

1 UNITED STATES COURT OF APPEALS
2 FOR THE DISTRICT OF COLUMBIA CIRCUIT

3 - - - - -X
4 STATE OF WEST VIRGINIA, :
5 ET AL., :
6 :
7 Petitioners, :
8 :
9 v. :
10 : No. 15-1363, et al.
11 ENVIRONMENTAL PROTECTION AGENCY :
12 AND REGINA A. MCCARTHY, :
13 ADMINITRATOR, UNITED STATES :
14 ENVIRONMENTAL PROTECTION AGENCY, :
15 :
16 Respondents. :
17 - - - - -X

18 Tuesday, September 27, 2016
19 Washington, D.C.

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

22 BEFORE:

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

APPEARANCES:

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C O N T E N T S

	<u>PAGE</u>
I. All statutory issues other than Section 112 (includes Generation Shifting & State Authority)	
Elbert Lin, Esq. On Behalf of the State Petitioners	4, 81
Peter D. Keisler, Esq. On Behalf of the Non-State Petitioners	15, 93
Eric Hostetler, Esq. On Behalf of the Respondents	41
Kevin Poloncarz, Esq. On Behalf of the Power Company Intervenors	71
Michael J. Myers, Esq. On Behalf of the State Intervenors	76
II. Section 112	
Elbert Lin, Esq. On Behalf of the State Petitioners	106, 169
Allison D. Wood, Esq. On Behalf of the Non-State Petitioners	132, 175
Amanda Shafer Berman, Esq. On Behalf of the Respondents	144
Sean Donohue, Esq. On Behalf of the Environmental Intervenors	162
III. Constitutional Issues	
David B. Rivkin, Jr., Esq. On Behalf of the State Petitioners	176, 223
Laurence H. Tribe, Esq. On Behalf of the Non-State Petitioners	191, 225
Amanda Shafer Berman, Esq. On Behalf of the Respondents	205
Michael J. Myers, Esq. On Behalf of the State Intervenors	216

C O N T E N T S (continued)

IV. Notice Issues

John Campbell Barker, Esq. On Behalf of the State Petitioners	251
Thomas A. Lorenzen, Esq. On Behalf of the Non-State Petitioners	229
Norman L. Rave, Jr., Esq. On Behalf of the Respondents	242

**V. Record-Based Issues Not Submitted on Briefs
(Petitioners' Opening Brief, II, IV. C-D, V. A, D)**

Misha Tseytlin, Esq. On Behalf of the State Petitioners	274, 316
F. William Brownell, Esq. On Behalf of the Non-State Petitioners	258, 313
Brian Lynk, Esq. On Behalf of the Respondents	288
Norman L. Rave, Jr., Esq. On Behalf of the Respondents	299
Kevin Poloncarz, Esq. On Behalf of the Power Company Intervenors	309

P R O C E E D I N G S

1
2 THE CLERK: Oye, oye, oye, all persons having
3 business before the Honorable, the United States Court of
4 Appeals for the District of Columbia Circuit are admonished
5 to draw near and give their attention for the court is now
6 sitting. God save the United States and this Honorable
7 Court. Be seated please.

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

12 JUDGE HENDERSON: Good morning. Mr. Lin.

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

15 ORAL ARGUMENT OF ELBERT LIN, ESQ.

16 ON BEHALF OF THE STATE PETITIONERS

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

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

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

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

14 MR. LIN: Yes, Your Honor.

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

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

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

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

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

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

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

15 MR. LIN: Your Honor --

16 JUDGE TATEL: Why is that transformative?

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

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

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

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

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

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

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

8 MR. LIN: Well, Your Honor, Mr. Keisler will
9 address in more detail why we believe that the statute
10 unambiguously precludes their interpretation of that term.
11 But my point is simply that what this is doing is very
12 different from what Section 111(d) is about, and the way
13 111(d) has been used, which is previously it has always been
14 used to set a, use a technology or process to set an
15 emission rate that an individual plant can theoretically
16 achieve. The emission rates that are set here, 1,003 --

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

1 at BSER or what it means, correct?

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

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

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

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

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

14 JUDGE TATEL: Right, right.

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

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

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

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

3 JUDGE PILLARD: I think, Mr. Lin, part of my
4 difficulty is understanding how your argument about the
5 level of deference is distinct from your statutory argument
6 on the merits. I mean, I understand your argument that this
7 is not permissible regulation of sources under Section
8 111(d), and I hear that you're making that argument, but I
9 don't see that you're getting from that a separate *Chevron*
10 exception. It just doesn't seem like *Brown & Williamson*, or
11 *UARG* in those respects.

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

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

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

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

22 JUDGE SRINIVASAN: Yes.

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

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

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

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

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

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

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

6 MR. LIN: Certainly not under a provision that is
7 about performance standards, that is about improving the
8 operations of particular facilities, and it's not about
9 forcing and requiring the restructuring of the mix of
10 electricity generation. Again, with the -- I see my time
11 has expired. But again, with the example of West Virginia,
12 96 of our power comes from coal, and this rule is clearly
13 designed to make us use a different mix of electricity
14 generation, which gets to the second independent clear
15 statement rule that we have mentioned in the briefs, which
16 is the *ABA v. FTC*, the *Gregory v. Ashcroft* case --

17 JUDGE MILLETT: Can I just ask --

18 MR. LIN: -- this is --

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

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

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

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

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

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

8 MR. LIN: Thank you, Your Honor.

9 JUDGE HENDERSON: Mr. Keisler?

10 ORAL ARGUMENT OF PETER D. KEISLER, ESQ.

11 ON BEHALF OF THE NON-STATE PETITIONERS

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

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

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

14 MR. KEISLER: Yes, Your Honor.

15 JUDGE TATEL: Okay. And as I understand --

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

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

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

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

5 JUDGE TATEL: Well, what's the right?

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

12 JUDGE TATEL: Well, excuse me --

13 MR. KEISLER: But we're not --

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

16 MR. KEISLER: Well, no, but --

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

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

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

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

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

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

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

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

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

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

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

20 JUDGE MILLETT: That's out of the definition.

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

1 which is why Section 111 --

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

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

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

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

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

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

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

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

1 heating up the water for the process of producing
2 electricity.

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

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

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

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

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

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

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

8 JUDGE TATEL: So, it's not --

9 MR. KEISLER: -- physical way --

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

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

15 JUDGE TATEL: And it doesn't say that.

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

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

25 MR. KEISLER: I think if --

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

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

7 JUDGE TATEL: I'm not talking --

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

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

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

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

15 MR. KEISLER: If it --

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

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

19 JUDGE TATEL: That's not in the statute.

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

1 wind turbine doesn't emit any pollutants.

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

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

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

18 MR. KEISLER: Yes.

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

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

1 assuming --

2 JUDGE MILLETT: Yes.

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

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

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

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

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

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

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

14 MR. KEISLER: Yes.

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

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

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

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

8 JUDGE PILLARD: And I --

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

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

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

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

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

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

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

25 JUDGE SRINIVASAN: Can I ask you --

1 JUDGE TATEL: So --

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

4 JUDGE TATEL: No, you go.

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

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

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

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

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

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

1 MR. KEISLER: It is the absence --

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

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

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

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

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

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

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

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

1 the operation of the source, and --

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

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

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

11 JUDGE MILLETT: Can I ask you one other thing?

12 MR. KEISLER: Sure.

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

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

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

21 MR. KEISLER: Yes.

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

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

7 MR. KEISLER: It does, Your Honor, and let me
8 address the particular statutes Your Honor mentioned very
9 specifically, because they show the difference, and our
10 argument really is very specific to 111(d), which is the
11 only statute EPA proceeded under here. So, EPA cites Title
12 IV, Title IV establishes in the statute what it calls an
13 emission allocation and transfer system, it's a cap and
14 trade mechanism where the number of the cap is set, the
15 number of tons in Title IV itself by Congress. And Section
16 110 under which the Cross-State Air Pollution Rule, and NOx
17 SIP Call, and those other programs mentioned, that
18 specifically, that specifically authorizes EPA to adopt
19 emission limitations, and other means, measures, and
20 techniques, and defines other means, measures, and
21 techniques to include marketable permits and auctions of
22 emission rights. Section 111(d) doesn't use the phrase
23 other means, measures, or techniques, it just uses the
24 phrase emission limitation and isolation.

25 JUDGE MILLETT: Does the NAAQS provision have that

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

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

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

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

21 JUDGE TATEL: Sorry.

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

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

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

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

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

22 MR. KEISLER: So --

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

24 MR. KEISLER: Exactly.

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

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

4 MR. KEISLER: Right. And so --

5 JUDGE TATEL: -- namely, carbon dioxide.

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

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

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

2 MR. KEISLER: Thank you, Your Honor.

3 JUDGE HENDERSON: Thank you. Mr. Hostetler?

4 ORAL ARGUMENT OF ERIC HOSTETLER, ESQ.

5 ON BEHALF OF THE RESPONDENTS

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

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

1 for us is --

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

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

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

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

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

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

1 *Homer City.*

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

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

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

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

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

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

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

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

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

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

4 JUDGE KAVANAUGH: I'll let you.

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

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

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

1 regulation before, never been --

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

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

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

1 just focused on the standard of review here.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 interpretation I'll start --

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

10 MR. HOSTETLER: Fundamentally --

11 JUDGE TATEL: Buy carbon credits.

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

1 already following in those --

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

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

1 and so this rule just deepens the trench.

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

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

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

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

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

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

16 JUDGE KAVANAUGH: Yes.

17 JUDGE GRIFFITH: We will act.

18 JUDGE KAVANAUGH: Repeatedly. Pen and thumb.

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

21 JUDGE KAVANAUGH: Yes.

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

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

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

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

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

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

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

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

25 MR. HOSTETLER: I would point this Court for one

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

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

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

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

1 subsidizing the different business as they see?

