the traditional functions of the federal state balance that Congress needs to speak clearly. So, why, distinguish *Bond* if you can for me.

MS. BERMAN: I'm sorry, I'm not prepared to distinguish *Bond*. I did want to talk about *UARG* a little, since you were taking us to the clear statement rule, if that's okay? You know, I think that's their best case for the idea that a clear statement rule should apply here either in regard to the basic questions, or even the two amendments question, but I think it's important to keep in mind that that text that you read earlier from *UARG*, Judge Kavanaugh, was in a very specific context. Justice Scalia, he wrote EPA's interpretation is unreasonable, so this is a *Chevron II* analysis, because it would bring about an enormous and transformative expansion in EPA's regulatory authority, and then down below he specified that this would bring in millions of new sources. So, that was the context in which a clear statement rule was found to apply, that's not the context we're dealing with her, we're dealing with an industry that's already regulated under multiple Clean Air Act programs.

Now, on the sort of the other separation of powers statutory issues that have been percolating back up, I did

want to briefly address the *AEP* footnote, because I think this is an important point. You know, the footnote is dicta, and I agree with my opponent --

JUDGE KAVANAUGH: It's Supreme Court dicta --

MS. BERMAN: It is, it's --

JUDGE KAVANAUGH: -- on a key subject, I mean --

MS. BERMAN: Yes. And I, but I agree with my opponent --

JUDGE KAVANAUGH: -- that they can call it dicta, we, yes.

MS. BERMAN: Well, I agree with my --

JUDGE KAVANAUGH: Keep going.

MS. BERMAN: -- opponent that, you know, we certainly don't think the Supreme Court had these issues before them about the two amendments, et cetera, but at the same time as Judge Tatel noted, the Supreme Court talked, and the way it phrased it it made the exclusion the same for the criteria in the hazardous pollutant programs. So, as we said in our brief if you read it the way Petitioners want you to read it then the Supreme Court was half wrong because the criteria pollutant program at the very least doesn't work that way.

JUDGE KAVANAUGH: Yes, that's a misdescription, right, of the NAAQS, that's what you're saying?

MS. BERMAN: Well, if you read it that way, but I

think you can very easily read it as just paraphrasing the awkward language of the U.S. Code. I don't --

JUDGE KAVANAUGH: But that's --

MS. BERMAN: I don't, I think it's --

JUDGE KAVANAUGH: I think you're making an important point I want to make sure you get it, which is that the first part of the footnote, if existing stationary sources of the pollutant in question are regulated under the National Ambient Air Quality Standard Program, you're saying that's incorrect phrasing?

MS. BERMAN: I'm saying if you read the second half the way they want you to I think that, as with the House amendment there is an implicit limitation to the pollutants governed by the program you're talking about.

JUDGE SRINIVASAN: And are you saying this that if you took out the NAAQS part of it and you only kept in the HAP part of it, to use acronyms that are overused today --

MS. BERMAN: Yes.

JUDGE SRINIVASAN: -- that, and you bought their reading, that when you add back in the National Ambient Air Quality Standards part of it it falls apart because --

MS. BERMAN: Exactly.

JUDGE SRINIVASAN: -- the description doesn't apply to the National Ambient Air Quality part of it?

MS. BERMAN: Yes, nobody disputes that as a

pollutant specific exclusion, and they talk about them as though they're the same here. So, I don't think this really actually supports Petitioners' argument all that much.

JUDGE TATEL: This is a good example of why courts shouldn't express themselves on unbriefed issues, right?

MS. BERMAN: You know, the last thing I wanted to say about, you know, separation of power issues, actual separation of power violations are very rare, rarely found, they're different in flavor than what we're dealing with here today. You know, a classic example is *Clinton v. New York,* where we're dealing with a line item veto which allowed the President to strike down particular lines of legislation. I think that case illustrates that separation of powers doctrine is about tyranny, and preventing the over-concentration, seismic shifts in the balance of power.

You know, EPA's use of its general long-existing Clean Air Act authority that's been delegated to it to address the major pollution problem of our day is not the same kind of animal, it's our government working exactly how I think it is supposed to.

JUDGE KAVANAUGH: Well, at its core all separation of powers issues are who decides.

MS. BERMAN: True, I agree with that. But I think here we have an answer, from, you know, the Clean Air Act itself, *AEP*, EPA decides whether and how to regulate this

source category for this pollutant. And if --

JUDGE HENDERSON: All right. Thank you.

MS. BERMAN: Thank you.

JUDGE HENDERSON: Mr. Myers?

ORAL ARGUMENT OF MICHAEL J. MYERS, ESQ.

ON BEHALF OF THE STATE INTEVENORS

MR. MYERS: May it please the Court. I'm going to address the Tenth Amendment issues. The rule faithfully embodies the Act's cooperative federalism approach. There's no commandeering because states that opt out of the rule face no federal mandate to act, and there's no coercion because states may opt out without sanction.

With respect to commandeering, the option of direct federal regulation to limit power plant carbon dioxide emissions defeats Petitioners' claim under the *Hodel* line of cases. That's because EPA would regulate the power plants directly, not states. Petitioner's assertion that states would nonetheless be commandeered under a federal plan because they would be implementing the rule by approving power plant actions to comply with it fails for several reasons. First, because state oversight over power plant requests for rate recovery or new licenses is independent of the rule, and it will be done to satisfy preexisting state law requirements, not for the purpose of ensuring compliance with a federal plan. By way of example,

states like Texas and Oklahoma have licensed a large amount of wind generation in recent years due to favorable market conditions. If those states were to opt out of the rule their continued reviews of proposed wind projects under states law would not suddenly morph into federal commandeering. Indeed, by Petitioners' logic, as Judge Kavanaugh noted, nearly every Clean Air Act regulation in the power sector, and that would include the acid rain program that was enacted by Congress, likewise would be unconstitutional because state agencies have issued licenses or heard rate-making requests related to those complying with those laws, as well.

Petitioners' commandeering claim also fails because states would retain independent authority under state law to accept or reject power plant actions related to a federal plan as evidenced in the examples in our brief at pages 22 through 24 of state reviews concerning previous Clean Air Act rules; and in a situation where a state rejects a company's proposed compliance approach, such as the retirement of a plant, the burden would fall to the owner, not the state to come up with an acceptable alternative. Petitioners' contention that the rule's emission guidelines will dictate the outcome of such reviews is also wrong. To be clear, the rule's emission requirements are modest, and industry is continuing to move

to cleaner generation, even without the rule in effect, providing a significant head start for compliance. So, rhetoric aside, even under a federal plan, states will continue to be able to exercise policy discretion concerning licensing, rate recovery, and retirements.

JUDGE KAVANAUGH: What about the, I unfairly asked Ms. Berman this question, but what about the *Bond* clear statement rule? And maybe I'm unfairly asking you this question, too, but if, I'm curious about the clear statement rule in *Bond* that the Chief Justice articulated of when legislation, in this case legislation, affects the federal balance, the requirement of clear statement assures that the body has in fact faced and intended to bring into issue the critical matters involved in the judicial decision.

MR. MYERS: Well, two responses to that, Your Honor. First of all, as I was mentioning, neither as a matter of law, nor as a matter of fact does the rule dictate any particular outcomes that a state has to come to as a result of a company action that's proposed.

JUDGE KAVANAUGH: It's like the, you know, model penal code, yes, the knowing, doing something knowing a result is certain to occur is considered the same as intending that result. And here, I think, the action is taken knowing that the states are going to have to do quite a bit, and we can argue about what quite a bit means in

particular contexts. And it seems that *Bond* reinforces the idea that before Congress does that they should speak clearly, different from the major questions issue, but similar underlying constitutional kind of value that the Court has set up a plain statement rule for to just make sure before these values are invaded that we require Congress to think about it and speak clearly, what about that?

MR. MYERS: Well, I don't think so, Your Honor. First of all, again, because I don't think state, the outcomes of those state decisions are dictated because they will have some room, certainly, they will have to do certain things, Your Honor, but I would also point --

JUDGE PILLARD: So, just, just -- I'm sorry, finishing answer that question.

MR. MYERS: I would also point Your Honor to the *American Farm Bureau v. EPA* case out of the Third Circuit from last year where the Third Circuit rejected a similar argument where the Petitioners were arguing and challenging an EPA water pollution rule that interpreted a similar statutory term as the best system of emission reduction. In that case it was a total maximum daily load was the rule that was being challenged or interpreted that, and the challengers were saying that EPA's interpretation was going to impact state land use decisions, and that therefore

Congress had to have made a clearer statement before EPA could interpret the rule that they had had. And the Third Circuit rejected that argument, finding essentially that it would, you know, that this was a *Chevron* question, given that EPA was interpreting a technical term under the statute.

JUDGE KAVANAUGH: Did they grapple with *Bond* in that case? I haven't read that case.

MR. MYERS: I don't recall, Your Honor, whether or not they specifically did, but they rejected a similar argument as to the one that you raised from the *Bond* case.

JUDGE PILLARD: So, what's your answer if West Virginia or its localities decides it doesn't want to do any licensing of wind, or solar, or even natural gas because it's a coal state, and there's a federal plan, and a state, or a public utility commission decides we're not going to license, what happens?

MR. MYERS: Well, Your Honor, we have not seen that happen before because federal and state governments typically work together on solving problems, but, you know, I think the --

JUDGE PILLARD: But their implication is that at some point that might happen, and that you're just counting on everyone to go along?

MR. MYERS: Well, there is some point that states

will have to choose, you know, whether or not to continue to exercise their authority in a certain way under state law. But I think given the emission reductions here that we're talking about are not particular stringent, that states will have that discretion to be able to continue to implement their state policy the way that they had previously. It's not going to be a dramatic change.

JUDGE PILLARD: Is this, is the answer different if, and maybe this is a question for the other side, but if some smokestack regulation required a re-permitting, or some kind of Commission approval, and the Commission were to refuse, is there something different about the way those things function in practice that would distinguish them for federalism purposes?

MR. MYERS: I don't think there's a different for purposes of the constitutional analysis, Your Honor. We've seen, for instance, in the past that states have rejected applications by power plants, we cite one in our brief where the plant had a particular proposal to comply with a federal plan, and the state rejected that, and that required the plant to go back and come up with a different alternative. So, too, that would be the situation here, and that's perfectly within the confines of the Supreme Court's constitutional law.

I see I've gone over, but if I just may very

quickly address the coercion issue, Your Honor?

JUDGE HENDERSON: All right.

MR. MYERS: As to coercion, that claim fails because states face no financial sanction for opting out of the rule. And Petitioners' alleged need to act to prevent blackouts under a federal plan is refuted by the facts in the record. EPA exhaustively studies reliability in conjunction with agencies such as FERC, included that the rule would not impact the nation's electricity supply, and that conclusion dovetails with the experience in many of our states. One of the approaches that EPA has proposed under a federal plan, a mass-based trading approach, is similar to the one used by the regional greenhouse gas initiative states, power plants in that program have cut CO2 emissions by 40 percent in eight years more stringently and more aggressively than the rule would require without experiencing any reliability problems.

In conclusion, the rule does not commandeer or coerce states, there's no constitutional obstacle to EPA's reasonable regulation of the largest source of pollution causing the most urgent environmental and public health threat we face today. Thank you, Your Honors.

JUDGE HENDERSON: Does Mr. Rivkin have any time?

THE CLERK: No, no time.

ORAL ARGUMENT OF DAVID B. RIVKIN, JR., ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. RIVKIN: Thank you.

JUDGE HENDERSON: Why don't you take two minutes.

MR. RIVKIN: Thank you very much. EPA continues to insist that we're talking about a routine permitting action, and in fact, I heard EPA concede just a few minutes ago that affirmative action would indeed be commandeering. We have multiple affirmative actions, the difference here is that the integration and planning of the affirmative actions that only states that indispensible actors, not the RTOs, not FERC that has limited authority, not the ISOs, only states can carry it out. An apropos of questions asked by both Judge Pillard and Judge Tatel, the fundamental difference between the ADA situation, which EPA mentioned in its briefs, is there you are engaging in permitting actions that are driven consistent with federal law that is a simple application of the supremacy clause. No effort to commandeer you into affirmative action is required. We are talking about affirmative actions, this is what makes CPP different from ADA, and this is what makes it different from this very routine picture portrayed by EPA. Point number one.

Point number two, apropos of timing. EPA recognizes that it takes years to perform those integrative functions, which is why they extended by two years the

initial application date between the proposed and the final rule.

If I may just read just two sentences from a submission by Florida that dramatizes exactly the magnitude of the changes. The proposed emission performance standards set by EPA necessarily required complies in enforcement activities that include changing displaced methodology, efficiency measures, and type of generation to be constructed, et cetera, et cetera. Fuel mix by the way has always been an area of traditional state responsibility. The Federal Government wanted to take it over, we heard many references to *Hodel*, I wish I had more time, but just one quick point, the full, the teaching of *Hodel* is if a state does not wish to regulate consistent with the statute the full regulatory burden would be borne by the Federal Government. Plus, there can be no suggestion that the state would be commandeered. The same point is mentioned in *New York*, that is not what we have here.

And as far as *Mississippi* is concerned, the only reference there in Title II and III of PURPA was to consider, and that was not enough. So, this is fundamentally irreconcilable, if EPA's approach in addition to being unsound as a matter of reputation is to be countenanced with insurmountable constitutional commandeering and coercion problems, and therefore it ought

to be rejected under the cannon of constitutional avoidance. Thank you.

JUDGE HENDERSON: All right. Why don't you take two minutes, Professor.

ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.

ON BEHALF OF THE NON-STATE PETITIONERS

MR. TRIBE: In a decision of several years ago in the District Court by Judge Wilkins it was brought by Kids Against Global Warning, there was an observation that I think is particularly pertinent here, he said ultimately, this case is about the fundamental nature of our government, and our constitutional system, more than it is about emissions, the atmosphere, or the climate. And that's why when Judge Kavanaugh refers to *Bond* and the clear statement requirement that sings to me because I think that's what this case is about.