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

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

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

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

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

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

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

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

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

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

6 MR. HOSTETLER: Yes. Yes, we --

7 JUDGE PILLARD: -- off site?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

13 JUDGE ROGERS: The statement --

14 JUDGE KAVANAUGH: -- the major questions rule --

15 JUDGE ROGERS: -- so by --

16 JUDGE HENDERSON: Major questions.

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

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

21 JUDGE KAVANAUGH: *Benzine*.

22 JUDGE ROGERS: *Benzine*.

23 JUDGE KAVANAUGH: *MCI*.

24 JUDGE ROGERS: *MCI*. These are --

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

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

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

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

1 that's an out here, is it?

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

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

17 MR. HOSTETLER: EPA relied on Section 111, Your
18 Honor, because the Supreme Court said in *American Electric*
19 *Power* that that provision speaks directly to the regulation
20 of this pollutant from these sources under this provision.
21 It could hardly be more on point. I'm not in a position to
22 speculate on the potential application or not of Section
23 115, the Agency didn't address that in this rule, but as *AEP*
24 makes clear, EPA does have authority under 111(d) to
25 regulate these sources, that's a settled issue.

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

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

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

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

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

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

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

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

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

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

3 MR. HOSTETLER: Thank you, Your Honors.

4 JUDGE HENDERSON: Mr. Poloncarz.

5 ORAL ARGUMENT OF KEVIN POLONCARZ, ESQ.

6 ON BEHALF OF THE POWER COMPANY INTERVENORS

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

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

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

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

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

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

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

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

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

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

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

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

1 emissions from power plants?

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

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

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

1 throughout the industry.

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

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

11 JUDGE MILLETT: Where does the record say most?

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

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

16 MR. POLONCARZ: I see my time is up.

17 JUDGE HENDERSON: Thank you.

18 MR. POLONCARZ: Thank you.

19 JUDGE HENDERSON: Mr. Myers.

20 ORAL ARGUMENT OF MICHAEL J. MYERS, ESQ.

21 ON BEHALF OF THE STATE INTERVENORS

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

25 EPA's express statutory authority to regulate

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

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

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

1 cleaner types of generation stem directly from Section
2 111(a)(1)'s directive that EPA limit pollution to levels
3 that reflect that best system of emission reduction
4 adequately demonstrated. And here there's broad consensus
5 among states, including those opposing the rule, EPA, and
6 industry that shifting to cleaner generation is such a
7 system for reducing power plant carbon pollution. Ten
8 states, those that are part of the regional greenhouse gas
9 initiative and California have successfully reduced CO2
10 emissions from the power sector by cap and trade systems
11 that rely in part on sources shifting to less carbon-
12 intensive generation. Power plants under that program, the
13 RGGI program, have cut CO2 emissions by 40 percent in eight
14 years. Even states opposed to the rule nonetheless
15 supported emissions averaging or trading through shifting
16 generation as a means of emission reduction compliance, and
17 some of those are listed at J.A. 214 of the preamble. Given
18 that the statute does not limit EPA's consideration to the
19 best technological or on site systems of emission reduction
20 it would have been contrary to black letter administrative
21 law for EPA not to consider this proven method in its best
22 system determination.

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

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

18 In conclusion --

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

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

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

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

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

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

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

4 ORAL ARGUMENT OF ELBERT LIN, ESQ.

5 ON BEHALF OF THE STATE PETITIONERS

6 MR. LIN: Thank you, Your Honor. I have three
7 points that I'd like to make. The first is I think what
8 Judge Tatel and Judge Kavanaugh said is exactly right, the
9 point here is not about the drawing a line in terms of how
10 factually transformative this is, the question is for the
11 *UARG* rule how transformative it is as a legal matter. And
12 what they are doing here as has been discussed already this
13 morning, is fundamentally different from the way Section
14 111(d) has ever been used before, this is about requiring
15 existing fossil fuel power plants --

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

21 MR. LIN: Well, it also --

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

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

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

9 JUDGE KAVANAUGH: What do you with --

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

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

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

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

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

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

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

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

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

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

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

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

4 JUDGE TATEL: Mr. Lin --

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

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

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

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

4 JUDGE TATEL: Yes.

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

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

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

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

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

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

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

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

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

1 don't know.

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

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

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

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

1 MR. LIN: Yes, Your Honor.

2 JUDGE SRINIVASAN: -- what Judge Millett --

3 MR. LIN: That's right.

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

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

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

19 MR. LIN: No, Your Honor --

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

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

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

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

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

16 JUDGE HENDERSON: Very, very quickly.

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

19 MR. LIN: Yes, Your Honor.

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

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

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

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

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

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

3 JUDGE TATEL: Okay.

4 JUDGE HENDERSON: All right. Thank you.

5 MR. LIN: Thank you, Your Honor.

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

8 ORAL ARGUMENT OF PETER D. KEISLER, ESQ.

9 ON BEHALF OF THE NON-STATE PETITIONERS

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

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

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

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

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

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

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

19 MR. KEISLER: Of course.

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

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

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

7 JUDGE PILLARD: In my hypothesis --

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

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

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

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

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

9 JUDGE PILLARD: Right.

10 MR. KEISLER: -- being balanced here, and Congress
11 determined not only that end purpose, but also the means
12 that EPA currently has to effectuate that purpose, and all
13 we're saying is that those means don't include what's going
14 on here, which I think relates, Judge Millett, to your
15 question about the difference between technology forcing and
16 what EPA calls generation shifting, because there's a world
17 of difference. There are lots of technology forcing rules,
18 none of them achieve their mission reductions by shutting
19 down particular existing sources, or a significant number of
20 them, and forcing them to subsidize their competitors to
21 displace them. None of them, that has never been understood
22 to be technology forcing. And while Mr. Hostetler disagrees
23 with it, that is what the rule says is going on here, J.A.
24 209, most of the reductions from this rule will come from
25 the replacement of higher generating facilities with lower

1 generating or zero generating facilities.

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

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

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

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

23 JUDGE PILLARD: So, they're really competing.

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

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

8 JUDGE PILLARD: That's contested, but --

9 MR. KEISLER: Excuse me?

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

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

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

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

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

1 your --

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

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

16 MR. KEISLER: Absolutely.

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

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

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

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

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

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

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

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

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

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

10 MR. KEISLER: But I --

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

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

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

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

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

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

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

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

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

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

21 JUDGE MILLETT: Yes, but where is, what is it in
22 111(d) that you're relying on for that point? I understand
23 that there's only been a fist full of cases under that
24 provision, so as to those samples it wasn't going on, but
25 I'm not sure it's statistically significant, one, because

1 once the Supreme Court said greenhouse gas emissions,
2 111(d), go forth, we have to figure out whether past
3 practice is evidence of limitation or just wasn't
4 implicated.

5 MR. KEISLER: Right. There are very specific
6 differences between the 111(b) provisions on new sources and
7 the 111(d) provisions on existing sources that reflect
8 exactly that congressional purpose, the first is that under
9 111(b) EPA sets the standards for new sources, under 111(d)
10 states establish the standards for existing sources, and
11 then the statute specifically says that states can take into
12 account the remaining useful life and other factors in
13 applying those standards to existing sources. And what that
14 provision was about, and EPA acknowledges this in its legal
15 memorandum, was codifying the regulations EPA had already
16 adopted to permit states to give variances, to vary from the
17 standards for individual sources when the economic burdens
18 on those sources would be too great. EPA has precluded the
19 states in this rule from meaningfully exercising that
20 authority, and we know why they did it, because they
21 recognized that there was a fundamental incompatibility with
22 a statutory provision that says states can act to prevent
23 individual sources from being prematurely closed due to
24 uneconomic burdens, and they rule whose entire purpose is to
25 prematurely close a significant number of plants by imposing

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

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

12 **II. Section 112**

13 ORAL ARGUMENT OF ELBERT LIN, ESQ.

14 ON BEHALF OF THE STATE PETITIONERS

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

21 Your Honors, the text of the Section 112 exclusion
22 is clear, it prohibits the use of Section 111(d) where the
23 source category is already, quote, regulated under Section
24 112.

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

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

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

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

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

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

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

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

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

1 JUDGE TATEL: Right.

2 MR. LIN: And as we explain --

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

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

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

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

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

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

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

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

3 MR. LIN: Excuse me, we cite --

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

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

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

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

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

20 MR. LIN: Yes, Your Honor.

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

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

24 JUDGE KAVANAUGH: I thought the --

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

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

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

8 JUDGE KAVANAUGH: But the Senate receded.

9 MR. LIN: That is also true.

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

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

3 JUDGE KAVANAUGH: Yes.

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

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

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

14 JUDGE TATEL: Right.

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

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

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

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

8 MR. LIN: It does. But what the statement says is
9 that they specifically recede to the amendment in 108, and
10 108, and in the description there it says that 108 is
11 amending Section 111 for both new and existing sources.
12 So --

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

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

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

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

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

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

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

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

22 JUDGE KAVANAUGH: Right.

23 MR. LIN: Right.

24 JUDGE KAVANAUGH: Of course it does because --

25 MR. LIN: Right.

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

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

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

1 MR. LIN: They were referring to, the debates that
2 I'm referring to, we're talking about say Section
3 112(n)(1)(A).

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

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

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

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

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

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

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

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

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

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

23 MR. LIN: Well, Your Honor --

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

25 MR. LIN: We do.

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

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

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

19 MR. LIN: Well, Your Honor, the fact that there
20 are other provisions that are clear, that make clear that
21 Congress was concerned about, again, under Section 129 what
22 they're talking about there is they specifically precluded
23 incinerators from being regulated under Section 112, and
24 specifically required them to be regulated under Section
25 111(d). So, my point is there is statutory context and

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

3 JUDGE ROGERS: And where do I find --

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

6 JUDGE ROGERS: No, go ahead.

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

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

18 JUDGE PILLARD: Why is that different? Like, if
19 we take an example, I take it you're saying that if you have
20 a source category that's emitting let's say HAPs, and it's
21 regulated for that, and it's emitting like mercury, so you
22 have a source that's emitting mercury, it's emitting
23 criteria pollution, like sulfur dioxide, and EPA wants to,
24 let's say it's a landfill, they want to go after it under
25 111(d) for landfill gases, your view is that if it's done

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

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

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

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

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

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

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

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

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

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

24 JUDGE TATEL: No.

25 JUDGE KAVANAUGH: -- if a source category was not

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

6 MR. LIN: Yes, Your Honor.

7 JUDGE KAVANAUGH: Okay.

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

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

18 JUDGE TATEL: No kidding.

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

22 MR. LIN: It was.

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

1 MR. LIN: Yes.

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

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

6 JUDGE PILLARD: I just -- go ahead.

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

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

18 MR. LIN: Well, and the thing to remember there is
19 that HAPs and, is that the Section 112 provision in terms of
20 the coverage of pollutants was also greatly expanded in
21 1990. And so, they talk about, they use the distinction
22 between HAPs and non-HAPs, but that's based on an
23 understanding pre-1990. The definition of pollutants
24 covered by Section 112 in 1990 was expanded such that it is
25 quite similar to, if not co-extensive with the definition of

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

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

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

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

18 JUDGE ROGERS: That's the point.

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

1 sense, but on the House amendment alone.