When the Supreme Court in *Bond*, even though the language was as Justice Scalia pointed out in the dissent hardly ambiguous, said that we are constitutionally obliged to take into account the fact that a law will change the federal/state balance if applied in a given way. He was making a statement that's even more applicable here, there's a reason there are 27 states on the Petitioners' side and 19 on the other, it's not normally the role of the EPA to arbitrate among competing industries, competing states, yet

that is what the interpretation that they are proposing would end up giving the EPA the power to do.

I think in this case a clear statement rule would not be used as it arguably was in *Bond* to rewrite a law, or introduce an ambiguity where there was none, rather, it is being used to avoid serious set of problems. I mean, let's talk --

JUDGE KAVANAUGH: What do you think the limiting principle is to that *Bond* cannon? Because it is something of a new appearance in the *Bond* case, at least as how it was applied, and lots of federal legislation obviously affects the states. So --

MR. TRIBE: Well, it's a matter, perhaps, of the degree, but if you take a case very different from *Bond*, *United States v. Windsor*, there too the idea was that because it's customary for the Federal Government to defer to the states in areas of family law, we look a lot more closely than otherwise. Now, Judge Millett, you asked me what if I do find ambiguity, and presumably you would be finding it with the help of the Senate version. Let's focus --

JUDGE MILLETT: No, I don't think I need the Senate version --

MR. TRIBE: You wouldn't need --

JUDGE MILLETT: -- to find --

MR. TRIBE: -- the Senate version.

JUDGE MILLETT: -- ambiguity.

MR. TRIBE: Well, I think many people would need it when otherwise you have to erase language from the House version. It's really, it's like the legislative, the line item veto that *Clinton v. New York* invalidated, that is if the President cannot decide to excise part of legislation surely the EPA cannot decide to just cross out in order to create ambiguity.

JUDGE MILLETT: I mean, I don't need to return to our statutory arguments from this morning, but the reality is with those three ors there, if you actually read them literally it actually requires coverage here.

MR. TRIBE: I'm sorry, I'm just saying --

JUDGE MILLETT: You know what, I didn't even want to go backwards in time --

JUDGE KAVANAUGH: Yes.

JUDGE MILLETT: -- but I'm just telling you that I don't think you have to, I don't think the excising is not what I'm talking about, the literal construction of that can be read 15 different ways.

MR. TRIBE: But for those who are interested in the Senate version it seems to me we ought to notice that all it is is six characters, four of which are parentheses, it's like six characters in search of a meaning, it doesn't

mean anything, it purports to remove and renumber, very much like the renumbering in Judge Tatel's opinion involved in *American Petroleum Institute* three years ago, it renumbers a section which doesn't exist anymore once the House version is executed. Now, you would really open a Pandora's box if you started saying that a provision which is called a conforming amendment, which occurs 107 pages later, which under the standard practice, not invariable, but overwhelmingly followed, would be disregarded when it was presented to the President for signature, you'd have to go back, you'd be inviting a massive amount of litigation when people go back through the U.S. Code to see where all of these little glitches were. This is, it's not a scrivener's error that's being corrected, it's a scrivener's error that is being relied on, and I think just as in the *American Petroleum Institute* case where this Court said that making too much turn on what looks like a clerical mistakes take a great risk of having the Court's own policy convictions about what's a sensible approach to a problem replace what Congress did. The bottom line for me is that I think under the scheme of government we have a plan like the one Congress almost enacted but didn't, the cap and trade plan, is radically different from trying to shoehorn something that Congress couldn't do into a little used provision that for more than a quarter of a century has been understood

differently from the way the Government now asks you to understand it. I think they are asking you to basically bail out Congress and solve a problem that is beyond the expertise either of the EPA or of the Federal Court. In the concurring opinion in *City of Arlington* --

JUDGE HENDERSON: I heard you say bottom line, so you need to wind it up.

MR. TRIBE: I will. Justice Breyer's concurring opinion in *Arlington* lists criteria for *Chevron* deference, expertise, a long history, and so on, all of them fail to be met here. Thank you.

JUDGE KAVANAUGH: He's the godfather of the majors questions doctrine, actually. 1986 article, right?

MR. TRIBE: Right.

JUDGE KAVANAUGH: It comes from Justice Breyer in a 1986 article.

MR. TRIBE: That's right. Thank you.

JUDGE HENDERSON: All right. Next is the notice issues.

IV. Notice Issues

JUDGE HENDERSON: Mr. Barker. Mr. Barker?

ORAL ARGUMENT OF THOMAS A. LORENZEN, ESQ.

ON BEHALF OF THE PETITIONERS

MR. LORENZEN: Good afternoon, Your Honors, Thomas Lorenzen on behalf of all Petitioners. Mr. Barker from the

State of Texas will handle rebuttal on the notice issue.

Your Honors, I'd like to make two points today, the first is that the chief regulatory requirement of EPA's final rule as EPA itself calls it, the chief regulatory requirement, which are the two uniform nationwide subcategory specific rates, one for coal, one for gas, were never proposed, they were entirely new creatures to the final rule. That is unlawful. Second, time permitting I want to address why Section 307(d)(7)(B)'s reconsideration provisions do not apply to failure of notice.

Let me start with those chief regulatory requirements, which, as I said, at J.A. 304 in the final rule, EPA declares to be the final rule's chief regulatory requirements, the subcategory specific rates for coal and gas. These were never proposed. They not only were never proposed, EPA never sought comment on them as an alternative to the state specific blended rates it was proposing, it never hinted at them, in fact, the only mention by EPA of nationwide uniform subcategory specific rates prior to the final rule was at J.A. 66 in the proposed rule where EPA specifically disclaimed any intent to promulgate such rules here.

Your Honors, there are plenty of cases that are directly on point here, I would point you to, for instance, the *International Union* case and the *Small Refiner* case,

which both say that where EPA makes a proposal and says in the course of that proposal we don't intend to do X, they cannot then finalize a rule that does precisely X unless they then, unless they first propose it and give people a proper chance to provide comment on it. Now, EPA --

JUDGE PILLARD: So, Mr. Lorenzen, your --

MR. LORENZEN: Yes?

JUDGE PILLARD: -- clients did not seek reconsideration of the rule, did they?

MR. LORENZEN: They did. They did seek reconsideration of the rule. There were four petitions for reconsideration filed on the notice issue. Yes.

JUDGE PILLARD: And?

MR. LORENZEN: EPA has sat on those for over a year.

JUDGE PILLARD: And so, you're invoking a futility doctrine?

MR. LORENZEN: Well, I am invoking the futility doctrine, but I do want to explore as well why I think that the Court has actually been misreading 307(d)(7)(B) for quite some time. If you want to approach that issue right now I'd be delighted to dive in, and I think we can start with, you know, there are three cases in 1981, '82, and '83 that show the muddle that the Court was dealing with. Let's start with the *American Petroleum Institute v. Costle* back

in 1981. There the Court was dealing a report that was put into the record one week before the final rule was published or was signed, pardon me, and the API Court said well, you can't raise it right now, you need to raise it in a petition for reconsideration before EPA under 307(d)(7)(B), but is specifically characterized that result as disturbing, that's the precise word it used, but it felt compelled by the language.

JUDGE SRINIVASAN: Can I just ask you to, not to skip ahead too much, but are you, is what you're suggesting that if we applied out decisions before we'd reach a conclusion that you wouldn't like, but because we're sitting as an *en banc* court we shouldn't apply those decisions, is that where you're headed, or --

MR. LORENZEN: I think as an *en banc* court it is time to clarify the law in 307(d)(7)(B), which is a muddle right now. Because let me go to the next decision, which is the *Kennecott* decision in 1982. Now, in *Kennecott* the Petitioners did actually file petitions for reconsideration having obviously read the decision in *API*. But again, it was the same kind of information put into the docket one week before the rule was finalized, and EPA denied the petitions for reconsideration saying you had notice, or we're not concerned about this. And what the Court said in *Kennecott* was that a petition for reconsideration can never

be an adequate substitute for an opportunity to comment on a proposed rule before the rule is finalized, because it is only prior to promulgation of the final rule that that comment can have any hope of influencing the trajectory of the rule. So, it identified that it really makes no sense to read lack of notice as being within the sorts of procedures that are covered by 307(d)(7)(B).

Now, let's go to 1983, the *Small Refiner* decision, which was cited by Counsel for EPA this morning on a different point. In the *Small Refiner* case what the Court was dealing with was, okay, you had a situation actually very similar to here, EPA proposed a standard for lead and gasoline, and they said in the proposal when we finalize our rule we're going to finalize it with sufficient lead time for everybody to comply. When they finalized the rule they actually finalized an interim standard, as well, that applied immediately. And what the Court in *Small Refiner* said is no, you gave no notice of your intent to do that, in fact, you specifically disclaimed it. Interestingly, though, that rule is covered by 307(d) there is no mention of 307(d)(7)(B) reconsideration. Why? Because the Court said there that the sorts of procedures that 307's standard of review is about, remember, you have to show that where you're making an objection to procedure it must be arbitrary and capricious, it must be central to the rule, and so

forth, are the procedures that EPA implements under 307(d). In other words, EPA gives you 30 days for comment, you think you need 60 or 90, you have to petition EPA for reconsideration of that affirmative procedure provided by EPA. If EPA says we'll have a hearing but we won't allow witnesses and you want witnesses you must petition EPA to allow those witnesses.

But what the Court also says in *Small Refiner* is that lack of notice, failure to provide notice is a violation of the Administrative Procedure Act, and something that is a reversible error under the Procedure Act is also a reversible error under Section 307(d)(8), and failure of notice is such a reversible error. Thus, the Court was never, didn't feel it even needed to deal with whether reconsideration procedures under 307(d)(7)(B) apply. Failure of notice is not a procedure, it's the complete absence of procedure. So, that's the first point.

The second point is that I think that if you read 307(d)(7)(B) it makes no sense to apply it to lack of notice. The first sentence of 307(d)(7)(B) says, Your Honors, that only an objection to a rule or procedure which was raised with reasonable specificity during the period for public comment, including any public hearing, may be raised during judicial review. Well, if EPA says you've got 30 days to comment, you can comment, you can object to that

procedure during the period for public comment, but by definition, failure of notice is something you don't know about until the rule is final. You simply cannot know. You cannot predict that EPA will fail to give you notice of something because it hasn't issued a final rule. You only know after the fact when it's too late to avail yourself of this provision.

Second, reading 307(d)(7)(B) this way turns that section, or 307(d) entirely from a revision to the Clean Air Act that was intended to expand upon the protections that are given to commenters and regulated parties under the Clean Air Act beyond those provided in the APA, into something that can be used as a weapon by EPA to shield rules that were never proposed, indeed, it kind of invites that because, you know, the more egregious the violation of 307(d)(3)'s notice requirements, the more thoroughly that rule is protected from judicial review, because according to EPA's theory as it states in its brief, you may not challenge this rule, it is in effect, and it applies to you unless and until you file a petition for reconsideration with us, and maybe someday we rule on it.

Third --

JUDGE ROGERS: What about the notice --

MR. LORENZEN: Yes, Judge Rogers?

JUDGE ROGERS: What about the notice of data

availability?

MR. LORENZEN: Well, the notice of data availability, let's go back to EPA's defenses, they say we had notice, that this is a logical outgrowth somehow of the proposal. The nota to which EPA refers said to the public we're thinking about using regional renewable energy data to inform the state specific blended rates. What is lacking from the nota again is any mention of an idea of establishing subcategory specific rights. Remember that the only mention by EPA of subcategory specific rates in this entire rule-making, until the final rule, was at J.A. 66 of the proposal where they said we're not doing them here. How can anyone comment on what those rates should look like, what methodology EPA ultimately adopted, what the BSER was, what the numbers are when they simply never proposed them and never even proposed a number? Your Honors, this is exactly like the *International Union* case. Now, that's an MSHA case, different statute, MSHA was promulgating air ventilation standards for mines. And MSHA said we're going to promulgate a minimum air velocity standard of 300 feet per minute, but we don't think it's necessary, in fact, we think it would counter-productive to promulgate a maximum air velocity standard, so we're not doing it. And during the public comment period some commenters said you know what, we think you should promulgate a maximum air velocity

standard, as well, and low and behold in the final rule there was a maximum air velocity standard of 500 feet per minute. And what the Court said in *International Union* is uhn-uh, you can't promulgate a rule that you said you weren't going to do, you've got to propose it at some point, you've got to propose how you would do it, you've got to propose a number at least, because EPA itself is required to publish the notice of what it intends, and direct comments towards what it is intending. It cannot bootstrap notice from a comment, as this Court said in *Fertilizer Institute*. What EPA is trying to do here is bootstrap notice from the fact that a few comments said EPA, your state specific blended rates were unlawful, you should consider proposing subcategory specific rates as you've traditionally done. That comment doesn't obligate those commenters then to then spell out for EPA exactly what the subcategory specifically should look like, that's EPA's job.

JUDGE ROGERS: Let me ask you --

MR. LORENZEN: Yes, Judge Rogers?

JUDGE ROGERS: -- under the Clean Air Act there are a number of requirements normally that have to be made to excuse your failure. So, you say none of those apply here for the reasons you suggest, but haven't we held that once you do know what the final rule says then you have to ask EPA to reconsider giving you an opportunity to comment

on the final rule before you come to the court?

MR. LORENZEN: Well, let's talk about what the provision is about. Let's remember that as the Court --

JUDGE ROGERS: No, I want to talk about what this Court has said --

MR. LORENZEN: In *UARG*, and *Mexican* (phonetic sp.), and recent cases, yes.

JUDGE ROGERS: And you say we're all wrong --

MR. LORENZEN: I do.

JUDGE ROGERS: -- of course in the --

MR. LORENZEN: Yes.