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

7 JUDGE KAVANAUGH: But that's not the point.

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

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

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

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

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

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

21 JUDGE HENDERSON: Let's let Counsel --

22 JUDGE TATEL: Okay.

23 JUDGE HENDERSON: -- state his position.

24 JUDGE TATEL: All right.

25 MR. LIN: Thank you --

1 JUDGE ROGERS: Thank you.

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

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

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

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

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

25 JUDGE SRINIVASAN: But why is it maximum exclusion

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

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

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

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

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

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

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

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

1 they were saying only regulated under 112(b), and that's
2 just getting blown out of the water under your reading. Why
3 isn't the reading that we should be doing here since we have
4 the least common denominator, all right? We know that as to
5 the Senate, and this is what, it went through the House,
6 went through the Senate, signed by the President, was a
7 determination that the things that are already regulated
8 under 7412(b) should not be regulated under 111(d), that's
9 consistent with pollutants. And the House said things under
10 7412, which includes 7412(b), so the common denominator that
11 went through House, Senate, and was signed by the President,
12 was the things that are regulated under 7412(b) won't be,
13 the pollutants that are regulated under 7412(b) won't be
14 regulated under 111(d), that's the one thing everybody
15 agreed on, why isn't that where we should land?

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

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

22 MR. LIN: Because that's not --

23 JUDGE MILLETT: The inclusion or exclusion thing.

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

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

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

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

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

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

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

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

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

17 JUDGE KAVANAUGH: Right?

18 JUDGE MILLETT: So, the least common denominator.

19 JUDGE BROWN: Would it help to look at --

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

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

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

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

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

6 MR. LIN: But I think that --

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

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

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

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

23 JUDGE TATEL: None at all?

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

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

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

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

6 ORAL ARGUMENT OF ALLISON D. WOOD, ESQ.

7 ON BEHALF OF THE NON-STATE PETITIONERS

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

20 JUDGE KAVANAUGH: Both versions make sense.

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

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

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

25 MS. WOOD: It, you know --

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

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

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

9 MS. WOOD: And then once --

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

14 MS. WOOD: Well, what happened is --

15 JUDGE PILLARD: -- and then --

16 MS. WOOD: -- if you had, if you came in and you
17 regulated under 111(d) for that period of time, and then you
18 now identify source categories under 112 to the extent there
19 were an overlap between the source category you're
20 regulating under 111(d) and what you're regulating under
21 112, you then, you can move that way, that is, you know, in
22 fact permissible under 112(d)(7), so in other words you
23 would have, you could now regulate more under 112.

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

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

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

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

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

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

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

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

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

22 JUDGE PILLARD: I mean, for other pollutants.

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

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

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

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

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

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

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

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

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

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

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

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

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

16 MS. WOOD: And obviously, we've already discussed
17 that the exclusion doesn't apply to 111(b) new sources, so
18 certainly that's also meant to not displace anything under
19 111(b) for new sources.

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

22 MS. WOOD: Well --

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

25 MS. WOOD: Yes.

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

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

7 JUDGE TATEL: No, but you're --

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

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

13 MS. WOOD: I actually --

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

18 MS. WOOD: Under --

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

21 MS. WOOD: Correct.

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

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

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

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

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

11 JUDGE TATEL: Just carbon dioxide.

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

13 JUDGE TATEL: Carbon dioxide --

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

15 JUDGE TATEL: Carbon dioxide emissions --

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

17 JUDGE TATEL: -- carbon dioxide emissions --

18 MS. WOOD: -- air pollutant --

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

22 MS. WOOD: Right, and --

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

25 MS. WOOD: Because for these lower category of

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

6 JUDGE TATEL: That's an argument for treating, for
7 having different standards for the two sources, and in fact,
8 112 requires taking account of costs and achievability, so
9 you might not be able to limit carbon dioxide emission from
10 existing sources as extensively as you can for new sources.
11 I got that. But under your theory you can't regulate
12 existing sources at all.

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

16 JUDGE TATEL: What about carbon dioxide?

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

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

25 JUDGE PILLARD: We're talking about different --

1 MS. WOOD: -- had a choice --

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

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

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

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

20 JUDGE PILLARD: Yes.

21 MS. WOOD: But, you know --

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

1 presumably this was a trade off, right? They got the three-
2 year delay, and they got this, under this theory, I'm not
3 saying I agree with this, by the way, but I think this is
4 the theory, they got a trade off of the three-year delay,
5 which turned into, you know, 22 years, and then they got the
6 trade off of if we subject you to the draconian limitations,
7 as you describe it, under 112, you could be regulated under
8 108, but not under 111(d).

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

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

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

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

3 JUDGE MILLETT: I just have a fact question.

4 MS. WOOD: -- it triggered the exclusion.

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

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

12 JUDGE MILLETT: They are all being regulated under
13 112?

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

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

19 MS. WOOD: Yes, they have to comply with both
20 NAAQS and acid rain, but you also see in the legislative
21 history, and let me get the actual Joint Appendix cite where
22 the EPA Administrator talked about regulating under Section
23 112 in the acid rain program, and said that that would be
24 ridiculous because it would be, it's too hard for existing
25 sources.

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

3 MS. WOOD: Okay.

4 JUDGE KAVANAUGH: -- to say that.

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

7 JUDGE HENDERSON: All right. Thank you.

8 MS. WOOD: Thank you.

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

12 ORAL ARGUMENT OF AMANDA SHAFER BERMAN, ESQ.

13 ON BEHALF OF THE RESPONDENTS

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

17 Congress did not unambiguously bar EPA from
18 addressing different pollution problems under the Section
19 111 and 112 programs in 1990. To begin with, we have the
20 two amendments to the relevant text, Sections 108(g) and
21 302(a) of the 1990 amendments. The latter of those, which
22 we call the Senate amendment, plainly allows regulation of
23 non-hazardous pollutants like carbon dioxide. So long as
24 this Court gives some effect to both amendments, we win.
25 The only way that Petitioners win this issue is if they get

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

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

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

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

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

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

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

25 JUDGE KAVANAUGH: Yes. The earlier one that

1 you're not buying --

2 MS. BERMAN: No, I'm not.

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

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

5 JUDGE KAVANAUGH: You can't buy it.

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

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

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

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

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

1 ignore both.

2 JUDGE KAVANAUGH: Here, you have --

3 JUDGE ROGERS: True.

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

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

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

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

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

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

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

5 JUDGE SRINIVASAN: When you say recede
6 statement --

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

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

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

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

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

1 try to resolve the absurdity, you know?

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

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

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

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

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

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

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

10 JUDGE TATEL: Yes.

11 MS. BERMAN: We believe the best reading of that
12 is regulated in regard to its hazardous pollutant emissions,
13 because we have to look at the context, the context is the
14 112 program specifically.

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

17 MS. BERMAN: There is slight potential daylight
18 between the two in regard to a hypothetical future question
19 that's not presented here, and that is what if we have a
20 scenario where we have a listed 112 pollutant, but for some
21 reason EPA doesn't regulate, doesn't actually regulate that
22 pollutant under 112, in that situation one could read the
23 House amendment as trying to say well, for that category,
24 that very narrow category EPA's potential to regulate under
25 111(d) may be preserved, but we don't have to answer that

1 tough question here.

2 JUDGE KAVANAUGH: That's the key. That's pretty
3 critical, the House amendment would have allowed under the
4 reading of that, I should say under the reading of the House
5 amendment altered by the other side the House amendment
6 would allow regulation of EGUs for HAPs and carbon under
7 111(d) if the EGUs were not regulated under 112, which was
8 an uncertain thing at the time of enactment.

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

12 JUDGE KAVANAUGH: As under --

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

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

17 MS. BERMAN: Under our theory if EGUs --

18 JUDGE KAVANAUGH: Were not regulated under 112
19 after --

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

1 a hazardous pollutant --

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

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

14 JUDGE KAVANAUGH: Yes.

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

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

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

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

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

10 MS. BERMAN: Ninety-two.

11 JUDGE TATEL: Is that right?

12 MS. BERMAN: Well, I think --

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

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

19 JUDGE TATEL: Yes.

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

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

1 MS. BERMAN: Okay. So, you don't buy --

2 JUDGE TATEL: Then what do I do?

3 MS. BERMAN: If you think there is a conflict
4 between the House amendment --

5 JUDGE TATEL: No, no.

6 MS. BERMAN: -- and the Senate amendment?

7 JUDGE TATEL: No, no. I just don't accept --

8 MS. BERMAN: Meaning you don't buy our --

9 JUDGE TATEL: -- I don't accept EPA's
10 interpretation of the House amendment. I think it's
11 unreasonable, even if you get *Chevron* deference I think it's
12 unreasonable. Now, what do I do? Where do I go from there?