JUDGE ROGERS: -- *en banc* we have this authority to overrule, but I just wonder what is the rationale here, now we're sitting *en banc* on a final rule, you've had notice as to what the final rule said, you could have gone back to EPA, I mean, to --

MR. LORENZEN: Yes, to EPA, and in fact, we did --

JUDGE ROGERS: -- and said we didn't get notice and comment, and that's a violation, and EPA might have said we agree, let's set up a notice and comment period on this precise issue. Or it might have disagreed with your position that this was not a logical outgrowth.

MR. LORENZEN: And it would be wonderful, Your Honor, if EPA had done that, because four --

JUDGE ROGERS: Had done what?

MR. LORENZEN: -- four petitions for reconsideration on the notice issue, at a minimum, were filed --

JUDGE ROGERS: And they're pending.

MR. LORENZEN: -- around a year ago, and EPA has sat on them for a year, all the time we are subject to a rule that we never had notice of, we don't know if EPA is going to tell us we get reconsideration or not, but I will tell you that in their brief their first argument --

JUDGE ROGERS: So, your argument, though, is not this is undo agency delay, you're arguing that this Court has for generations misread this provision of the statute. So, I'm wondering aren't you a little premature?

MR. LORENZEN: No, I don't think so, Your Honors. First of all, I think EPA has -- we filed petitions for reconsideration, I think in EPA's brief they argue that, it's their very first argument, we had notice. They've effectively resolved those petitions, they just sit on the petitions for reconsideration in order to argue here --

JUDGE ROGERS: Well, you heard Judge Kavanaugh say, you know, sometimes three years can become 22 years. Here, we're just talking about petitions that were filed a year ago.

MR. LORENZEN: But petitions on a very simple issue, which is did you tell us about the final rule before

you promulgated, or did you not? This is not an issue that requires the exercise of EPA's expertise, and this --

JUDGE MILLETT: Were the petitions for reconsideration filed before or after the petitions were filed here for review?

MR. LORENZEN: Some of them were filed before. Some of them were filed before. I think the earliest --

JUDGE MILLETT: The petitions for review were filed the same day the final rule came down.

MR. LORENZEN: Oh, I'm sorry, you're right. Yes.

JUDGE KAVANAUGH: Before the final rule.

MR. LORENZEN: No, they were filed before because -- good point, Your Honor, and I'll come back to that. No. All right. They were filed after the petition, or the rule was signed, and the rule was signed in August, even though it wasn't published until late October. So, yes, some of them were filed in September, even though petitions for review weren't filed until October 23rd. Now, EPA could have very easily resolved those, as I said, in its brief it argues we had notice, what more does it need to do with those petitions on that point? It has effectively resolved them.

But I want to go back to 307(d)(7)(B) for a moment because I think this is important, not just for this case, but generally for Clean Air Act. 307(d)(7)(B) as the Court

explained in the *API* case is merely the codification of *Al Hato* (phonetic sp.). I don't know if Your Honors all remember *Al Hato v. Trade* (phonetic sp.). *Al Hato v. Trade* was about when can you present late evidence to the Court, because remember, 307(b)(1) says that you can petition for review based on grounds arising solely after the sixtieth day. New evidence arising after the sixtieth day seems to meet that requirement. And what the Court said in *Al Hato*, and *Al Hato* is pre-307(d)(7)(B), of course, it's 1975, is even though the statute says you can bring that to us as a new grounds, we don't really have a record on which to evaluate it because that new evidence that you've got is stuff on which EPA should first opine so that we have a record on which to review that question. So, take it to EPA first, if EPA considers it your problem is solved. If EPA denies your request for reconsideration, or for consideration of that evidence then you can bring that denial to us. What *API* says, what the House Report accompanying 307(d)'s amendments say is that this provision, 307(d)(7)(B) is merely the codification of the rule in *Al Hato*, it is about presentation to the Agency of evidence that you couldn't present during the rule-making because it was impracticable to do so, for instance, let's say EPA gives you 30 days to comment on a rule, but you're doing --

JUDGE HENDERSON: Mr. Lorenzen --

MR. LORENZEN: Yes, Judge Henderson?

JUDGE HENDERSON: -- you're way over your time, so you need to wrap it up.

MR. LORENZEN: I will wrap it up. I will wrap it up. But you couldn't present that information because it either takes too long to develop it, or it didn't exist yet. And what 307(d) said --

JUDGE GRIFFITH: Did you ask us in your briefs to overturn our precedent? Maybe I missed it. I thought you said the precedent didn't apply?

MR. LORENZEN: When we wrote that brief we were before a three-judge panel that has no authority to overturn opinions of prior panels. I am now before you. Thank you, Your Honors. I think, Your Honors, that really concludes my argument, unless you have further questions. The rule should be vacated because the central regulatory requirement of the subcategory specific rates was never proposed, and 307(d)(7)(B) was never intended to act as a bar to claims that EPA simply didn't provide notice of the rule. Thank you, Your Honors.

JUDGE HENDERSON: Mr. Rave.

ORAL ARGUMENT OF NORMAN L. RAVE, JR., ESQ.

ON BEHALF OF THE RESPONDENTS

MR. RAVE: Good afternoon, Your Honors, may it please the Court, Norman Rave for Respondent, EPA. With me

at counsel table are Chloe Coleman (phonetic sp.) from DOJ, and Matthew Marks from EPA's Office of General Counsel.

The Clean Air Act imposes three statutory requirements that Petitioners must meet before this Court can act or can find that the rule is defective for lack of notice. First, the lack of procedure must be arbitrary and capricious. The -- and I'll get to this in a minute, but the Petitioners claims of the difference between the proposed and the final rule are greatly exaggerated, and Petitioners did have adequate notice, and they did have an adequate opportunity for comment. It's important to recognize, Your Honors, that the amount of public participation and comment --

JUDGE GRIFFITH: But why is it your lead argument that there's a petition for reconsideration pending that hasn't been ruled on, and that we have a whole bunch of cases that say end of matter, why isn't that your argument? Am I missing something?

MR. RAVE: Well, Your Honor, I agree that that, that is in fact the case, and we made that case in our brief, and believe that the Court can in fact dismiss this claim on those grounds. I also think that the Court could dismiss the claim on the grounds that they have completely failed to even address the requirement in the Clean Air Act that they must demonstrate that their objection is of

central relevance, and that there is a substantial likelihood that the rule has been, would have been changed.

JUDGE KAVANAUGH: The provision is not jurisdictional then, you agree?

MR. RAVE: It may not be jurisdictional, Your Honor, but it is a prerequisite, and it is a central element of their claim.

JUDGE KAVANAUGH: No, I'm talking about the rule that requires EPA to wait until EPA considers it, that's not jurisdictional?

MR. RAVE: Yes, Your Honor, the Supreme Court has decided that that's not jurisdictional, but it is mandatory. And so, the Agency, the Court in fact can reject their claim, and should reject their claim. And if I -- the Court is precluded from vacating the rule on notice and comment grounds until EPA completes its reconsideration process.

JUDGE GRIFFITH: When will that be?

MR. RAVE: Well, Your Honor, the Agency is working on them, it does not have a specific time frame. The Agency received 38 petitions for reconsideration, many of which raise many, many issues, so there are hundreds and hundreds of issues being raised, most of them they were filed in the fall, some of them up till December. In that same time frame the same personnel who work on this rule have addressed the reconsideration petitions on the new source

rule, they've been heavily involved in this litigation, there was extensive stay briefing, there was the expedited merits briefing, and preparation for oral argument. So, the Agency's count, the Agency is working on them, they're working diligently, but they have not been able to establish a timeline for completing them.

And Your Honor, I think another point that's very important, Mr. Lorenzen asserts that well, it's just a procedural issue, you can just dismiss it, but there is no, the distinction between procedural and substantive is illusory. If you're objecting that you didn't have notice, you have to be objecting that you didn't have to have notice of something, of some specific aspect of the rule that you've objecting to. So, when you're asking the Agency for reconsideration what you're saying is I object to these particular parts of the rule, I wasn't given an opportunity to comment on them, and this is the information that I would have provided you, 307(d)(7) specifically says that that's one of the requirements for the Agency to grant reconsideration is that the Petitioners must show that there was substantial likelihood that the rule would have been different. And I don't believe, as we've argued in our briefs, that they have not presented that evidence, they certainly have not presented that evidence to this Court. The lack of notice they claim is greatly exaggerated, Your

Honors. The Agency did not --

JUDGE KAVANAUGH: There were a lot of switches, I mean, there were a lot of switches, which is to your credit, actually.

MR. RAVE: There are a lot of changes to the rule, Your Honor.

JUDGE KAVANAUGH: And those were touted by the Administrator when the final rule came out, again, to your credit, you listened, but it was significantly different.

MR. RAVE: There are significant differences. But, you know, there is a lot of case law saying that the fact that a rule is different, even if a rule does something completely different --

JUDGE KAVANAUGH: I mean, I agree with you on that. I'm just saying --

MR. RAVE: The Supreme Court, unanimous Supreme Court decision in *Long Island Care*, this Court's decision in *Arizona Public Service*, and I think what the Court said in that case is very apropos here, the proposal raised a highly visible and controversial issue, and elicited responses from both tribal and industry commenter. Furthermore, any reasonable party should have understood that EPA might reach a different conclusion after considering public comments. The Agency --

JUDGE MILLETT: What's your best cite for notice

of the national rates?

MR. RAVE: Your Honor --

JUDGE MILLETT: When they were on notice that national rates were raised?

MR. RAVE: They were on notice that EPA would set a national standard, or a standard that applied uniformly. In fact, the Agency specifically asked for comments, the Agency, the citation that they've given on J.A. 66 is not a statement by the Agency that it's not going to do national rates, it's simply a statement of what it was doing. And in a separate part of the proposal on J.A. 71 the Agency specifically stated that it was considering alternatives to its methodology. The methodology EPA used to establish the proposal was based on small multi-state regions, and what the Agency did was it looked at what the states, whether they had plans, or how much effort they had put into developing renewable energy, and then they applied that rate of increase based on not on what they were capable of doing, but on what they had planned, what was in their regulations to the existing level in each state, and that resulted in a state by state, excuse me, state by state set of rules that EPA expressed as a uniform blended rate.

I should point out, Your Honors, that the final rule also contains as one option for state plans a uniform blended rate that is exactly in form the same thing as what

was in the proposal, it is calculated differently, and the reason EPA changes its approach was that it was inundated with comments objecting to that state by state approach because it gave, it meant that states that had done little or nothing to address CO2 emissions has much less stringent rates than states that had already taken substantial efforts because of the way it was set up, and that created an uneven playing field in the market for electric power. Utilities in states with the more stringent standards would have higher costs, which would disadvantage them in the market for electricity, and would also disadvantage their customers who had to pay higher rates. For instance, this Petitioner, State of Texas' comments at J.A. 1709 to 10 objected very strongly to that. And so, states and utilities objected to the state by state approach, asked the Agency to have rates that were uniform and national, and the Agency then issued the notice of data availability once again asking for comments on an alternative approach. And it said, it pointed out that it had received all of these comments objecting to the unique state by state setting of standards, and saying that it was going to look at instead of effort it was going to look at capacity, and the ability of renewable energy to be developed, and gas plants to be used on a regional basis, and use that to develop the standard. It then received comments on that, and then in fact comments

that clearly demonstrate that the regulated community understood what EPA was doing. For example, the comments at J.A. 2295 from the LG&E and KU, which are Kentucky utilities, recognized that EPA was establishing a standard, calculated it, gave us a, reported a calculated rate, a blended rate standard that had been calculated by the State of Kentucky, which was, and complained that it was going to be too stringent, it was in fact more stringent than what was promulgated, but it, and the Agency received other comments that indicate that the utilities knew what EPA was doing, it knew how it was recalculating them, and that's what the final rule does, it looks at, uses the same building blocks, it takes the same approach, it uses three building blocks instead of four, but as we, I think we've talked about earlier building block four had a number of issues that commenters objected to and they dropped it. But building block one was efficiency, which was looked at on a regional basis; building block two is increased utilization of existing gas combined cycle plants, which was now done on a regional basis, and the region that was chosen was the interconnects, which are the large regions over which electricity moves and are connected, and regulated; and building block three was the amount of developable renewable energy. It based all of those, and it calculated two separate rates, and then it used those two separate rates to

also calculate mass-based goals by each state, which is just a matter of taking each rate and multiplying it by the amount of that generation, and then it calculated a rate-based goal, which is a blended rate for gas plants, and fossil fired, and, excuse me, and steam plants, and those are the, and states can use any one of those three options.

So, it's not that the states, the regulated community knew what EPA was doing in developing a standard. EPA had hundreds and hundreds of meetings with stakeholders, over 600 meetings with stakeholders; it had four public hearings over eight days; there were millions of comments filed; the amount of public opportunity, the amount of outreach by the Agency, the opportunity for stakeholders to comment on the rule was massive. They had the opportunity to comment. And I think the fact that they have not come here in their briefs, even after we raised this issue in our brief, and identified a single piece of factual information, a single piece of data that they could have presented to the Agency but didn't have the opportunity to speaks a lot, it says that they don't have anything, they didn't know what was going on, they don't have any information, there is no reason why the rule would be substantially different. And I think that the Court could rule on that ground because it is a threshold requirement that they have to make. The Court could also, of course, find that they have not met the

reconsideration problem, which is a statutory requirement, it's an exhaustion requirement, it's intended to, as I said much earlier its distinction between procedural and substantive is essentially illusory because they're always late, they're always complaining about something in the rule that you want EPA to get, and that Congress clearly intended, as this Court has recognized, EPA to get the first opportunity to look at whatever information that the Petitioners claim that they didn't get, have an opportunity to present, and make a decision on it. And therefore, I think the Court could rule on that, as well.

JUDGE HENDERSON: All right. Thank you. Mr. Barker.

ORAL ARGUMENT OF JOHN CAMPBELL BARKER, ESQ.