13 MS. BERMAN: Well, so, I assume that means you buy
14 Petitioners' interpretation of the House amendment, but then
15 we still have --

16 JUDGE TATEL: No, I don't accept theirs either.

17 MS. BERMAN: -- to deal with the Senate amendment,
18 and what --

19 JUDGE TATEL: I don't accept their either. These
20 are all hypotheticals.

21 MS. BERMAN: Okay.

22 JUDGE TATEL: Where do I go?

23 MS. BERMAN: Well, here's what we think you
24 should, that the Agency should be able to do, and did do, is
25 to draw that reasonable middle course that was talked about

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

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

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

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

7 MS. BERMAN: Sorry?

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

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

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

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

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

8 JUDGE KAVANAUGH: Yes.

9 MS. BERMAN: -- source categories.

10 JUDGE KAVANAUGH: I agree. I agree.

11 MS. BERMAN: And EPA has very little --

12 JUDGE KAVANAUGH: I'm aware.

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

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

1 opposed to regulated by the statute, covered by the statute.
2 If you read it as regulated by the statute, covered by the
3 statute, so regulated under 7412 as a statutory matter, then
4 would it not include EGUs when you have a provision in
5 7412(n) that says here's this whole scheme, now, Secretary,
6 start studying these folks and figure out what's necessary
7 and appropriate, is that a form of statutory regulation of
8 EGUs?

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

22 JUDGE KAVANAUGH: Correct me if I'm wrong on the
23 facts here, EPA has never regulated a source category under
24 111(d) that is regulated under 112?

25 MS. BERMAN: Municipal solid waste landfills are

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

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

9 MS. BERMAN: No, it's a fact, but I want to point
10 you to one thing in the municipal hazardous waste landfill
11 regulation that I think is important, and that is that the
12 Agency specifically talked about in a line a potential
13 future regulation of non-hazardous components of landfill
14 gas under 111. Let me see if I can find the Joint Appendix
15 site for that, quickly. Yes, this is at Joint Appendix
16 4284, it might start on 83 and continue through 84. It says
17 some components of landfill gas are not hazardous pollutants
18 listed under 112, and thus will not be regulated under 112,
19 and it was suggesting that those could still be regulated
20 under 111. So, again, the Agency has always viewed this
21 exception in 111(d) as a hazardous pollutant specific
22 exception.

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

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

4 MS. BERMAN: With respect, Your Honor, you are
5 wrong, the reading EPA reached in 2005 at the end of the day
6 was the same one it reached here. EPA concluded that it
7 could regulate under 111(d) there because it had delisted
8 under 112. And so the source category and the pollutant
9 were no longer regulated under 112. But the conversation
10 was always about can hazardous pollutants be regulated under
11 111 where they haven't been regulated under 112. Nobody
12 ever suggested, and in fact, Petitioners agreed with EPA's
13 reconciliation of the two amendments to the contrary, nobody
14 ever agreed with this House amendment only version that
15 we're hearing now.

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

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

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

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

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

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

12 ORAL ARGUMENT OF SEAN DONOHUE, ESQ.

13 ON BEHALF OF THE ENVIRONMENTAL INTERVENORS

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

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

1 treatment under those other programs it's there, and the
2 Petitioners certainly wouldn't say that Section 112 with its
3 10-ton threshold for regulation is inappropriate, they would
4 be back here saying EPA can't regulate under that.

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

9 MR. DONOHUE: Right.

10 JUDGE KAVANAUGH: -- future pollutants that --

11 MR. DONOHUE: Right.

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

15 MR. DONOHUE: Right. I think --

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

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

25 The same 1990 amendments on which Petitioners rely

1 expressly address the relationship between Section 112
2 standards and Section 111 requirements, and they refute
3 Petitioners' theory on the availability of a specific
4 textual provision that tells you how to interpret this
5 relationship, should be very important, particularly given
6 the difficulty of this statutory hodge-podge we've been
7 discussing. And as Judge Rogers recited, Section 112
8 instructs that no emission standard under Section 112 shall
9 be interpreted, construed, or applied to diminish or replace
10 requirements under Section 111. It directly contradicts
11 Petitioners' account of the 1990 Congress' intent, and it
12 forecloses interpreting 112 standards to annul Section
13 111(d) for virtually all existing sources, as would be the
14 consequence of the Petitioners' reading. And EPA in the
15 preamble at Joint Appendix 195 pointed to 112(d)(7) and said
16 that shows that 111(d) standards were not intended to roll
17 back protections against dangerous but non-hazardous
18 pollutants, and that's what we have here. None of EPA's
19 prior interpretations have said that the effectiveness
20 cross-reference is to foreclose regulation under 111(d) of
21 such --

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

23 MR. DONOHUE: -- non --

24 JUDGE TATEL: -- do you do with these two

25 conflicting amendments then?

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

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

9 MR. DONOHUE: I'm sorry?

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

12 MR. DONOHUE: No.

13 JUDGE TATEL: No?

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

16 JUDGE TATEL: What's the difference?

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

18 JUDGE TATEL: Yes.

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

20 JUDGE TATEL: Right.

21 MR. DONOHUE: -- foreclosed in --

22 JUDGE TATEL: And under your view?

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

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

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

16 MR. DONOHUE: For both, under both.

17 JUDGE KAVANAUGH: Right, right.

18 MR. DONOHUE: We think that --

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

22 MR. DONOHUE: Right.

23 JUDGE KAVANAUGH: -- potentially allowed --

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

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

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

14 MR. DONOHUE: If we --

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

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

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

22 MR. DONOHUE: Okay. Sorry.

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

25 MR. DONOHUE: Right. Right.

1 JUDGE TATEL: I meant Senate amendment.

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

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

5 MR. DONOHUE: Yes.

6 JUDGE TATEL: I mixed them up.

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

8 JUDGE TATEL: Yes.

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

11 JUDGE TATEL: Yes.

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

14 JUDGE TATEL: Right.

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

16 JUDGE TATEL: Okay.

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

19 JUDGE TATEL: Right.

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

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

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

9 MR. DONOHUE: Okay.

10 JUDGE HENDERSON: We have to move on.

11 MR. DONOHUE: Thank you, very much.

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

14 ORAL ARGUMENT OF ELBERT LIN, ESQ.

15 ON BEHALF OF THE STATE PETITIONERS

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

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

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

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

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

13 MR. LIN: No, Your Honor, that's not true. First,
14 they could delist, power plants they could withdraw their
15 112 regulation and regulate power plants under Section
16 111(d), the exclusion would not apply then; or, as we've
17 discussed, there's the, they have themselves suggested that
18 carbon dioxide might be regulated under Section 112. Now,
19 we disagree with that, and that's --

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

22 JUDGE KAVANAUGH: You'd be opposing --

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

24 JUDGE TATEL: Carbon dioxide be --

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

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

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

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

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

7 JUDGE TATEL: Yes. Yes.

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

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

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

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

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

19 JUDGE TATEL: Well with *Utility Air*.

20 MR. LIN: But to --

21 JUDGE TATEL: Excuse me.

22 JUDGE KAVANAUGH: Your point is --

23 JUDGE TATEL: Excuse me.

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

1 JUDGE TATEL: Right, right.

2 MR. LIN: Yes, Your Honor.

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

5 JUDGE TATEL: Yes.

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

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

10 JUDGE KAVANAUGH: They're not delisted.

11 MR. LIN: But as we know --

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

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

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

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

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

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

20 JUDGE KAVANAUGH: The footnote's huge.

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

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

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

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

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

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

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

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

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

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

25 MR. LIN: There are other issues in this case

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

3 JUDGE HENDERSON: Two minutes.

4 ORAL ARGUMENT OF ALLISON D. WOOD, ESQ.

5 ON BEHALF OF THE NON-STATE PETITIONERS

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

8 This is not an, this case is not an attack on
9 *Massachusetts v. EPA*, this is, as Judge Srinivasan
10 identified earlier today, this is a question, not a question
11 of whether, it's a question of how. And I think, you know,
12 that's important to keep in mind. It's also important to
13 keep in mind that existing power plants are not getting a
14 free ride under the Clean Air Act if you read the Section
15 112 exclusion the way Petitioners argue it should be read.
16 Existing power plants are currently regulated under the pre-
17 construction, prevention of significant deterioration
18 program, that includes CO2. There is also pending a
19 regulation to regulate CO2 from new modified and
20 reconstructed sources under Section 111(b), and while that
21 regulation is the subject of petitions for review before
22 this Court, none of the issues in that case involve the
23 authority of EPA to regulate CO2 from those sources. Thank
24 you.

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

1 till 2:30.

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

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

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

8 **III. Constitutional Issues**

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

10 ON BEHALF OF THE STATE PETITIONERS

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

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

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

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

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

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

1 accountability is absolutely essential, that people have to
2 understand who is doing what to them.

3 JUDGE GRIFFITH: To who are the state commandeered
4 by this?

5 MR. RIVKIN: We are, if the record submitted, or
6 generated during the rule-making, Judge Griffith, indicates
7 that you have commandeering of both legislatures, which of
8 course isn't exactly the teaching of *New York*, as well as
9 commandeering of regulatory officials in the Executive
10 Branch.

11 If I may briefly unpack what exactly states would
12 have to do. EPA makes us think that all that would happen
13 here is a bunch of private individuals are going to come to
14 the states and ask them to approve particular facilities.
15 Even that is commandeering enough because that's exactly the
16 situation in *Prince* where private parties came to chief law
17 enforcement officers and asked them to perform certain
18 functions, but much more is at stake here. Apropos, Judge
19 Tatel's observations about the integrated nature of a grid
20 earlier today, the grid is a very intricate beast requiring
21 for it to function enormous amount of planning to come, and
22 to given the only party given the lack of preemptive
23 authority on the part of Federal Government, the only other
24 agency of the states. If I can briefly unpack it for you.