ON BEHALF OF THE PETITIONERS

MR. BARKER: May it please the Court. In defending its unprecedented claim of Executive power to issue a cap and trade system that Congress refused to pass, EPA is wrong in arguing that this Court cannot even resolve whether this rule was issued with proper notice, and it was not. I'd like to first turn to the exhaustion arguments, and then turn to the notice arguments.

To rule for us on exhaustion and consider the merits of our notice and comment claim the Court need not do any more than recognize the reasoning of its earlier *Small*

Refiner case in 1983. We do agree that later decisions in *UARG* and *Mexican* went the other way and interpreted 307(d) to apply to a notice and comment claim, but as early as *Small Refiner* in 1983 the Court walked pretty exhaustively through the legislative history of Section 307(d)(7), and explained, in fact, held there that it should not be interpreted to bar judicial review of a procedural claim that is also claim of procedural error under the APA, such as a fundamental failure of notice and comment. And for all the reasons there this Court, 307(d) is not a bar. If you look at what happened in *UARG* the 307(d) argument there was almost an afterthought, it was addressed at oral argument, and there wasn't any extensive consideration of the legislative history of 307(d)(7), or how it fit together. And the provisions --

JUDGE KAVANAUGH: The *UARG* decision from 2014? Is that what you're talking about?

MR. BARKER: Yes.

JUDGE KAVANAUGH: Our Court? That wasn't an afterthought.

MR. BARKER: No, it was the Court's basis for resolving the notice claims there, but the question there of whether the (d)(7) exhaustion should be applied to procedural issues was not addressed extensively in the briefs, the Court didn't walk through the reasoning of *Small*

Refiner and try to grapple with it. So, all I'm suggesting is that the Court's cases are in conflict.

JUDGE KAVANAUGH: It's a pretty thorough opinion. I didn't write it, just for the record.

MR. BARKER: The overall opinion is thorough --

JUDGE ROGERS: Neither did I.

MR. BARKER: -- but *Small Refiner* is also thorough, and all I'm suggesting is that *Small Refiner* has the better reasoning on this because it does actually grapple with not only the text of 307(d)(7), but its structure, as well as the legislative history, and I'd encourage the Court to look at that as it considers the issue, because 307(d)(7) is not a good fit for notice issues. If the EPA's reading of that was write, then EPA could propose a final rule saying we propose to do not X, and then it could have a final rule that does X, that final rule could be stayed for only three months, that's what (d)(7) provides, and judicial review of that rule would be barred under their reading so long as EPA sat on a petition for reconsideration, as long as it wanted. So, the Agency could without any notice --

JUDGE TATEL: There's always *mandamus*, a lot of people use that.

MR. BARKER: Could you repeat your question?

JUDGE TATEL: I said there's always *mandamus*,

that's what that's for.

MR. BARKER: Perhaps there is, but there's also the futility doctrine --

JUDGE TATEL: What do you mean perhaps? I mean, that's what *mandamus* is for.

MR. BARKER: Well, even if the Court disagrees with us on that argument, our second argument on exhaustion is the futility doctrine, we cite that at page six of our brief, and after EPA has sat on our petition for over a year, but told us in its merits brief here exactly what it thinks of our notice claim, the futility doctrine is triggered, because there is no reasonable chance that EPA --

JUDGE MILLETT: You filed your, when did you file your brief raising this futility argument? It wasn't a year after the petitions for reconsideration were pending, it would have been a few months?

MR. BARKER: The delay is part of our futility argument, but the stronger part of our futility argument is that we know from EPA's merits brief here exactly what it thinks of our notice claim.

JUDGE MILLETT: But when you filed your opening brief you didn't get no, you hadn't yet seen EPA's merits brief, so I'm really trying to figure out what your futility argument is, it can't be that we think their merits brief will answer this, and so we therefore have an argument, and

if they don't, maybe they'll wait a really long time.

MR. BARKER: Well, our lead argument is that 307(d)(7) is not a good fit for this, and as *Small Refiner* held, if procedural error is reversible under the EPA --

JUDGE MILLETT: Not a good fit for this adequate notice problem.

MR. BARKER: If that's rejected as page six of our reply brief we raise the futility argument and point out that the waiting for EPA to rule on the administrative reconsideration petition would be futile. It sat on it for over a year, and we know exact, from its merits brief here exactly what it thinks. There is no reasonable chance it's going to reach a different conclusion, so the Court should reach the merits of our notice and comment claim here, and the final rule was not issued with proper notice because EPA specifically said that it was not proposing a subcategory specific emission rate, but instead was proposing source specific rates.

JUDGE PILLARD: But Mr. Barker what about the part of our test where you're supposed to show a substantial likelihood that the rule would come out differently? I haven't heard anything from either of you on that.

MR. BARKER: Right, the prejudice prong. And in *Small Refiner* the Court held that if procedural error is reversible under the APA it's also reversible under

307(d)(7), so we think that those two elements are really just one prejudiced prong that is the same as the EPA's prejudice test. And as the Court knows, we don't have to convincingly show that EPA would have reached a different result.

JUDGE PILLARD: But I just want to hear the substance of it, because we've heard from the EPA that they've had millions of comments, they've had hundreds of meetings, that this, you know, a lot of what they did that's different is stuff that was proposed by industry, and so, you know, can you give us your counterpoint to that?

MR. BARKER: The high level picture on this is that regulating a state's energy grid is an intricately detailed process, and that we need notice of, with some specificity what EPA is proposing to do. And I think this is captured at J.A. 1706, which is a comment by the Texas Commission on Environmental Quality, where it was perhaps a bit prescient in thinking ahead to the notice and comment issue and said if the EPA intends to deviate substantially from the state goals included in the proposed rule, then the EPA should withdraw and re-propose the rule to allow states and other affected parties adequate opportunity to provide meaningful comment, and the rest of that comment explains why.

JUDGE PILLARD: But can you point to specific

things you would have, or categories, or types of things that you would have liked to be able to say to them about what they've done that you were unable to say to them?

MR. BARKER: First of all, there was no number for subcategory specific rules, 1305 for coal plants, 771, I guess, there was no number at all, so this is not a case where it was just a binary decision.

JUDGE PILLARD: So, you would have said to them we don't want that number?

MR. BARKER: Some Petitioners would have explained why that was too high, for example, the State of Wyoming under the proposed rule it could largely go on with how it was doing things with some adjustments because it didn't have a lot of potential for new energy, but under the final rule it got much stricter. And EPA acknowledges at page J.A. 224 that the rates got much stricter for many of the Petitioner states. But even apart from that there's just a question of, and you're going to hear in a little bit in the record based argument about some of the flaws in EPA's methodology in a final rule, some of the assumptions it makes aren't well founded. The record as it exists now shows that that is reversible error, but if that had been issued in the proposed rule we would have had even more opportunity to put on affirmative evidence, Now, of course, it's EPA's burden to show adequate demonstration, and that's

all going to be addressed in the next part of the argument, but those are the sorts of issues.

JUDGE PILLARD: Yes, but that's helpful. That's responsive to what I was asking.

MR. BARKER: Right. And then my final point on notice and comment is that it is usual and normal for an agency when it realizes that the approach in this proposed rule is not going to work to republish the rule, that is what EPA did here with the new source rule, it originally had a new source rule proposing a statewide goal, much like the proposed rule here, but then when it decided to switch it republished its rule, that's all that we're asking be done here.

JUDGE HENDERSON: All right. Thank you. So, we've come to the last issues, which are the record-based issues.

V. Record-Based Issues Not Submitted on Briefs (Petitioners' Opening Brief, II, IV. C-D, V, A, D)

JUDGE HENDERSON: Good afternoon.

ORAL ARGUMENT OF WILLIAM BROWNELL, ESQ.

ON BEHALF OF THE NON-STATE PETITIONERS

MR. BROWNELL: Judge Henderson, may it please the Court, William Brownell on behalf of the Non-State Petitioners.

Let me take just a minute to explain how my

colleague from Wisconsin, Mr. Tseytlin, and I are going to handle the argument. In this last portion of the argument today we're going to focus on EPA's failure to satisfy its statutory burden to show that even if it's generation shifting system can ever be used under Section 111(d) that system must be demonstrated to work in the real world in all of the states to assure that the national performance rates, and electric demand can be met. I'm going to begin with a brief explanation of the rule, and then focus on why this demonstration cannot be based on national performance rates that are derived from projections of total region-wide building block capacity.

My colleague will then explain why the extreme reductions in coal fired energy that are derived from the regional analysis cannot be met by many states in the regions, as the statute requires, and also, he's going to address the practical problems that result for states from EPA's heavy reliance on a shift to renewable energy.

Now, because this was discussed this morning no individual unit can achieve these national performance rates with any emission control system that can be applied at the unit. EPA created a system of emission reduction that is based on what is called in the rule emission rate credits that are derived from a vast expansion in alternative generating capacity across three vast geographic regions.

In the case of the eastern region, for example, this region includes all or part of 38 states that vary greatly in their renewable energy capacity. The rule establishes a formula that appears at Joint Appendix 490 at 60.5790(c) of the rule, but this formula must be used by existing fossil units to calculate compliance with the national performance rates. Under the rule each existing fossil unit must hold enough emission rate credits to calculate a fictional, or what EPA calls an effective average megawatt hour rate that's equivalent to the national performance rates. Now, these emission rate credits are the only best system of emission reduction based compliance method that's available to fossil units to calculate compliance. So, as a result, a shortfall of available emission rate credits is going to prevent fossil units from generating the megawatt hours that they're being relied upon to supply, and a shortfall in emission rate credits is also going to reflect a shortfall in replacement generation which then increases the need for fossil megawatt hours that cannot be supplied due to a lack of ERCs, or emission rate credits.

For three reasons, the rule's requirement of what is in effect a megawatt hour by megawatt hour authorization to operate each fossil unit based on regional projections of as of yet to be constructed alternative generation to provide both emission rate credits, and to meet electric

demand has not been demonstrated, nor shown to be achievable. First, this system to create the emission rate credits that fossil units must have in order to operate does not exist now. To meet the rates this regional system requires across each of --

JUDGE KAVANAUGH: For purposes of this argument we're assuming arguendo that EPA has legal authority.

MR. BROWNELL: Absolutely, Your Honor.

JUDGE KAVANAUGH: So, of course it hasn't happened yet, I mean, how could we, I'm trying to figure out how we could say what you're talking about. I guess I'm trying to understand the nature of your argument, what would we be saying, it's arbitrary and capricious?

MR. BROWNELL: Okay. The first point goes to whether the system is demonstrated, Your Honor. And under the case law of this Court to be demonstrated a system has to be something that's more than speculative, or experimental, or theoretical, there has to be actual historical experience.

JUDGE KAVANAUGH: Well, and on that don't they have the practice that's gone on first with other programs which are similar, but not identical, obviously, and then state efforts, they're relying on those, as well. And I agree, it's not all a perfect fit, but this is the idea of administrative practice is to come up with a program that

hasn't been used before, but that doesn't mean it's not adequately demonstrated, necessarily, does it? If they're relying on --

MR. BROWNELL: Your Honor, if I can --

JUDGE KAVANAUGH: -- similar proven programs?

MR. BROWNELL: If I can break that down into two points, because it really covers the first point I want to make about whether this system of replacement generation to create emission rate credits is demonstrated; and the second point about whether regardless of that whether the rates are achievable with that system.

On the first point I'd start by analogizing to what went on in this Court's *Sierra Club* decision with SO2 scrubbers. In that case the Court found that SO2 scrubber, they were out there, they existed, there was a database, and the Court said you can project based on that system that's demonstrated that the system can achieve a higher level of reduction in the future. But what the Court did not say, and could not have said is that if scrubbers do not then exist it could not have said that they were demonstrated based on a prediction that they would develop at some point in the future. And that's what we have here with this system, EPA says in the record at Joint Appendix 222 that the location of generating resources and loads matter, first, and second, at Joint Appendix 3895 that local

reliability conditions are critical to the functioning of the system. Therefore, they say at that page, as well, that there's no, that any reliable analysis of electric reliability cannot be undertaken until the rule is implemented when we know what the system looks like, because you need to know where the generating resources are located. Recall we're talking about a vast region, all or part of 38 states, you don't know where the generating resources are located, you don't know where the infrastructure is required, you don't know what the flow of ERCs, emission rate credits or megawatt hours looks like, and as a result EPA says at the 3895 that a realistic assessment of reliability is not possible yet. This system does not exist now, has to be developed in the future, system that must be created for the future, and that can't even be realistically assessed now is not a system that's demonstrated under this Court's case law. It's theoretical.

JUDGE KAVANAUGH: But this language, the statutory language here which the Administrator determines has been adequately demonstrated, that which the Administrator determines, this give you extra boost at deference, this seems the classic example of a situation where of course they're making predictive judgments about the future, and those will be, turn out, some of them will turn out to be not true, that's how it works when you're doing things like

this. But does that mean, and how would you do the first time you were trying something would that always be not adequately demonstrated.

MR. BROWNELL: Let me answer that in this way, Your Honor, that EPA's demonstration here never goes beyond projections of total region-wide building block capacity, so they look at building block one, two, and three, and say across this vast eastern region this is what we project for building block two, this is what we project for building block three, the disconnect comes that they never take it down from this vast regional projection of total building block capacity to what this system actually looks like, where do the generation resources go, where do the loads go, what do the flows of electricity look like? Without that you can't really assess adequacy, reliability --

JUDGE PILLARD: Why not?

MR. BROWNELL: -- or availability of emission rate credits.

JUDGE PILLARD: Why not?

MR. BROWNELL: Because if you don't know, Your Honor, where the generating resources are located --

JUDGE PILLARD: Your argument --

MR. BROWNELL: -- you don't know where the infrastructure goes, you can't assess what the impacts are going to be, what the perimetering difficulties are going to

be, what the electricity flows are going to have to be from those renewable rich areas to the fossil areas that is going to be critical both to meet the rates for ERCs --

JUDGE PILLARD: I don't, I'm not sure that I'm following your point. You don't have to control which kind of energy comes into your jurisdiction, do you?