25 So, great deal of integrated resource planning

1 would go into figuring out how to integrate both renewable
2 fuel facilities, as well as new natural gas facilities into
3 the existing grid in a way that preserves their liability
4 and minimizes the impacts and affordability. There has to
5 be a great deal of planning, all of it would be followed by
6 execution where it states also for both parties. But just
7 to finish the planning part, planning for new transmission
8 infrastructure to integrate the renewable fuel facility or
9 power facilities and gas fired facilities because without
10 that it would not go into delivering electricity to anybody.

11 Another part, very important, planning for renewed
12 natural gas pipelines because you're not going to be able to
13 operate new natural gas fired plants that really would be
14 the mainstay of the base load fleet.

15 JUDGE GRIFFITH: How is that different from state
16 officials reacting to any federal initiative? I mean,
17 there's planning that has to go on when the Federal
18 Government --

19 MR. RIVKIN: I appreciate this question, Judge
20 Griffith. There's enormous constitutional significance in
21 the Federal Government exercising its preamble authority in
22 other areas, and producing unavoidable consequences, even if
23 unavoidable consequences --

24 JUDGE TATEL: Well, let me just give you an
25 example, to follow up on Judge Griffith's question. Suppose

1 under your theory, actually, I think the EPA uses this
2 example in its brief, wouldn't the Americans with
3 Disabilities Act be unconstitutional? I mean, it requires
4 individuals and companies to build ramps, install elevators,
5 do all kinds of things, and all of that requires zoning, and
6 building permits, and all kinds of actions by state and
7 local agencies that deal with, you know, the intricate plan
8 of streets, and how a town is set up, what's the difference?

9 MR. RIVKIN: Judge Tatel, we understand that
10 unavoidable consequences of the exercise of federal power.
11 The best way to answer you is to quote roughly, a rough
12 paraphrase from *Prince* where the Court said --

13 JUDGE TATEL: Wait, could you just answer my
14 question? What's the difference between this case and --

15 MR. RIVKIN: Yes.

16 JUDGE TATEL: -- the ADA example? Both statutes
17 require action by state authorities.

18 MR. RIVKIN: The difference that --

19 JUDGE TATEL: So, what's the difference?

20 MR. RIVKIN: If the key constitutional difference,
21 Judge Tatel, but in our case the object of this rule is to
22 administer the functioning of state government. In the ADA
23 case the purpose of this rule is to bring about certain
24 results in the private sector, and any consequences of our
25 state government --

1 JUDGE TATEL: No, no.

2 MR. RIVKIN: -- which exist are purely incidental.
3 It makes enormous difference, commandeering doctrine would
4 make no sense unless it meant one thing, the purpose of an
5 exercise is to direct the functioning of state entities,
6 state officials, state legislatures, so as to shift
7 accountability for unavoidable consequences, good or bad, of
8 an exercise.

9 JUDGE TATEL: Well, that's exactly what happens in
10 my hypothetical, it forces state agencies to use their
11 police power to issue permits, zoning changes, and other
12 things, and they're not politically accountable for that.

13 MR. RIVKIN: I understand, Judge Tatel.

14 JUDGE TATEL: So, what's the difference?

15 MR. RIVKIN: The key difference in this rule, just
16 like in *New York* and *Prince*, the Federal Government is
17 telling the officials of a co-equal sovereign that they
18 intend, expect, and desire for them to engage in the task of
19 generating shifting, which is within the sweet spot of their
20 police powers, which the Federal Government has not
21 preempted them, unlike in *Hodel*. In your hypothetical the
22 Federal Government is accomplishing certain results, and it
23 has consequences for the states, the states would indeed
24 exercise their power, it is the subtle --

25 JUDGE TATEL: The same thing here, the Federal

1 Government is issuing environmental emission standards, and
2 that has indirect consequences for state regulation, just
3 like in the ADA case.

4 MR. RIVKIN: Your Honor --

5 JUDGE TATEL: Isn't that --

6 MR. RIVKIN: -- the purpose of an exercise, which
7 sometimes may be difficult to infer, we have no problem
8 here, in any situation where the Federal Government
9 explicitly tells states that legislative or regulatory tasks
10 have to be undertaken, the anti-commandeering cannon, which
11 is per se --

12 JUDGE TATEL: Where did it do that here?

13 MR. RIVKIN: It does it in five places in this
14 rule, it doesn't use exactly the same language as *New York*
15 and *Prince* --

16 JUDGE TATEL: Yes, I didn't think so, I couldn't
17 find it. Where does it tell the states that they have to do
18 something?

19 MR. RIVKIN: It says in, throughout the rule which
20 states are expected to exercise their traditional
21 responsibility to maintain electric liability. It mentions
22 in four places in the rule what the states are supposed to
23 do, and for example just to quote from --

24 JUDGE MILLETT: It says expected, not required.
25 Expected, not required, it's a predictive statement.

1 MR. RIVKIN: I'm glad you asked this question,
2 Judge Millett, let me put it this way, given a respect for a
3 rule of law, when officials of a co-equal sovereign, Federal
4 Government, tell the officials of another co-equal
5 sovereign, that they are going to destroy, which is destroy
6 a portion of existing energy infrastructure where they say
7 we cannot replace it, only you can, and we expect you to
8 replace it, and a failure to replace would --

9 JUDGE MILLETT: Where does it say you have to
10 replace anything, as opposed to industry might have to
11 change something?

12 MR. RIVKIN: Let me paraphrase slightly my
13 response to one of your colleagues, Judge Millett, grid can
14 only be created through a concerted action, like state
15 regulators, given its highly intricate nature, the notion
16 that you can throw a grid together --

17 JUDGE MILLETT: Collective state regulators,
18 correct? That's not something that a single state does,
19 collectively state regulators create the grid.

20 MR. RIVKIN: No.

21 JUDGE MILLETT: The grid --

22 MR. RIVKIN: No.

23 JUDGE MILLETT: -- doesn't belong to any single
24 state.

25 MR. RIVKIN: Both, Judge Millett, both actions

1 take place, each state plans its own grid, but state
2 regulators also can cooperate sometimes to play original
3 grids or national grid. But the notion that EPA puts
4 forward that all that would happen here is the state can sit
5 back and allow private parties to come in is risible. Let
6 me give you a perfect example. The state regulators have a
7 responsibility to ensure sufficient fuel diversity, so that
8 the fuel that is cheapest today, that would be put forward
9 by private individuals because, no disrespect to the market
10 but all they want to do is to make money, that is
11 officially, that fuel diversity is preserved so as to be
12 resilient to future changes in prices. They have to be
13 ensured that there's a sufficient balance between close to
14 low generation, versus long distance generation, because
15 transmission is inherently liable. In the great state of
16 Oklahoma, for example, because of tornadoes, transmission
17 cannot be, you cannot rely solely on long distance
18 generation. The great state of Florida mentioned in their
19 comments that because natural gas pipelines tend to run from
20 the Gulf of Mexico they cannot rely too, too much on the
21 natural gas fired generation because of tropical storms.
22 All of those things are highly states --

23 JUDGE MILLETT: But is this mandated or choices?
24 Is this choice? I mean, it seems to me like this is, what
25 you're saying is there's an interstate highway system, and

1 as a result when states maintain their roads as a practical
2 matter they hook them up to the interstate highway system,
3 they have maintenance responsibilities as to that, and it's
4 going to be driven, probably influenced, and certainly
5 expected and encouraged from the federal level, but at the
6 end of the day it's not required. Your people may require
7 you to do it, but it's not required.

8 MR. RIVKIN: It is not an apropos analogy because,
9 for example, to use Florida as an example, Florida mentions
10 in its comments that they roughly have 68 megawatts of
11 misloaded capacity, what they can import from out of state
12 is 3.8 megawatts, less than five percent. States cannot, no
13 state can ever abandon the unique and distinctive
14 responsibility at the height of their police power for
15 structuring their own grid, and the fact that they do it day
16 in and day out, according to their own desiderata, or
17 according to the impacts of market force it's entirely
18 constitutional and objectionable. A federal mandate tasking
19 them in very clear and compelling language to undertake
20 those responsibilities is the worst example of commandeering
21 from a standpoint, commandeering is a --

22 JUDGE MILLETT: If Congress passed a law, if
23 Congress just passed a law that banned the use of coal
24 power, coal based power, fossil fuel based power --

25 MR. RIVKIN: Banned?

1 JUDGE MILLETT: -- they just banned it --

2 MR. RIVKIN: That statute --

3 JUDGE MILLETT: -- would that be unconstitutional
4 commandeering?

5 MR. RIVKIN: That statute, Judge Millett, would
6 create some constitutional issues, but it would have one
7 virtue, at least it would produce accountability, second --

8 JUDGE MILLETT: No, so the question is doesn't
9 that cause the exact same commandeering consequences that
10 you're raising here, you're going to have to change your own
11 internal grid, you're going to have to change your supplies?

12 MR. RIVKIN: We have --

13 JUDGE MILLETT: How would the consequences be
14 different?

15 MR. RIVKIN: I understand. If I may, our case is
16 stronger precisely because of an unambiguous indication in
17 this rule, but the Federal Government lacks the ability to
18 undertake those tasks. Congress could have actually given
19 EPA or some other agency preemptive authority, like in
20 *Hodel*, to take over the entire field, they did not.

21 JUDGE TATEL: That was true in my hypothetical,
22 too. The Federal Government can't do permits for curb cuts,
23 or for any other changes required for the Americans with
24 Disabilities Act.

25 MR. RIVKIN: Judge Tatel --

1 JUDGE TATEL: They can't, the Government does not
2 have the authority to do that, compliance with the ADA can
3 only occur if states exercise their police power to provide
4 the necessary permits.

5 MR. RIVKIN: I go back to, and if I may, an
6 additional point, I go back to a point about incidental
7 impacts, and intentional impacts. The essence of
8 commandeering is seeking a desired outcome in terms of
9 federal policy by utilizing the machinery of the states.

10 JUDGE TATEL: I don't mean to beat a dead horse --

11 MR. RIVKIN: That is --

12 JUDGE TATEL: -- but that's the purpose of the
13 ADA.

14 MR. RIVKIN: No, the purpose of APA, Judge
15 Tatel --

16 JUDGE TATEL: But they did, the ADA --

17 MR. RIVKIN: -- is to produce --

18 JUDGE TATEL: -- Congress passed the ADA requiring
19 these changes, that's what they wanted, just like the EPA
20 here is trying to control emissions of pollution, and both
21 EPA here and Congress with the ADA knew full well that it
22 could not be accomplished without the states exercising
23 their police and zoning and other but --

24 MR. RIVKIN: But --

25 JUDGE TATEL: -- it couldn't happen.

1 MR. RIVKIN: -- the goal in Americans with
2 Disabilities Act is to produce certain changes regard to the
3 private sector. I have no doubt that the goal is present
4 here. But if I may, Judge Tatel, the goal here is far more
5 profound, the goal here is to change the energy
6 infrastructure of the states, it is not just an admission
7 rule. We heard a concession from my colleague from EPA, Mr.
8 Hostetler, this morning, and I quote who said this rule is
9 about substituting cleaner technology for dirtier
10 technology, that means changing the grid, the grid that only
11 states can change and maintain. It is a fundamental
12 difference in quality, and in kind --

13 JUDGE MILLETT: Does that mean changing the grid
14 or changing --

15 MR. RIVKIN: -- and not just in quantity.

16 JUDGE MILLETT: -- does that -- I have taken that
17 to mean changing the sources of power, the types of power
18 generation being used to feed electricity into the grid, is
19 that different from what you're talking about?

20 MR. RIVKIN: Forgive me.

21 JUDGE MILLETT: Sorry. No, I had understood that
22 comment to be that what this rule does is certainly heavily
23 encouraged that require changing the forms of power
24 generation that feed electricity into the grid.

25 MR. RIVKIN: It is that which is sufficiently

1 objective, but it's more than that, apropos of my point
2 about grid being a very, a very carefully calibrated
3 mechanism. The essence of its mechanism is integration.
4 You can put together a bunch of facilities that would do
5 nobody any good either on a day to day basis, but
6 particularly on days of peak demand, days flagged by natural
7 disasters. The only indispensable party can do
8 reintegration of the states, EPA knows it, EPA acknowledges,
9 EPA expects the states to perform, and apropos my response
10 to Judge Tatel, it is that unique sliver of desire to seize
11 state agencies that produces such disjunctive, such
12 unconstitutional results, and if it were not true then the
13 entire Supreme Court's anti-commandeering jurisprudence
14 would make no sense. Let me also add that we do have an
15 anti-coercion argument because --

16 JUDGE MILLETT: And anti what?

17 MR. RIVKIN: An anti-coercion argument, which is
18 the teaching of *Steward Machine*, *South Dakota v. Dole*, and
19 *FIB*. The situation we have is much more of a gun to the
20 head than the palpable collapse of a Medicaid system, and
21 issue NFIB because to be, aside from the state's police
22 power responsibility to maintain reliable service for their
23 citizens, states themselves, Judge Millett, would not be
24 able to go on as functioning, ongoing concerns if we don't
25 have access to reliable and affordable electricity, state

1 offices would close, state prisons would close, they would
2 be unable to dispatch fire and rescue services. So, we have
3 unprecedented mix of commandeering and coercion, and if
4 that's not true the entire Supreme Court juris prudence in
5 this area has been nurtured for at least --

6 JUDGE MILLETT: Your state get energy from sources
7 outside the state?

8 MR. RIVKIN: I made the point, Judge Millett,
9 regard to Florida, the opportunity to import power is a
10 contributing factor to the state's integrative, essential
11 job, but it never can substitute for it, for one thing, no
12 state, no sovereign would entirely rely on somebody else.

13 JUDGE MILLETT: I'm not saying that, I'm just
14 asking whether it is a self-sufficient, internal grid, or
15 whether in fact it's an interstate, interconnected grid?

16 MR. RIVKIN: We do know one thing, the State of
17 Texas, for example, is entire, it's an island of its own,
18 it's entirely decoupled from a grid. Virtually every single
19 state, I mentioned the ratio in Florida, I mentioned a
20 concern about resilience, and if we have a natural disaster
21 you want to have a sufficient amount of close to load
22 generation, and not to get technical, but in order to
23 maintain the viability of a grid you need to have a
24 sufficient amount of base load capacity that by definition
25 has to be within your generating footprint. There is both

1 technical reasons and political reasons and constitutional
2 reasons that you never totally make it impossible for EPA to
3 carry out what it set out to do, and it's not even
4 pretending to do anything otherwise, it is clearly directly
5 state officials in multiple places to perform those tasks,
6 and that is commandeering, that is the only thing that
7 commandeering means.

8 JUDGE HENDERSON: All right. Thank you, Mr.
9 Rivkin. Professor Tribe.

10 ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.

11 ON BEHALF OF THE NON-STATE PETITIONERS

12 MR. TRIBE: May it please the Court. I was
13 thinking of Judge Tatel's question, I don't think there's
14 anything unconstitutional about the Americans with
15 Disabilities Act. But if Congress had been unable to pass
16 it, as it was unable to enact -- excuse me, thank you --
17 enable to enact a nationwide cap and trade system when the
18 Senate wouldn't go along with the House, and if instead of
19 that some agency with relatively limited previous powers in
20 a related area were to tell the states each of you must pass
21 a mini-ADA, you have some room to maneuver, but if you don't
22 pass it then, although Congress failed to enact an Americans
23 with Disabilities Act, we will simply exercise preemptive
24 power and put it in place.

25 JUDGE TATEL: Well, but the EPA here was acting

1 pursuant to the Clean Air Act --

2 MR. TRIBE: Well, that's right --

3 JUDGE TATEL: -- and it's directed that it --

4 MR. TRIBE: -- and the question is --

5 JUDGE TATEL: -- it's directed that it set goals
6 for the states to set performance standards, it was acting
7 pursuant to a federal statute. This morning we had a lot of
8 arguments about whether it was, whether the regulations
9 comply with the statute, but are you saying that even if the
10 regulations comply with the statute then the Clean Air Act
11 is unconstitutional?

12 MR. TRIBE: No. What I am saying is that in a
13 case like *New York v. United States* even though Congress
14 could have taken over the area of radioactive control all by
15 itself, the Court was concerned not just with the effect,
16 but with what some call the etiquette of federalism because
17 of accountability, it said that if a state like New York is
18 given an ostensible choice, either take title to the
19 radioactive waste, or regulate in accord with our standards,
20 that's an impermissible choice, even though it had a choice.
21 The fallback if the State of New York did nothing was not
22 that the Government would come in and take over, in fact,
23 it's simply that it would not allow New York to free ride
24 and dump its nuclear waste in other states that were
25 assuming their responsibilities. Here, the fallback is very

1 different, that is the states are given a theoretical formal
2 choice, but if they do not exercise it in accord with the
3 EPA's goals there is a draconian alternative, and the states
4 are warned in no uncertain terms that they will be worse off
5 if they don't comply.

6 But my point is really less to talk about
7 horizontal federalism, I think you avoid all of those issues
8 which are serious issues, that is vertical federalism, my
9 point is not to talk about vertical separation of powers,
10 because I think that under the horizontal separation of
11 powers, and the role of the three federal branches, this
12 action by the EPA is impermissible, and for separation of
13 powers reasons that came up occasionally in the morning, and
14 you don't have to face the issue of how to make sense of the
15 anti-commandeering doctrine of a case like *New York v. U.S.*
16 against the backdrop of contingent preemption. The reason
17 that I do not think that the EPA is acting within the bounds
18 of an executive agency has very much to do with the Clean
19 Air Act that you're referring to, Judge Tatel, and the way
20 it is written. It's not written in a way that's perfectly
21 ideal for the regulation of CO2, let's admit it, and I think
22 members of this Court have suggested that there's a kind of
23 bait and switch going on, that is the Supreme Court in *AEP*
24 *v. Connecticut* said that the Federal Government has decided
25 to set up an agency to deal with all forms of air pollution,

1 including we now understanding air pollution of a ubiquitous
2 kind, like CO2, and that's where the solution must be found.
3 There was no promise that 111 would necessarily solve
4 everything, there was a question at the time of exactly what
5 the scope of this little used provision, 111(d), would be.
6 It has only been used five times for limited localized
7 problems, only one since 1990, and the question of whether
8 you would be able to do it without delisting sources of
9 power generation under 112 was very much alive. The *Mercury*
10 case in this Court was in the immediate background, so when
11 the *AEP* Court in a six to one ruling wrote that footnote
12 seven, which very clearly, as I think Judge Kavanaugh
13 recognized, if we take it seriously, and I think we should,
14 though it's only a footnote it was an important part of the
15 decision, the Court said that if the source category is
16 regulated under 112 then you cannot regulate that category
17 even with respect --

18 JUDGE TATEL: But say it --

19 MR. TRIBE: -- to a non-HAP under 111(d).

20 JUDGE TATEL: -- didn't it also say if it was
21 regulated under the --

22 MR. TRIBE: I'm sorry?

23 JUDGE TATEL: It also said if it was regulated as
24 a HAP under the criteria program.

25 MR. TRIBE: Well, if you --

1 JUDGE TATEL: That's what it says.

2 MR. TRIBE: -- read the, if you read the text of
3 footnote seven it says EPA may not employ 111(d) if existing
4 stationary sources of the pollutant in question are
5 regulated, sources are regulated under the national ambient
6 air quality standard program, or the hazardous air
7 pollutants program. I mean, taking literally what that
8 means is that you have to make a choice, and it's not as
9 crazy a choice as some of those that have been posited, you
10 know, for example, a state telling somebody you have to fix
11 your brakes or your rear headlights, but the state can't
12 make you do both. This isn't like that, it's quite
13 sensible, though it may not be ideal, to require an
14 Executive agency of the Federal Government to make a choice
15 whether to proceed under national standards under 112, or to
16 direct the states to regulate under 111(d) for existing
17 plants. No, some people say well, that leaves a gap, what
18 if the pollutant is not a hazardous air pollutant, and
19 you're not going to go through the process of classifying
20 CO2 as hazardous, though perhaps that could be done, but one
21 person's gap is another person's choice. I mean, this Court
22 in *RDC v. EPA* in 2014, in the cement plant case, and three
23 years earlier, Judge Tatel, in your opinion dealing with
24 ozone made it clear that even if this Court believes, or
25 certainly the EPA believes that it's unwise to create a