MR. BROWNELL: Absolutely you do, Your Honor.

JUDGE PILLARD: This goes onto the grid.

MR. BROWNELL: Absolutely you do, and that's my point that because the only way a fossil unit can comply under this compliance formula at Joint Appendix 430, you need emission rate credits. We know, and you will hear more from my --

JUDGE PILLARD: Those don't have to be for units in your state, do they?

MR. BROWNELL: No, they don't have to be for units in your state, and that's where the problem comes in because there are many states that do not have the in-state building block capacity, and that's one of the big changes from the proposal to the final rule. A state like Kentucky, for example, EPA assessed in the proposed rule in-state building block capacity and came up with a state goal of 1935 pounds per megawatt hour for Kentucky. When they went to this region-wide approach in the final rule they changed that to the national performance rate of 1305. The only way a state

like Kentucky and many other states that are rich in fossil resources can make up for that is to acquire emission rate credits from areas that are rich in renewable capacity.

JUDGE PILLARD: They didn't pull this out of thin air, this is a situation where they studied for some time trends that had already been happening within the industry, and then projected forward based on existing trends. Now, I know there's debates about those types of things, but this isn't just sitting back and speculating, this was, we did a, you know, we looked at this for a period of time, here's what's going on in the industry, I haven't heard you, anyone dispute that in fact these generating shifting, and the capacity to switch to gas, and all of these things are going on out there, it's just they projected forward, and people are fighting about the lines they drew and the projections they made. Does that matter?

MR. BROWNELL: Your Honor, if I can respond to that. The generating shifting that's been going on is that the balancing authority area, the sub-regional area, and it's designed to ensure the least cost supply of electricity to consumers in that sub-regional area. What EPA is talking about in this generating shifting, or generation replacement, or emission rate credit creation system is something that is entirely different in terms of magnitude, and character. Not one emission rate credit is created by

any of the existing generation shifting, as EPA characterizes it. What they are projecting --

JUDGE KAVANAUGH: One of the thoughts, thinking about *EME Homer* is is this the right time to consider something like this, because you're raising points that I think are hard to know whether they're going to prove out to be true or not in the future, but *EME Homer* suggests as-applied challenges to particular problems could happen in the future, as opposed to vacating the entire rule based on something like this.

MR. BROWNELL: Yes, Your Honor, in contrast to *EME Homer*, which dealt with EPA's decision to disapprove specific state implementation plans, and issue federal implementation plans for those states, once the Supreme Court clarified what the law was that applied to those determinations with respect to state specific plans, they then directed that those plans be reviewed and evaluated in accordance with that law. We're dealing here with the national performance standard --

JUDGE TATEL: Mr. Brownell --

MR. BROWNELL: -- which either rises or falls based on the demonstration and achievability.

JUDGE TATEL: -- this morning we heard from Intervenors on the side of EPA, intervening power companies that the generation shifting that EPA is talking about is, I

think he called it business as usual, he said this is the way the grid works now, that it is a generating shifting machine, and because of the way it works with constrain least cost dispatch that, that the economic system and the way the grid worked is in the process of shifting already from more expensive, higher emission fuels to lower cost renewable fuels, and they said that's the way they do their business, now, is that all wrong?

MR. BROWNELL: Your Honor, it's perhaps right with respect to the states, where they're located, there are states on both sides of this case, and there are states that are rich in renewable resources, and there are states that are rich in fossil resources, and we have a national performance that requires for those states that cannot meet the national performance rates, or for states with sources that cannot meet national performance rates to go out --

JUDGE TATEL: Which states --

MR. BROWNELL: -- and do something different that has never been done before.

JUDGE TATEL: -- can't meet it? Do we know?

MR. BROWNELL: Fossil rich states, such as Kentucky, and Montana, and Wyoming, and North Dakota. And I think there are about 18 or 19 states in all that had at the time of proposal when EPA focused on what is in-state building block capacity, emission rates that are higher than

the national performance rates that came out in the final rule.

The second point I wanted to make in response to Judge Kavanaugh's earlier question --

JUDGE ROGERS: Yes, but what I'm trying to understand is EPA had this data over a decade of what was it, 884 coal steam plants, which account for 96 percent of the carbon dioxide emissions from such plants nationwide. And so, it took that data and did all kinds of scientific and analytical things, and expert things, and so, it looked at what was going on. It's not as though, as Judge Millett says, it just came up with this sort of out of thin air. And then when it finally got all these figures together it chose the lowest, and I don't understand why Judge Kavanaugh's point isn't correct here? It's simply too early in the game to address these very state-specific objections since EPA has yet to receive the state proposed plans to see what might be required, and what's doable and not doable, and that's a whole negotiation that will start at the state, and then, as we heard, and then come to EPA. And so, unless EPA was totally arbitrary and capricious in using this as a data source to identify the best system for emissions reduction based on what was going on, and the statutory factors, aren't your arguments foreclosed at this point?

MR. BROWNELL: No, Your Honor, I don't believe so,

and let me make one point in response to that, and then I'll come back to my second point. That EPA did make these national and regional projections based on all of the data you talk about regarding building block capacity. So, they projected that with respect to renewable energy, renewable energy would develop to provide the needed power and emission rate credits --

JUDGE ROGERS: And develop.

MR. BROWNELL: -- at a rate, at the maximum rate for the maximum year it had ever developed in the past, and that rate would be applied going forward year after year. They assumed that every gas fired unit could increase its operations to 75 percent capacity factor, even though historically only 15 percent could operate at that level, and they assumed that every coal fired steam generating unit could operate at its highest historic efficiency, even though that had not been attained on a sustained basis by any unit in the past. That was all to come up with region-wide capacity numbers which doesn't answer the question that needs to be answered for the states that need to implement this. Is that, that doesn't, that projection of total region-wide capacity doesn't tell you what each state can do with respect to its units, its in-state capacity, and that brings me to the second point. The rule for compliance for those states that lack in-state building block capacity

depends on the availability of an interstate system for acquisition and transfer of emission rate credits. A system, basing the system on regional averages works on if alternative generation anywhere in the region is available to all of the individual units in the region. But EPA's rule provides no program that is going to make emission rate credits transferable to and available in each state. Rather, and this comes to Judge Rogers' points about the state plans, it provides a whole range of mutually exclusive state plan options derived from the national rates, each subject to different programmatic requirements and potentially different state requirements. Collectively, these programs assure that there is going to be no uniform interstate method to acquire and to transfer emission rate credits. And EPA recognizes that these multiple options cannot be relied upon to establish that its system is demonstrated to assure a reliable supply of electricity in each state.

JUDGE MILLETT: How would you get to, get through building block one, you get to building block two, and then it turns out that things are not materializing as anticipated, states plans can't work, or the federal plan if that's what's being used just isn't working, is there not a mechanism, almost to get Judge Kavanaugh's ripeness point, if that's what I can label it, is there no mechanism under

the rule for state, I thought there was a mechanism in which you could go to the EPA and say this isn't working and we can revisit it then. It just seems a little hard now to predict that they're wrong about the trends. You're not injured yet, you can fix this if and when you get to that point, can you not go to the EPA and then re-jigger it then?

MR. BROWNELL: Your Honor, the point is that we are injured now, EPA is promulgating a rule that companies must comply with --

JUDGE MILLETT: I don't mean in any Article III sense or anything like that, I'm really just talking about, you know, we don't know what's not going to be there until we get somewhat closer in time and see what happens through the other building blocks. So, isn't it better to wait and deal with, you know, the processes that are available to go back to an agency at the time when it's pretty clear it's not going to work and deal with it then, and if they don't deal with it then come back to the Court and say look, this is not working, their projections were wrong and they will not be flexible about this, or work with us on this.

MR. BROWNELL: It would be nice if we did not have any compliance options, obligations in the interim and could come back and have the Agency fix problems. With respect to your comment, it recognizes at 407 of the Joint Appendix that there's no reasonable certainty right now regarding

implementation of any planning measure at any location, so we don't have any reasonable certainty regarding what is going to develop with respect to trading, with respect to generating capacity, and that is a problem under a statutory provision that requires EPA to demonstrate that it, that established that its system is demonstrated, and that its national rights that impose compliance obligations are achievable with that system.

My third point is that in response to comments on achievability problems with the rates, EPA repeatedly asserts throughout the rule that well, the rule is achievable because it's flexible. The Agency's obligation is to establish that the rates can be met, and electricity demand can be met with its best system of emission reduction. The flexibility mechanisms include, first, measures that are not a Section 111 best system of emission reduction by EPA's own admission, demand side energy efficiency, for example. Second, measures that restrict the regional availability of the emission rate credits on which the system depends, that's the multiple states plan options. Third, measures that do not provide generating shifting, even EPA agrees that electricity does not flow freely between interconnects, yet their whole headroom analysis is based on investing, relying on renewable energy, and other interconnects. And finally, it's based on measures that do

not even yet exist, and I'm thinking of the clean energy incentive program that's still out for public comment. So, anytime EPA says flexibility it's merely highlighting that its generating shifting system is not demonstrated now.

JUDGE HENDERSON: All right. Let me let your colleague have some time.

MR. BROWNELL: Okay.

JUDGE HENDERSON: Thank you.

MR. BROWNELL: Thank you, Your Honor.

ORAL ARGUMENT OF MISHA TSEYTLIN, ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. TSEYTLIN: Thank you, Your Honor. Misha Tseytlin on behalf of State Petitioners. I'd like to make two points, one is about the unachievability of the state goals, and second is about renewable energy.

But before I do that I'd like to address the questions from Judge Kavanaugh and Judge Millett, because they I think rest upon an incorrect assumption of what we are trying to decide here with regard to the record-based issues. This is from this Court's decision in *National Lime Association*. At this point we need to determine whether EPA has affirmatively shown that the rates that it set, the 1305, 771 are going to be achievable under the, quote, most adverse circumstances which can reasonably be expected. That decision has to be made now, not an as-applied basis

later. That is unquestionably the question before the Court.

Now, with regard to the unachievability of the state rates, there is only two propositions this Court needs to accept --

JUDGE KAVANAUGH: Is it the, and this blends into the statutory authority argument, they're not going to be achievable by certain plants, you're talking about achievable by, in the states as a whole, for the whole system, or what are you exactly talking about?

MR. TSEYTLIN: There's two potential statutory arguments with regard to achievability, one would be with the, with utilities, and that's not the argument that I'm making.

JUDGE KAVANAUGH: Right.

MR. TSEYTLIN: My making the argument is that the state goals that EPA set they blended 1305, 77 rate, those numbers are not achievable by the states. And the test again is EPA must affirmatively show now --

JUDGE KAVANAUGH: How do we know that? How do we know they're not going to be achievable?

MR. TSEYTLIN: Well, Your Honor, if I could I'll walk through my analysis, it involves two steps, and it's ultimately pretty simple. There needs to be two propositions the Court would accept for the rule to be

vacated on this basis and this basis alone now, first, that EPA has not affirmatively shown that many states can meet these national blended rates within their own borders, that's proposition one. Proposition two, that EPA has not affirmatively shown that there will be sufficient intrastate measures for these short fall states to achieve these rates.

Now, let me talk about the first part, this point should really be indisputed, and undisputable, and I'd like to illustrated the scope of this problem by turning the Court's attention to J.A. 27, 2878, which is the, one of the charts that I submitted in my letter yesterday, and I'll kind of walk through one state example to show the scope of this problem. Now, at the proposal stage EPA told the world what it thinks each state could obtain from each building block within its own borders. This chart that I submitted yesterday and it's the J.A., that is those numbers. The reason this chart is so important for purposes of this discussion --

JUDGE ROGERS: This chart?

MR. TSEYTLIN: Yes, that's correct. The reason this chart is so important for purposes of this discussion is this is EPA's latest word on what the states could do within their own borders on a block by block basis, but I will just caution the Court that this chart grossly understates the real problem for the states because at the

proposal stage EPA was giving states credit for existing renewable energy, which they don't get. But in any event, the problem will be illustrated by just taking the chart's understated problem at their word. And in order for illustration I'd like the Court to please look at the Montana numbers. Now, with regard to Montana, the third number there is 2114 --

JUDGE SRINIVASAN: So, just as a framing question, is this part of your argument? Are you arguing that EPA cannot look beyond a state's borders?

MR. TSEYTLIN: No, Your Honor. As I mentioned at the beginning, I have two parts to my argument, one is it's not achievable within the state's borders; two, once I establish that that there's, EPA has not provided that the shortfall, which you will see is extremely --

JUDGE SRINIVASAN: So, this is just a factual predicate, it's not a legal point, it's a factual.

MR. TSEYTLIN: So, they're both necessary legal points for me to prevail. And I guess it's factual, too. They're both factual points for me to prevail, so I would have to establish both.

So, the first number I'd like to point to is the third number in the Montana chart, which is 2114, that's what EPA set at the proposal stage Montana could obtain just from block one. The next number I'd like you to look at is

the very next number in the chart, 2114, again, that is what EPA is saying Montana can achieve from blocks one and blocks two. Now, the reason those numbers are exactly the same is that block two relies on increase in natural gas capacity usage. Montana has no natural gas capacity, so it can't get anything from block two within its borders. Now, the third number, and this is the critical number, is 1936, that is what EPA told the world Montana could achieve by applying blocks one, block two, and block three within its borders. Now, with regard to that number, when we go to the final rule, Montana's goal is 1305, that is 600 more reduction, 600 more pounds per megawatt hour, that is an incredibly big gap. To be absolutely clear, there is no way, there is no way Montana can make up that gap by resources within its own borders. And the easiest way to understand that is that 1305 number involves Montana achieving a national average from natural gas, from block two, Montana has no natural gas, it can't possibly achieve that 1305 numbers, and that's just the tip of the iceberg. States from North Dakota, West Virginia, Wyoming, Wisconsin, my home state, Kentucky, Indiana all have similar problems, there's not enough time to talk about those states now, but if the Court wants to see the scope of the problem just please compare line F, column F from this chart that I talked about, with the other chart that I inserted into my letter, which is J.A. 442,

you'll see the massive scope of this problem.