1 situation where something is not going to be easily covered
2 there is a solution, and the solution is to go to Congress,
3 because I think implicitly it was recognized earlier the
4 structural principles of our Government can't depend on this
5 Court's evaluation of whether Congress is being productive
6 or not, in fact, that was what happened in 1990 --

7 JUDGE MILLETT: So, I'm still having trouble --

8 MR. TRIBE: -- with respect to stratospheric
9 ozone --

10 JUDGE MILLETT: I'm still having trouble
11 reconciling this with what actually happened in the *AEP* case
12 in the Supreme Court. In the wake of *Massachusetts v. EPA*
13 saying you've got to regulate these greenhouse gases, and
14 people were bringing public nuisance actions because nothing
15 had happened by Congress, and the Supreme Court's answer,
16 yes, there's that footnote, but the Supreme Court's answer
17 was that there is a federal agency empowered to make these
18 regulatory decisions. Now, whether EPA could have decided
19 no, we're not going to do it consistent with *Massachusetts*
20 *v. EPA* is a very different answer than saying displacement
21 was the word the Supreme Court was using. This is taken
22 over, it's displaced by this scheme, and it wasn't a
23 congressional scheme, it was that EPA has the authority to
24 make that decision. And now we're told you don't, that in
25 fact it had no authority whatsoever to make any decision

1 here it had already made.

2 MR. TRIBE: But Judge Millett, the issue before
3 the Court was not the interpretation of the intricate scheme
4 of intersection between 111(d) and 112, it was the fact that
5 Congress had decided to create under the Clean Air Act an
6 agency with responsibility for all air pollution, including
7 CO2. The Court stopped quite short of saying and that
8 problem has been solved by the design of this law, it has no
9 gaps --

10 JUDGE MILLETT: The problem there was power plant
11 greenhouse gases --

12 MR. TRIBE: Yes.

13 JUDGE MILLETT: -- in *AEP*, power plant greenhouse
14 gases --

15 MR. TRIBE: And then --

16 JUDGE MILLETT: -- and the answer that we're being
17 told is that as to power plant greenhouse gases, those can't
18 be regulated by EPA, I mean, the delisting is an extremely
19 difficult, and I'm not sure that statutory elements could be
20 met, I'm not sure it's even a conceivable option here. And
21 so, you're being told --

22 MR. TRIBE: But there are --

23 JUDGE MILLETT: -- the whole reason you can't
24 bring your public nuisance action is because they will make
25 the judgment whether and how to take care of it, and now

1 we're told they can't. That's the reasoning, the whole
2 thrust of the decision.

3 MR. TRIBE: I understand the passion, but I don't
4 think the reasoning quite works. It seems to me that under
5 Section 115 it's quite possible that CO2 could be dealt
6 with, that section is specifically designed to deal with
7 international pollution. It's also true that 111(b) applies
8 not only to completely new plants, but to plants that are
9 upgraded after June 18th, 2014, and a great many are in that
10 category. In fact, something like 95 percent of the
11 standards promulgated under 111 are under 111(b), which has
12 no exception for Section 212. So, I don't think it would be
13 a case of the Court saying well, we're looked carefully,
14 although it's not an issue in this case, at which parts of
15 111 we'll be able to use --

16 JUDGE SRINIVASAN: It did say, the Court did say,
17 and most relevant here, 7411(d) then requires regulation of
18 existing sources. So, you're of course right that there's
19 other provisions that are potentially in play, but the way
20 the Court framed it was that the most relevant provision was
21 7411(d) as to existing sources.

22 MR. TRIBE: And then said but of course that can't
23 be used if the source is one in a source category that's
24 dealt with under 112, that's inescapable. And in fact, it
25 wasn't just that the Court, you know, said that as a

1 throwaway, or in light of the *Mercury* case without thinking
2 about it, if you look at the language, the House language of
3 111(d) to read it the way the EPA now reads it after years
4 of not reading it that way you'd have to absolutely erase
5 the language, a source category which is regulated under
6 Section 112 of this title. If you cross out those words at
7 the end of 111(d)(1)(A)(i) the law would mean exactly the
8 same thing under the Government's interpretation. And yet,
9 the Court has repeatedly said that an interpretation of a
10 statute which completely nullifies a significant part of it
11 is not likely to be undertaken, I mean, you don't need much
12 of a clear statement rule to say that just the racing
13 language of a statute won't do, that is why --

14 JUDGE PILLARD: But Professor Tribe, those, the
15 cases you are referring to are not cases in which you have
16 the two --

17 MR. TRIBE: Right.

18 JUDGE PILLARD: -- separate provisions, both of
19 which are equally authoritative, and we've spent a lot of
20 time on that this morning.

21 MR. TRIBE: And that's exactly --

22 JUDGE PILLARD: But those cases are not --

23 MR. TRIBE: -- what I'm going to turn to. That's
24 what I think the reason that the separation of powers adds
25 more than just the usual gloss to a pure statutory argument

1 is precisely that the EPA finally decided it has to assert a
2 *Chevron*-like authority not to interpret ambiguous language
3 in the statute, which in itself wouldn't be enough to
4 trigger *Chevron*, you need a delegation, but it needs to
5 invoke *Chevron* to assert this novel power, which is
6 essentially legislatively, as Whitman said, to take two
7 different statutes, or at least two different versions of a
8 statute and decide which one to make the law of the United
9 States, that is not something that Congress ever set the EPA
10 up to do, it's not the enactment parliamentary agency, it's
11 not even the energy policy agency, it's the Environmental
12 Protection Agency, that task of deciding what to make the
13 law is really not subject to *Chevron*. And in particular in
14 this case saying that the Senate had a distinctly separate
15 version is a bit of an exaggeration, I mean, Judge
16 Kavanaugh --

17 JUDGE MILLETT: We don't let the --

18 MR. TRIBE: -- has already pointed out --

19 JUDGE MILLETT: We don't let the EPA pick what the
20 statutory text is between these competing versions, but if
21 we take even the U.S. Code version and we look at it, and we
22 say it's utterly confusing, is there any separation of
23 powers problem with saying it's ambiguous text, even taking
24 the text as --

25 MR. TRIBE: But I don't see the ambiguity.

1 JUDGE MILLETT: You may not, but if I did --

2 MR. TRIBE: If you do. Okay.

3 JUDGE MILLETT: -- saw the ambiguity, and I don't
4 think I'm alone in that, we saw the ambiguity, and so the
5 Agency gets to apply *Chevron*, its *Chevron* authority to
6 interpret ambiguity in the House version of the language,
7 that's not a separation of powers problem --

8 MR. TRIBE: Well, first of all --

9 JUDGE MILLETT: -- and it's not a factor in the
10 Senate amendment.

11 MR. TRIBE: It's interesting that the first time
12 they ever suggested that the House language was ambiguous
13 after all these years was in the final rule that they
14 promulgated in this case. Until then everybody said it may
15 not be brilliantly written, but it's quite clear that a
16 source category is regulated under 112, you have to
17 deregulate it, which is what they failed to do with *Mercury*
18 before you can regulate it as an existing source under
19 111(d). It was very clear. Now, I think inventing
20 ambiguity, manufacturing it in order to give an agency power
21 over a choice that Congress didn't really give it, that
22 raises serious separation of powers considerations, and they
23 are aggravated in this case by the fact that it's not an
24 ordinary choice, when you add it to the broad definition of
25 the best emission reduction system, which you were

1 struggling with this morning, you have a simultaneous
2 contraction of an exception that Congress wrote for plants
3 that are categories of sources that are regulated under 112,
4 and an expansion of the normal meaning of source category.
5 There's a dilemma that they face in that regard, and as they
6 suggest --

7 JUDGE TATEL: Professor Tribe --

8 MR. TRIBE: -- it's -- I'm sorry.

9 JUDGE TATEL: I just wanted to ask you a question
10 about I guess both your constitutional argument, and your
11 statutory argument, and a sentence in your brief. And
12 earlier you said that EPA has only regulated two pollutants
13 under 111(d), and in your brief you distinguish it this way,
14 and I want to ask you about the significance of this
15 sentence. You say as compared to those you say none of
16 them, that is the pollutants that are regulated under
17 111(d), concerned a ubiquitous substance like CO2 benign in
18 itself, emitted from sources across the nation, and indeed,
19 the globe, rather than from discreet local sources. And
20 then you go on and say atmospheric CO2 is the intermingled
21 result of all human activity and Mother Nature. My question
22 is, is that critical, does that description of carbon
23 dioxide affect your analysis of either the constitutional or
24 the statutory issue?

25 MR. TRIBE: I think it sets the background against

1 which it is not surprising that Congress did not anticipate
2 that the law would be used in quite this way, and I --

3 JUDGE TATEL: Right.

4 MR. TRIBE: -- don't read *AEP* as promising --

5 JUDGE TATEL: But with the Supreme Court having
6 ruled that carbon dioxide is a pollutant --

7 MR. TRIBE: Right, and --

8 JUDGE TATEL: -- and EPA having made the
9 endangerment finding then this is irrelevant, isn't it?
10 What's this got to do with the constitutional analysis? If
11 it has something to do with it I'd like to understand what
12 it is.