Now, before I move on from this chart I'd like to make one more point. The Court will notice in column F, which is the 123 block column, there's a lot of, a couple of states with really no numbers, states like California, Washington, Massachusetts, New York, those are the states --

JUDGE ROGERS: Could I just ask you, I'm looking at your chart and I don't --

MR. TSEYTLIN: Yes.

JUDGE ROGERS: -- see the 1305 number for Montana.

MR. TSEYTLIN: Your Honor, the chart --

JUDGE ROGERS: Is that on, it's on the first page effected EGU, the interim rate and the final rate, is that Montana?

MR. TSEYTLIN: Yes, Your Honor. If you look at the Montana number for the final rate it's 1305.

JUDGE ROGERS: Okay.

MR. TSEYTLIN: So, last what I'd like to make before moving on from the chart that I've been discussing is you'll see some states with low numbers, California, Massachusetts, New York, et cetera, those are the states that by their word can over-comply. So, what do we have here? We have a bunch of states, Montana, Wyoming, Wisconsin, Kentucky, that can't possibly comply within their borders; then you have a bunch of other states,

Massachusetts, California, New York, Washington that can over-comply. And now, the other part of my presentation, Judge Srinivasan, EPA has failed to affirmatively show that its only answer to this problem, the interstate imbalance, will occur in the, quote, most adverse circumstances that can reasonably be expected. EPA has not mandated interstate trading or cooperation, indeed, it specifically said at J.A. 147 that, quote, each state can do it on its own. That means that the states that can easily over-comply, California, Massachusetts, New York, Washington, retain the authority to lock out Montana, Kentucky, North Dakota, West Virginia, who need their credits and cooperation to comply. That lock out scenario is the most adverse circumstances which can reasonably be expected, and there is no way those states can beat those rates under that most adverse circumstances. And it's not even --

JUDGE ROGERS: Any evidence of that? This is a regional system where the grid is, you know, a single entity, as it were, it's not a state by state matter.

MR. TSEYTLIN: Your Honor --

JUDGE ROGERS: The states cooperate in so many different ways.

MR. TSEYTLIN: Your Honor, with respect, state compliance is a state by state matter, and state --

JUDGE ROGERS: So, you're saying there's no way

Montana can comply if the surrounding states, as I understood your point, block them --

MR. TSEYTLIN: Yes, and we have --

MR. TSEYTLIN: -- from getting natural gas?

MR. TSEYTLIN: No, no. Your Honor, that's, it's not blocking, it's a very important point, to kind of correct something Judge Pillard said earlier.

JUDGE ROGERS: Credit.

MR. TSEYTLIN: For getting the credits, because you can get the gas without getting the credits, and the most adverse scenario is exactly this lock out scenario. We have the most compelling possible --

JUDGE TATEL: Is there any reason to believe that the over-complying states won't cooperate?

MR. TSEYTLIN: There is, Judge Tatel, there is every reason to believe that.

JUDGE TATEL: Well, would you -- what is the reason?

MR. TSEYTLIN: There is every reason to believe that --

JUDGE TATEL: Why would they not cooperate?

MR. TSEYTLIN: California law, the biggest state, sixth largest economy of the world, the world, one of the world leaders in renewable energy, their state law by their own admission they will not link with Montana or any other

state except if Montana surrenders authority to California, and sets rules that are significantly more stringent than the clean power plan requires. This is not just the most adverse circumstance possible, this is a likely scenario. I will note that California in its letter to the Court yesterday did not disclaim it's state law, it just said we'll link to a state if --

JUDGE TATEL: So, if Montana agreed to that could it then meet its emission goals?

MR. TSEYTLIN: Sorry?

JUDGE TATEL: I said if Montana agreed to California's conditions could it then meet its performance, its standards?

MR. TSEYTLIN: Right, Your Honor, I don't take EPA to be arguing that it is constitutional or legal for it to put Montana or the following choice, either be governed by a federal plan, or surrender their sovereignty to California by over-complying with the rule. That cannot possibly be the regime.

JUDGE ROGERS: You see what I'm getting at --

JUDGE SRINIVASAN: So, even if we take this -- go ahead.

JUDGE ROGERS: -- we have this letter from the Attorney General of California that says you're misrepresenting the California situation. Now, I don't want

to get into the issues because all of this stuff is coming to us sort of after the fact, but are we going to get into this fight now when at least even the data you're submitting to us says this is an unlikely worst case scenario?

MR. TSEYTLIN: Your Honor, as I said at the beginning of my presentation, the legal standard now is whether EPA has affirmatively shown that this will be, which will be by the states in the most adverse circumstances which can reasonably be expected. The only way this Court can uphold the rule here is to determine that the very thing that California told you is likely to happen in that state statute, and in that letter, that letter, Your Honor, I would ask the Court to read it very carefully, it does not say California will waive its state law that prohibits it from linking to any other state that doesn't establish a regime as stringent as California.

JUDGE ROGERS: With all due respect, Counsel, this doesn't say quite what you say. So, if this is the type of evidence that EPA had before it why couldn't it proceed?

MR. TSEYTLIN: Your Honor, this is very important, it is EPA's burden, not our burden, EPA's burden to affirmatively show that the --

JUDGE ROGERS: California says our proposal explicitly anticipates multi-state trading --

MR. TSEYTLIN: Yes.

JUDGE ROGERS: -- consistent with California's long-standing support from multi-state collaboration to reduce emissions, et cetera, et cetera.

MR. TSEYTLIN: Your Honor, I don't have --

JUDGE ROGERS: So, my point is if this is what the record is before the Agency, why hasn't it met its burden?

MR. TSEYTLIN: Your Honor, if you --

JUDGE ROGERS: You're positing things that seem to be outside the record.

MR. TSEYTLIN: No. Well, Your Honor --

JUDGE ROGERS: Yes?

MR. TSEYTLIN: -- if you read on in that letter, California then references its own state law, and its state, and this is completely, completely undisputed, its state law says we will not link with another state unless the other state rations off its program to as stringent as ours, which is indisputably more stringent than the clean power plan.

JUDGE SRINIVASAN: Can I just ask this question? Let's just assume for present purposes that we get passed all the threshold issues and we actually focus on this question, notwithstanding what Judge Rogers raised. If California has its provision and it works in the way that you posit that it works, it's not true that California wouldn't give credits to any state, right? There's at least some states to whom California would give credits?

MR. TSEYTLIN: Well, Your Honor, and those states can comply with the rule.

JUDGE SRINIVASAN: And then can those states then turn around and give them to a third state?

MR. TSEYTLIN: No, Your Honor, in order to get a credit from California, Montana has to enter into an agreement with California, that's the only way that works.

JUDGE SRINIVASAN: No, but I mean if there's some other state that enters into an agreement with California and therefore gets a credit, I don't, this is just a factual question, I don't know the answer to this, if some other state enters into an arrangement with California and gets a credit, and then that other state doesn't have the same rule that California does, is there then a secondary market for the credits?

MR. TSEYTLIN: No, Your Honor, once the two states enter an agreement they're treated like a pool. So, they can't work with another state unless both states now agree with the third state. And so, and then this is another point, and this is, goes to EPA's burden to affirmatively show, if California withdraws, just with California, and that's very likely to happen, but it's probably going to happen with some other states, as well, if that happens all of EPA's numbers break. The whole point of the national average rate, especially on the renewables, is based on what

happened in the whole nation in certain years between 2010 and 2014. Once California is removed from that assumption all of the numbers that EPA, and all of the insufficient modeling it did completely, completely falls apart.

Now, I would like to move on to my second point about renewable energy. Even if EPA could set its national rates at rates that some states could not possibly achieve, then the rates that it set, 1305, 771, are not achievable by just the three building blocks, and I would like to focus on renewable energy and the specific wind energy, and the reason that this is so important is renewable energy is the biggest building block, and wind energy is the majority of that building block. How did EPA get its wind number? What it did is it took one year, 2012, which is a year what everyone agrees that the amount of wind energy increase was astronomically spiked by the expiration of a massive federal tax credit. And what EPA did is they took that year and they said that expanded year is going to happen for seven straight years, year over year. Now, what's amazing about this is if the Court looks at that year there was a huge amount of wind growth, the very next year the wind growth was one-thirteenth, let me repeat that again, one-thirteenth of what happened in 2012. We were given assurances earlier that the reason this is not an unbounded is because there's all these other important constraints on EPA, including

showing it achievability. If EPA can take a year where the very next year was one-thirteenth the rate, and project that completely unsustainable year for seven straight years, there is no way this does anything but become completely unbounded. And I would also like to point out that EPA's wind number is not the product of any modeling, it's not the product of any reasoned analysis, and it's not the product of any economic analysis. EPA just kind of picked this number. It could have just as easily discounted the obvious outlier year, which was 2012, and EPA failed to demonstrate this entirely unrealistic wind number will provide a reliable supply of energy.

Now, the biggest single challenge with adding a huge amount of wind to your power grid is that wind is not controllable, the wind blows when it blows, and that energy must be consumed at that time, which means that if it's not windy on a hot summer day in Texas you're not going to get much wind energy, and you've got to ramp up your natural gas capacity all the way up in order to fill that gap. That is undisputed. And this is a striking point that I really didn't understand until I began preparing for this argument, EPA never modeled any situation where wind is that high, and also, natural gas is running at the rate that's required under block two. EPA never did that analysis because those numbers don't work. What EPA did in its modeling was that

it took just wind at that level, and it let anything happen with natural gas that it wanted to happen, and of course, at that point natural gas was running at only 48 and then it was able to ramp up. But EPA has never shown a model which achieves wind at that incredibly high rate, but also has natural gas at the block two level. That is a fatal defect in the rule, and that's not a technical judgment, that's just an error in fact. Thank you, Your Honors.

JUDGE HENDERSON: All right. Mr. Lynk.

ORAL ARGUMENT OF BRIAN LYNK, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. LYNK: Good afternoon, Your Honors, my name is Brian Lynk from the Department of Justice representing EPA. Let me briefly explain how I'm dividing this segment with my colleague, Mr. Rave. I'm prepared to address record issues concerning the determination that the building blocks are the best system, achievability of rates, and costs; Mr. Rave will address reliability and transmission adequacy, trading issues, and specific state objections not submitted on the briefs.

In this case EPA made the reasonable determination that the best system of emission reduction of carbon emissions from power plants consists of measures that power plants already widely use to reduce carbon, and can do so cost effectively, and more cost effectively than the other

measures EPA considered. EPA took in the final rule a regional approach reflecting the regional nature of the interconnected electricity system, and the region-wide scope of opportunities available for affected plants to access emission reduction measures. It quantified the building blocks at a level that did not project their maximum possible level of emission reduction, but rather did so at a reasonable level of stringency, and there were multiple ways in which in constructing those building blocks EPA was conservative. In building block one EPA used three different statistical approaches to calculate heat rate potential and picked the lowest one. In building block two EPA looked at the ability of gas plants to increase their rates of utilization, and set a target that was well below what gas plants, so owners themselves report as their availability. Availability typically 87 to 92 percent, the target was 75 percent to be met gradually by 2030, not in the first year of compliance. In building block three EPA projected levels of renewable growth that were middle of the road, not at the high end, and EPA documented that extensively in the record in showing how industry estimates, the estimates of the national renewable energy laboratory and other sources had all concluded that similar levels of growth, or even higher levels of growth were likely, and that the grid could support that.

EPA then set emission limits not at the rate, not at the level that equaled full implementation of these conservatively constructed building blocks, but at the least stringent level after applying them to sources in each region. So, this meant, this even further assured the achievability of the rates by leaving headroom, as EPA called it, because it's not necessary to implement fully the building blocks in all three regions.

JUDGE KAVANAUGH: They're basically arguing that the whole thing, or parts of it, not the whole thing, parts of it are going to fall apart in a couple of years, if not sooner, and I don't know how we assess that, but support it does start falling apart in parts, are there avenues, legal avenues open to them? I'd like to know the extent we were to on this issue agree with you and uphold the rule on this issue, depending on what happens on the other issues, but uphold the rule are there avenues to bring future challenges if all these predictions turn out to be wrong?

MR. LYNK: Well, and I don't know how we answer that. Let me start by saying the Court has always understood there would be a degree of uncertainty in any standard under this section, as in other regulations.

JUDGE KAVANAUGH: Yes. Yes, that's right.

MR. LYNK: The Court's upheld rules based on test data from just representative plants, as in the *Essex* case,

whereas here, as the Court noted earlier, EPA had data from the entire coal and gas industry. The Court has upheld the standard that extrapolated from the performance of utility boilers to set limits for industrial boilers, in the *Lignite Energy Council* case. Here there was no extrapolation, EPA looked at what this industry is doing. There is, of course, the state planning process --

JUDGE KAVANAUGH: My question, I appreciate --

MR. LYNK: Yes.

JUDGE KAVANAUGH: -- all that, and I --

MR. LYNK: That's fine.

JUDGE KAVANAUGH: -- gave you that for there, but my question was what happens if things start unraveling?

MR. LYNK: Well, I mean, the state planning process is obviously the first outlet, but if there were actually new significant information, changed circumstances that somehow demonstrated EPA should reach a different conclusion about what's achievable, someone could still petition for a new rule, there's nothing stopping that, and obviously, the question would be are those the facts, will those facts emerge?

JUDGE KAVANAUGH: And then the denial of that would be judicially reviewable?

MR. LYNK: The denial of that petition in that circumstance would be --

JUDGE KAVANAUGH: Just making sure how this --

MR. LYNK: -- a judicially reviewable action.

JUDGE KAVANAUGH: I mean, I know everything always has uncertainties, but they're saying the uncertainties in this case are quite significant, and --

MR. LYNK: I think, again, the way that, given the robustness of the record the extent of its consultation with all the other agencies that have expertise in the grid and energy markets and renewable energy, the enormous unprecedented public outreach in response to comments, I mean, no one can ever say there's no uncertainty, but it's hard to imagine what more in any one rule the Agency could do to meet its obligation as defined in *Small Refiner*.

JUDGE MILLETT: I just want to follow up on that, though, because I think it's important. Instead of someone petitioning for a new rule imagine it's pretty much working for 47 states, but, or I know two of them aren't in, so I guess 46 states, and there's two of them, two of the 48 for which it's not the alternative sources of power just aren't showing up there, who's now to be capable. Short of petitioning for a new rule can you explain to me how the state planned process works in a way that would allow, if it would, allow EPA to work with that state to address its particular concerns and needs? Are these state rules updated each year, or is there ongoing dialog about this?

Would you have the capacity to alter emission limitations, or adjust them at least temporarily for a particular state that had a need?

MR. LYNK: Well, one of the reasons the state planning process would help is that, and obviously, on the legal side of the case there are different views about what's permissible and what's not, but from a record perspective one of the things EPA did here to assure achievability is there is a far broader array of measures that a state could include in its plan that would qualify for compliance beyond the building blocks, you know, energy efficiency measures, just to give one example; to give another example, distributed renewable generation technology, which EPA noted at 201 of the Joint Appendix there is preliminary analysis from NREL from DOE suggesting that alone could potentially achieve a third to one-half of the building block three stringency. But that wasn't counted --

JUDGE MILLETT: But I get that you're --

MR. LYNK: -- in setting the building blocks. So, the point being that the state when it devises a plan has so many more options available, often even more cost effective.

JUDGE MILLETT: My question is about if they try their best, the state is doing its darnedest and it just doesn't get there for some sort of, you know, either the

nature of resources within that state, what can be -- don't -- because I didn't want --

MR. LYNK: I am sure there would be opportunities --

JUDGE MILLETT: I appreciate the answer, but I don't, the fact that they could meet it some other way, if it just can't be met in good faith then what happens to that state?

MR. LYNK: I have no doubt that EPA would be available to consult with the state in this process as it went on. And, you know, to give an example of that, the preamble, for example, on the reliability issue, which I prefer mostly to leave to my colleague, but notes that EPA explicitly plans to continue consultation on that front. So, there's no reason why it wouldn't also continue to consult with state who encounter stumbling blocks in the process of developing an approval of a plan, same thing happens under the SIP process, which of course this is an analog to.

There were some --

JUDGE MILLETT: Is this done year by year, or are they adjusted year by year, or are they done, are the state plans supposed to project out for 15 or 20 years, as well? I just don't know mechanically how it works.

MR. LYNK: As a factual question I actually don't

know how often a state plan would have to be updated in the course of a compliance time frame. I think maybe my colleague may be able to answer that one.

You did have a question earlier about is there a place in the record that actually says most of the industry is cross-invested. Joint Appendix 277 says that 77 percent of coal fired generation in the country is co-owned with natural gas, and that 80 percent of the modeled shift in building block two could be achieved just by those cross-invested entities. And again, of course, the emission rates were not set at the full level of the model shift. Joint Appendix 286 says that 82 percent of the fossil fuel capacity in the country, coal and gas is co-owned, co-invested, cross-invested with renewable energy. So, again, most of this industry already has a diversity of generation sources. So, again, when we talk about uncertainty and difficulties and implementation we shouldn't overstate that.

Now, EPA --

JUDGE KAVANAUGH: I wouldn't understate it either, it's going to be quite a burden, I mean --

JUDGE ROGERS: Who knows.

JUDGE KAVANAUGH: -- who knows. I agree. Who knows. Yes.

MR. LYNK: And EPA did not in this rule-making ignore --

JUDGE KAVANAUGH: Our record of predictive judgments as a country on big things is not ideal over the last generation.

MR. LYNK: I should not, too, that, you know, *Massachusetts v. EPA* itself recognized the idea that look, when you regulate typically you do it incrementally, you don't necessarily answer every question in the first fell swoop, and that's just the same thing as a legislator, agencies are the same way.

EPA did not ignore the compliance needs of smaller entities, it documented again in the record 286, for example, that coops are amongst those entities cross-invested between technology. So, again, it's not as if this is a rule that only some entities can implement and not others. Even if for some reason a source didn't want to choose the most cost effective measures available, there are other ways that a source, even without acquiring emission rate credits, even without shifting to another source could implement, or could meet the standards. EPA, for example, documented in the proposal that the more stringent proposed coal emission limit could be met just by conversion to natural gas at the source. So, again, if you're talking about other hypotheticals, yes, that's possible, as well, could meet the limit that way, could meet the limit with on-site renewable investment, again. Of course, EPA expects

that sources will where they have these opportunities to implement these measures that were identified as the best system because they are cost effective, and it anticipates reasonably that states, many states will likely engage in trading because some have already said they want to do it, some are already doing it under the state RGGI program, so it was reasonable to assume that those things will emerge here. But again, the rule isn't dependent on that, it is achievable even without those things, they just make it even more cost effective.

JUDGE TATEL: What's the answer to the argument that Counsel made about the 2012 wind power calculation, that that was based on a year that, where wind power was, or are you not, is that your colleague's question?

MR. LYNK: I guess there's an argument that that was unrepresentative. I mean, first of all --

JUDGE TATEL: And he said it was based on a year when it was excessively, there was huge amounts of wind power because it was the last year of a tax credit.

MR. LYNK: There was actually a renewal of a tax credit that supports investment of renewable energies recently, which means it will extend through the rest of this decade. So, to that extent, then, circumstances haven't changed. We also addressed in our brief regarding building block two the argument that 2012 was

unrepresentative, and the counter to that is EPA didn't just look at that year, it looked at long term trends, gas utilization has grown almost every year since the early 1990s, renewable energy has been growing at incredibly, at an incredibly rapid pace in recent years. It's not that aggressive to assume that 15 years from now it might grown at the maximum rate observed in the early part of this decade, considering the continuing decline in its price, its cost of construction, and the increase in its competitiveness. It's a new technology, that's what new technologies general do when they're successful, they become more competitive.

JUDGE KAVANAUGH: Would you want to speak to the standard of review the Solicitor General of Wisconsin argued that this burden was on you to affirmatively demonstrate, do you disagree with that?

MR. LYNK: I think that the *Small Refiner* case continues to be an authoritative articulation of what EPA's burden was, and that was to consider the factors required by the statutory provision, in this case Section 111, and show a reasonable connection between the facts on the record and the policy choices EPA made. But importantly, this Court has long recognized that a rule can be reasonable even if the Court itself would not necessarily have made the same policy choices, assuming they're lawful. And so, for that

reason I don't think, I think that the notion that there is a burden of persuasion, or proof is not quite right, and doesn't fit the administrative context.

If I can briefly address, as well, I know my time is running short, but just to make the point, one more point, that the cost here, if costs were the criterion for determining what rule is transformative, this is not it. We showed in McCade (phonetic sp.) declaration attached to our opposition to the stay motion, paragraph 43, that the costs of this rule were less than or at most comparable to, for example, CAIR, the NOx SIP Call, and the 1979 new source performance standards for power plants. So, if this rule were transformative then you'd have to say they all were. We also showed that the costs here are not in the same league with MATS. MATS was estimated to cost $10 million within four years of implementation, within the first 10 years this rule is only estimated to cost one to three million, and even that estimate is conservative for reasons EPA explained in the record. Thank you, Your Honors.

JUDGE HENDERSON: All right. Mr. Rave.

ORAL ARGUMENT OF NORMAN L. RAVE, ESQ.

ON BEHALF OF THE RESPONDENTS

MR. RAVE: Good afternoon, again, Your Honor, Norman Rave from the Department of Justice representing Respondent. Judge Millett, to answer your question about

state plans, the rule provides that states will do one, do an initial, do a one plan that will cover, you know, the set up of the system that is designed to achieve the interim and final goals. However, there are a number of mechanisms available for both EPA to work with the states, and to, for the plans to be revised. The EPA specifically put in the final rule, or the preamble of the final rule at J.A. 213, footnote 37 where it specifically stated that if a state is having trouble developing its plan, and having trouble finding partners to coordinate with, or has some other difficulty that it anticipates in being able to implement the rule that EPA will work with the state. And also, going forward, EPA, DOE, and FERC have reached, have an agreement where they will meet regularly, and they have been meeting regularly, and will monitor the implementation of the rule to address any reliability issues that might come up. The rule itself requires that state plans address the question of reliability, and includes a specific provision that allows states to come in to modify their plans if there are reliability issues. So, the rule does contain a number of mechanisms, and EPA has committed to working with the states, to working with the other federal agencies that are associated with the regulation of the electric utility industry to ensure achievability and reliability of the grid.

JUDGE MILLETT: And which of those if the state said it didn't get the cooperation it needed would be judicially reviewable, would that latter one where they could come in and try to amend the state plan, if that was denied would that be judicially reviewable? Because this cooperation and working together is a great thing, I'm not dismissing it, that's a wonderful thing to do, but if we needed later to be able to revisit the question, whether in a particular region, particular state these predictions had just collapsed, they didn't work, and it wasn't working, how would that happen?

MR. RAVE: Well, it would depend on the situation, Your Honor. For instance, if a state submits a revision to, and states can always revise their plans, but if a state submits a revision to its plan, and EPA denies the decision that is reviewable. If a state or any other entity petitions EPA for rule-making to monitor, to change the rule --

JUDGE MILLETT: They have to petition for rule-making, and then a whole new rule, as opposed to just getting a change or an adjustment to our obligations under this rule?

MR. RAVE: Well, I'm talking, I'm not talking about -- I mean, I'm talking about outside the state plan process. The state plan process the states can modify their

plans, they can submit a modification --

JUDGE MILLETT: They can change their plans, but what if they cannot meet the emission targets as predicted because things have gone awry, or they haven't turned out the way predicted, at least for that state, or for that portion of a region --

MR. RAVE: Well, again --

JUDGE MILLETT: -- what then?

MR. RAVE: -- EPA has committed to working with states in that situation, they can certainly come in, they could, I assume, perhaps bring another, an action based on newly arising grounds if that qualifies. I mean, there certainly are mechanisms by which either, that EPA will act, or that if absolutely necessary can come to the Court. But, however, we certainly don't think that there is any reason to believe that --

JUDGE MILLETT: Just to be clear, so EPA agrees that if somebody was really in a pickle and they said to EPA help, we need to adjust our plan, we can't make the targets, we're going to need another five years, or 10 years, and you said no, we think you haven't done enough to reduce consumer demand, that could come to court?

MR. RAVE: I believe there'd be, I'm sure there'd be a mechanism by which that could come to the court, Your Honor. But of course, we don't believe that that is likely

to occur. The rule provides numerous options and ways for states to comply, they can utilize a rate-based plan which would be based on emission rate credits, and there are numerous ways that facilities in a state can obtain credits. They can obtain it through a trading program, or they can obtain it by direct interactions with renewable sources in other states, you know, even if two states do not have a trading agreement, a state, say Georgia, a renewable, somebody who develops renewable energy in Texas or Georgia that wants to sell emission credits to a utility in another state can go to the second state, Ohio, or Montana, or whatever, and that state can issue, states can issue their called ERCs, emission reduction credits, to sources in, renewable sources in other states. They don't, it doesn't have to be in their own state. There are some restrictions to ensure that emission credits meet the same, you know, speak the same language, it's the same currency, but there are flexible options so that even if two states are not in a trading arrangement that a state in I think a utility, an affected utility in one state can access emission credits for resources in other states. So, this rule has a lot of flexibility.

JUDGE MILLETT: I thought there was an issue, though, if you have a mass based program, mass based rate program that almost it doesn't translate into credits that

you could get from a rate-based program.

MR. RAVE: There are actually, in some circumstances it does, Your Honor, and I have to look this up because this is a complicated part of the statute. But states can, there are mechanisms for states in rate-based states to obtain credits for renewable resources in mass space states, where the rate-based state can issue the credit directly to that facility. You don't have to, if you're a renewable energy source in building one you don't have to get the credit issued by your own state, you can go to another state and have it issue the credit and then facilities in that state can utilize it. So, even if one state is a mass-based state renewable energy sources in that state can provide credits to utilities in other, in rate-based states.

JUDGE KAVANAUGH: We were presented an example of Montana and California, can you respond to that?

MR. RAVE: Yes, Your Honor. A number of misstatements, I believe, in that analysis. The first is it misrepresents how EPA applied building block three in the proposal. EPA did not analyze how much capability each state had to develop renewable energy. Building block three in the proposal was based on state renewable performance standards that states had, in other words, what if any goals states had already had developed in a region, not, you know,

it happened in certain sub-regions, what goals they had for developing renewable energy, and then applied that to the amount of renewable energy already in the state, so that, and that was as I talked about in the notice section of the argument, this was the big complaint that many people had. That system because it was based on what states had already done, or what states hadn't already done in the case of states like Montana, it meant that states that had done nothing to address CO2 emissions had less, much less stringent rates than states that already had done. So, it basically said, you know, if you were out, working out every day, and running really hard, and training, you're going to have to do more than somebody that sat on a couch in order to get fit would have to do, you know, walk out to their refrigerator or something, you know, it was, it was not a system, and the system generated many negative comments, and that's why EPA switched to a system that is based on what is achievable on a regional basis using the least stringent of the three interconnects, so that it's not true to say that the column that he's referring to in his chart, J.A. 2878 to 79, reflects some determination by EPA of what could be achieved in Montana. Montana has a lot of wind resources and can develop renewable energy if they can, so that it's based on a false premise, you can't compare the numbers in this to the numbers in the final rule, because they're

calculated on a different basis.

Secondly, it misstates California, as I think California pointed out in its own letter it misstates what California requires. Yes, California requires if it's going to enter into a trading program that there be a common currency that the, in other words that a rate, you know, a unit of rate in one state represents the same thing as a unit of rate or reduction in the other, that they have the same, no, excuse me, that a quantity of generation in one, in the state it's linking with represents the same amount of redition reductions as a quantity of generation in California, but that's just the inter, necessary for any trading system to work. And it has applied that system very, very flexibly, California has taken the lead in trying to reach out to other states, it's already established some linkages with other states, and even into Canada to set up a system for trading, the rule as the state's letter that I filed yesterday indicated, its proposed rule is very open to state trading, so it's simply not the case that California wants to lock itself away, it's just the opposite.

And we also point out, Your Honor, that nine northeastern states on their own, the regional greenhouse gas initiative states set up a nine-state trading block to deal with greenhouse gas emissions, and as Mr. Myers stated, it has resulted in 40 percent reduction in CO2 emissions in

eight years. There's simply no reason to believe that trading programs are not going to develop, utilities ask for them, the states ask for them, every time EPA has set one up and made NOx SIP Call, for instance, the CAIR rule, the CSAPR rule, and Congress set one up in Title IV, successful trading programs have developed, and there's absolutely no reason to believe it won't happen here, one of the state, EPA received reams of comments saying we want to be able to use trading, make the rule trading-friendly, and that's what EPA has done here, it provides for your emission-based trading credits, or rate-based trading credits, it also provides mechanisms for states to exchange or utilize units as I was speaking earlier, even if they're not specifically trading.

And it is important to understand what we mean by trading, because Petitioners particularly in their briefs have used it a couple of different ways, they've used trading to some extent to talk about any interstate interactions, so even if it is a one to one, you know, State A buys credits directly from a, or arranges for renewable energy in State B and gets credits, that's not what EPA considers to be trading. Trading is some sort of marketable, fungible, not fungible, you know, freely tradable emission credit or reduction, some sort of instrument that's used for compliance that's traded on

market, you know, the difference being between, you know, contracting with a farmer to buy, you know, whatever his one apple trees produces, as opposed to buying apples at the grocery store. So, it's important to remember what we're talking about.

And EPA did do modeling to show that, that states, that the rule could be achieved even without trading, it did involve some back to back interstate --

JUDGE PILLARD: Mr. Rave, you're drifting a little bit from your speaker, I think --

MR. RAVE: I'm sorry. Sorry, Your Honor.

JUDGE PILLARD: -- it's going to be hard for people to hear in the overflow.

MR. RAVE: So, EPA has demonstrated that the rule is achievable without trading, there are many things states can do in their plans to achieve reductions, they can use demand reduction, and energy efficiency measures, they can, there's this local type solar, solar panels on people's roofs and things that reduce demand, there's, there are many things states can do, power, coal plants can meet their limits simply by changing to gas but not necessarily building a new plant, just repowering to gas. So, there are many things states can do, they have many options, there is a lot of flexibility built into the rule, but as I think it was Judge Kavanaugh or Judge Millett said earlier, the

record is trading programs have developed, they've been very successful, and there's simply no reason to believe they won't here, they won't be here.

JUDGE HENDERSON: If there are no more questions your time is up.

MR. RAVE: Okay. Thank you, Your Honor.

JUDGE HENDERSON: All right. Mr. Poloncarz.

ORAL ARGUMENT OF KEVIN POLONCARZ, ESQ.

ON BEHALF OF THE POWER COMPANY INTERVENORS

MR. POLONCARZ: Good afternoon, Your Honors, Kevin Poloncarz for Power Company Intervenors. My time is short, and it's late, so I will quickly cover a few points.

We've heard a number of arguments challenging EPA's technical determinations of whether the best system is adequately demonstrated and achievable, I'm just going to respond to points regarding building blocks two and three, and the role of trading in the rule.

With respect to building block two, Petitioners contend that a 75 percent utilization rate for the existing gas fleet can't be maintained over time, or will result in excessive wear and tear on their equipment. My clients include the operator of the largest gas fired fleet in the country, based on my client's collective experience a 75 percent utilization rate is eminently reasonable, and the record demonstrates that even higher rates can be achieved.

The fact that the existing fleet was operated at a lower rate in the past reflects nothing more than the failure of the system to factor the cost of carbon emissions into dispatch decisions. This rule would cause utilities to start accounting for those costs in those decisions aligning well with the market shift away from coal and to gas, and with the way the power sector works.

Petitioners also argue that building block three is unachievable, but the record reflects incremental renewable generating capacity well in excess of the amounts needed to comply. EPA assumed that the amount of new renewable capacity added to the grid will never exceed the rates at which it was added between 2010 and 2014. The reality is as technology advances and prices decline an even more rapid penetration of renewables is inevitable, but EPA conservatively capped its projections at rates the grid has already successfully demonstrated it can integrate, so from the perspective of my clients its rates are modest and reasonable.

On the role of trading --

JUDGE ROGERS: Could I just ask you regarding building block number two, you had a sentence in there about the only reason more hasn't happened is because of something of conservation, or --

MR. POLONCARZ: The only reason it hasn't happened

in the past is because the current system as it exists doesn't factor the cost of carbon emissions into dispatch decisions.

On the role of trading, Petitioners don't come out and say trading is unlawful, they can't, that's because many of them advocated for EPA to include trading within the rule, and because trading enjoys mere universal support within the power sector as the most cost effective means of achieving emissions reductions. So, to avoid contradicting themselves, Petitioners don't argue that trading is per se unlawful, instead they make a series of claims that all boil down to the central contention that the rule's goals are inadequately demonstrated, or can't be achieved in the absence of a federally mandated trading program. These claims are meritless. First, trading isn't necessary to achieve the rule's emission performance rates. Utilities can invest directly in lower emitting generation, and thereby generate the credits their own fossil units need to comply. While Petitioners say that's not possible, the record and experience of my clients demonstrates otherwise. My clients operate in over 20 states, and nearly as many different markets, the one thing they have in common is that they've all managed to reduce emissions in their generation portfolios by investing in lower emitting generation. Petitioners have no good answer for why they can't do the

same. All that trading does is it allows utilities to void making those direct investments themselves, and let somebody else who might have more experience building something like a wind farm do it instead. This has consistently resulted in the required reductions being achieved at least cost to consumers, and that's the reason so many states and utilities, including both my clients and many Petitioners alike advocated strongly for EPA to include trading within the rule, and EPA gave us all exactly what we asked for, with a final rule that makes it simple for states to incorporate trading into their plans.

Petitioners contend that EPA had to show sources in each state could comply using only those credits generated in their own state, nothing in the statute commands EPA to take such a vulcanized approach and pretend each state would function as an island. Electricity doesn't observe state boundaries, and transactions for power and renewable energy credits regularly cross state lines. So, Petitioners attempt to suggest EPA had a burden to demonstrate the system would work if credits never crossed state lines is a fabrication that makes no sense, and has no basis in the statute.

As a final point, I'd simply like to remind the Court that the strategies on which this rule is based are exactly those my clients have been implementing through

their investments in lowering main generation, and they've done so while continuing to provide reliable and affordable power to their customers. Their collective experience doing so, and our very presence here today demonstrates the reasonableness and achievability of the rule. Thank you.

JUDGE HENDERSON: All right. Mr. Brownell, how about two minutes?

ORAL ARGUMENT OF F. WILLIAM BROWNELL, ESQ.

ON BEHALF OF THE NON-STATE PETITIONERS

MR. BROWNELL: Okay. Thank you, Your Honor. I just have three points I'd like to make. The first point is that under the statute it's EPA's burden to show that its system has demonstrated, and that its rule is achievable with its best system of emission reduction, not with non-best system measures that have not met the best system criteria. Under the case law of this Court that demonstration takes place under must show that the rates are achievable under the variable conditions that confront the industry, and as my colleague said, under the most adverse reasonable conditions, those include things like electric utility system includes municipal utilities and rural coops that may only have one electric generating station that serves one load demand, and that has very little opportunity for replacement generation. That's discussed at 3345 to 46 of the Joint Appendix.

The other thing about trading, coming back on the point that I think Judge Millett and others raised earlier, the rule makes interstate trading optional, that's 60.58-10(c), and provides a variety of interstate trading options that states can adopt that don't communicate with each other. As Judge Millett raised, there are restrictions between, on trading between rate-based and mass-based plans, one of the restrictions is that the power has to follow the emission rate credit, that is there has to be a power purchase agreement, or a production agreement. And that's a real problem for this headroom analysis because power doesn't flow across interconnect, so that investing in renewable energy in California is not going to provide the power that's needed to meet demand while complying with the rates. Multi-state plans don't communicate with states outside the multi-state plans. Under the proposed federal plan, a federal rate plan doesn't communicate with a state mass plan, and vice-versa, we don't even know what federal plan is going to be adopted yet because it's still out for proposal.

The second point goes to what happens if things unravel. The only way fossil units comply, as I said earlier, is with emission rate credits. Emission rate credits are defined in the rule at Joint Appendix 441 as a tradable compliance instrument. One creates in some other

jurisdiction, or acquires from some other jurisdiction this tradable compliance instrument. If emission rate credits cannot be obtained, or if they're not available one can't operate the fossil unit because you have to backup each megawatt hour of fossil generation with an emission rate credit. And if one doesn't have an emission rate credit that means that megawatt hour that was needed to generate an emission rate credit isn't being generated, so you lose that to generation, as well.

Under this regional system that EPA has created of generation shifting, achievability must take into account the ability to satisfy electricity demand, as well as the national rates, there must be enough emission rate credits so that enough fossil units can operate in compliance with the national rates. That together with the renewable energy megawatt hours can meet the demand.

My final point is that my friend from EPA mentioned costs. EPA considered costs, not benefits, they concede they didn't do any cost-benefit analysis. Under the Supreme Court's decision in *Michigan* no regulation is rational if it substantially, does substantially more harm than good. The failure to consider cost-benefit analysis here is another reason to set aside the rule. Thank you, Your Honor.

JUDGE HENDERSON: All right. Mr. Tseytlin, take

two minutes.

ORAL ARGUMENT OF MISHA TSEYTLIN, ESQ.

ON BEHALF OF THE STATE PETITIONERS

MR. TSEYTLIN: Thank you. Just four very quick points. On the standard of review, Counsel cited *Small Refiner*, that's a 211(c) case that was generic arbitrary, capricious review. The standard here is sufficiently higher on EPA, it's the *Lime Association* case, the Excess (phonetic sp.) case, and the *Portland* case, it's a hard luck standard, and EPA has the burden, that's undisputable.

Second, on the question of what happens if it's not working for states, there is no mechanism in the rule to fix that problem. Period. There's a footnote that Counsel cited in the preamble, the preamble is not binding, does not provide any legal authority. The actual rule has no mechanism, if a state can't comply it's going to be forced into a federal plan, which takes away Montana's legal right to be governed by a state plan instead of a federal plan.

JUDGE MILLETT: Would that be something, would that moment of force of giving up on your state plan and being forced into the federal plan be a judicially reviewable action or point?

MR. TSEYTLIN: Yes, Your Honor, you could challenge the federal plan. But again, the burden is for EPA to show achievability now, that's undisputed.

The third point, the wind number, Judge Tatel. The wind number in 2012 was 13,131, the wind number in 2013 was 1,087. EPA is telling the Court that it can base a rule on assuming that higher number happens for seven straight years.

JUDGE TATEL: Well, is Government Counsel wrong that the tax credit has been renewed?

MR. TSEYTLIN: The tax credit expired.

JUDGE TATEL: He told me, he said it's been renewed.

MR. TSEYTLIN: No. Right, Your Honor. Let me please explain. So, what happened is the tax credit expired, so everyone knew it was expiring, so they took all the 2013 wind and blew it into 2012. If the tax credit keeps running then it will be back at the average rate, around 6,000. The problem is the 2012 year is inflated by the expiration of the tax credit. I'm not saying that you can't --

JUDGE PILLARD: But I think the record reflects that that wasn't the only data that they used, they used a lot of other data to come up with that figure.

MR. TSEYTLIN: Your Honor, no, that's not accurate, that was the only basis, the only basis. And I urge Your Honor to look for choosing that number, it was the only basis. There's nothing, there's no, it's not the

product of a model, it's not the product of economic analysis, that was the only, only basis in the rule.

And then the final point on trading, Montana and states like it absolutely need California, they need it for trading, and even for this notion that if you don't have trading you need cooperation, but you can't get reductions from existing renewables. You need new renewables, you have to get California's permission to cite the renewables in California's jurisdiction under a sovereign authority. You're not going to get that unless California is cooperating, and that's what this rule creates, it creates a situation where the states that can over-comply, California, Massachusetts, Washington, et cetera, are given significant power and leverage over states like Montana, like West Virginia, like Wyoming, and this is a really big problem in this particular area because those states, California, Massachusetts, Washington, think that we're laggers, they think that we, that the clean power plan does not go far enough, they think it should go further. So, what the states are going to do, and this is a natural economic incentive is they're going to follow California's example, they're going to say hey, Montana; hey, Wisconsin; hey, Wyoming, if you don't want to be governed by a federal plan which is really bad, this is what you need to do, this is your price of admission. You've got to comply with what we

are doing in California, not what the EPA has mandated, that is the system the clean power plan creates. That is patently unlawful. Thank you very much.

JUDGE HENDERSON: All right. Let me just say on behalf of the whole Court, I feel like we've all been through a marathon today. You all have done your part. All of you have, I can't imagine the hours and days and weeks you've put into this case, and you have given us all we need and more, probably, to work on it, so it's now up to us. But I just want to thank you on behalf of the Court for all of your efforts, and all of your time.

THE CLERK: Stand please. This Honorable Court now stands adjourned until Wednesday, October 5th at 9:30 a.m.

(Whereupon, at 5:49 p.m., the proceedings were concluded.)

DIGITALLY SIGNED CERTIFICATE

I certify that the foregoing is a correct transcription of the electronic sound recording of the proceedings in the above-entitled matter.

Paula Underwood — October 10, 2016
Paula Underwood — Date

DEPOSITION SERVICES, INC.