13 MR. TRIBE: What it has to do with is that a law
14 that was originally designed to deal mostly with highly
15 specific, localized problems from identifiable sources is
16 not naturally adapted --

17 JUDGE TATEL: Okay.

18 MR. TRIBE: -- to dealing with so ubiquitous a
19 pollutant.

20 JUDGE TATEL: Okay. But our, but the question
21 before us --

22 MR. TRIBE: And that suggests --

23 JUDGE TATEL: -- is still, our question before us
24 is still how to deal with a pollutant under the statute,
25 correct?

1 MR. TRIBE: Yes. Well, it's about how --

2 JUDGE TATEL: Statutory issue and the Constitution
3 question.

4 MR. TRIBE: Well, there's no question that an air
5 pollutant includes CO2. There is, however, under *UARG* a
6 question of how it's permissible under the statute as
7 written to regulate it, and is it permissible to regulate it
8 under 111(d) --

9 JUDGE TATEL: But that's because it's a pollutant
10 that's emitted by a source regulated as a HAP, not because
11 it's a --

12 MR. TRIBE: Well, it might affect --

13 JUDGE TATEL: -- intermingled result of all human
14 activity and Mother Nature, I mean --

15 MR. TRIBE: No, that is fair. I mean, I suppose
16 as a --

17 JUDGE TATEL: Right.

18 MR. TRIBE: -- critique of that draft I accept it,
19 but I don't think --

20 JUDGE TATEL: I wasn't criticizing it, I was
21 wondering whether it related to how we should think about
22 the constitutional issue.

23 MR. TRIBE: Only in that you should be --

24 JUDGE TATEL: And I gather your answer is it
25 shouldn't.

1 MR. TRIBE: -- less surprised by what some people
2 call a gap, that is this is a case, if our whole atmosphere
3 here were not poisoned by the fact that Congress can't seem
4 to do anything we would be saying that's the natural way to
5 fix this up, to deal with this ubiquitous modern problem.

6 JUDGE TATEL: Well, maybe the way it handled this
7 is just proof that it shouldn't be doing anything, right?

8 MR. TRIBE: That it shouldn't, and this Court's
9 mandate to get Congress to move would be rather challenging
10 to write.

11 JUDGE TATEL: Yes.

12 JUDGE HENDERSON: All right, Professor Tribe,
13 you're over your time. So --

14 MR. TRIBE: Okay.

15 JUDGE HENDERSON: -- thank you.

16 MR. TRIBE: Well, can I reserve any for a
17 rebuttal? Thanks.

18 JUDGE HENDERSON: Ms. Berman?

19 ORAL ARGUMENT OF AMANDA SHAFER BERMAN, ESQ.

20 ON BEHALF OF THE RESPONDENTS

21 MS. BERMAN: Petitioners' Tenth Amendment claim is
22 entirely unmoored from the governing case law. Neither the
23 Supreme Court nor this Court have ever held that giving
24 states a choice between regulating in a field and federal
25 preemption is a problem. To the contrary, we have *Hodel*, we

1 have this Court's decision in *Mississippi Commission* that
2 established that if you give states that choice it's a
3 permissible exercise of cooperative federalism. And we know
4 from *FERC v. Mississippi* that this rule applies to
5 utilities, as well. The choice may sometimes be a difficult
6 one as the Court characterized it in *Mississippi*, but it's
7 not an unconstitutionally coercive one.

8 By way of contrast, cases where the Supreme Court
9 has found a Tenth Amendment violation all involve federal
10 laws or rules that didn't give states that choice, but
11 rather required them to take affirmative action to implement
12 the federal policy. For example, in *Prince* the Brady Act
13 required state law enforcement to establish a national
14 background check system. In *Train* (phonetic sp.), state
15 officials had to establish and implement a vehicle retrofit
16 testing system, and the one provision that was found to be a
17 Tenth Amendment issue in *New York*, as my opponent said,
18 required states to actually take title to radioactive waste,
19 they could choose between regulating or taking title, an
20 affirmative action. Here, states have the classic
21 cooperative federalism choice of regulating power plants'
22 carbon dioxide emissions themselves through a state plan, or
23 declining to do so, in which case EPA regulates private
24 sources directly through a federal plan. If states choose
25 that latter option there are no sanctions, there are no

1 penalties, unlike in cases like *NFIB*. This is bread and
2 butter cooperative federalism, and it is indistinguishable
3 from the criteria pollutant program at issue in the
4 *Mississippi Commission* case.

5 Now, in a desperate --

6 JUDGE KAVANAUGH: I think they're saying there's
7 more than that, not necessarily unconstitutionally more, but
8 more in the sense of that the states are going to have to do
9 a lot to help restructure the source of energy supply
10 electricity in their states, and switch it from so it's more
11 than just the usual, I think they're saying.

12 MS. BERMAN: Well, but it isn't, that's the
13 problem. So, what they say states are going to have to do
14 in their brief, they cited three things, deal with new
15 permit applications, make siting decisions, and decommission
16 plants. First of all, it's kind of a premature argument
17 because we don't actually have a federal plan yet for any
18 state, we don't know what will actually be required based on
19 what sources might do pursuant to such a plan, and what they
20 might ask state regulators. But even let's set that aside
21 for a second, these sorts of ancillary regulatory action
22 just don't give rise to Tenth Amendment issues. This is the
23 normal result of private entities like power plants, or car
24 companies, or banks being subject to dual sovereignty. You
25 know, Petitioners made a lot of this one line from the

1 preamble of the rule about states' responsibility to
2 maintain a reliable electric system. To begin with, this is
3 from a background section entitled additional context, it's
4 describing, just describing the regulatory framework in
5 which states operate, and in fact, what it actually says is
6 that numerous entities have both the capability and the
7 responsibility to maintain a reliable system, it lists FERC,
8 DOE, state public utility commissions, ISOs, RTOs, those two
9 are private entities, and other planning authorities, and
10 NERC, all contribute to ensuring the reliability of the
11 electric system. And then it goes on to note that critical
12 to the function are the dispatch tools that are used by
13 RTOs, and ISOs, private entities. So, this passage wasn't
14 really about states having to do things at all, it's a
15 background description of the very complex regulatory
16 framework that EPA was dealing with here, and it's
17 reasonable for the Agency to take that complex regulatory
18 framework into account when it's designing air emissions
19 regulations.

20 You know, if Petitioners are right, as the Court
21 has already pointed out, Congress itself could not take
22 action to require power plants to reduce greenhouse gas
23 emissions, and indeed, I think their argument would take
24 down much of the Clean Air Act, because there's nothing
25 about the clean power plants' interaction with state

1 regulatory processes that's any different than any other air
2 pollution standard for this sector.

3 JUDGE MILLETT: Well, I take their argument to be
4 that maybe *Gregory v. Ashcroft* is the better principle here,
5 and that is look, we all know that if this comes into play
6 we're going to have to do a lot because our job is to keep
7 the power running. This strikes at the heart of a state, if
8 it doesn't have power running where it needs to go, it can't
9 function, it's got no choice, it can't sit on the sidelines,
10 it is going to as a direct result have to, I take it as his
11 argument, get in there, re-jigger the grid, make sure
12 everything is balanced, it can't leave you in control of the
13 plug, it's got to come in and do it with you. And this is
14 the heart of state operations in sort of a *Gregory* sense.

15 MS. BERMAN: And Your Honor, the problem with this
16 argument is that it has no basis in this record. There is
17 just nothing that supports this idea that there are going to
18 be blackouts, and jails closing, and a parade of other
19 horrors if a state doesn't actively intercede to make a
20 federal plan work. The only thing they cite is that
21 statement about, that statement I just read, which is a very
22 background vanilla statement. To the extent they think
23 these things are going to happen from an actual federal plan
24 being imposed for a state, well, there will be an
25 opportunity for any federal plan to be challenged in this

1 Court.

2 JUDGE KAVANAUGH: Won't states have to do quite a
3 bit, though, to oversee, direct, manage the restructuring of
4 the electricity supply in the state? No? You're not --

5 MS. BERMAN: I don't think that's really a fair
6 statement. Under the federal plan as we'll take it as
7 proposed sources are directly regulated, it's anticipated
8 that they'll engage in trading, the federal government will
9 set a whole platform --

10 JUDGE KAVANAUGH: But if the coal plants --

11 MS. BERMAN: -- to allow that.

12 JUDGE KAVANAUGH: I'm sorry to interrupt. Go
13 ahead.

14 MS. BERMAN: That was --

15 JUDGE KAVANAUGH: Okay. If the coal plants go out
16 of business, or some of them do as they already are starting
17 to do, then the state's going to have to do something if
18 it's going to serve its citizens, to find alternative
19 supplies of electricity for the citizens, and that's going
20 to be a busy process.

21 MS. BERMAN: The burden under a federal plan is
22 placed directly on the regulated source. And if a source
23 under the existing regulatory scheme as I understand it,
24 including federal reliability regulation, if a source asks
25 to decommission it actually has to find a way to replace the

1 power that's being lost. So, there is a very complex
2 regulatory mechanism that, you know, ensures reliability,
3 and I think EPA just reasonably pointed to the existence of
4 that, that it wasn't saying states are going to have to step
5 in and make sure the lights don't go out. At the very
6 least, we just don't have the record evidence for that in
7 this rule or this record.

8 JUDGE KAVANAUGH: Do you agree that maintaining
9 the electricity supply is one of the traditional police
10 functions, police power functions of the states?

11 MS. BERMAN: Yes and no. States have an important
12 role, but as I just mentioned there are at this point a
13 number of other federal regulatory schemes in play, and
14 there are also these non-state actors, like RTOs, and ISOs,
15 and they all work together to do this. So, states --

16 JUDGE KAVANAUGH: So, where --

17 MS. BERMAN: -- definitely have a role, but, you
18 know, there's a real difference between requiring state
19 actors to take new affirmative actions and just sort of
20 assuming they're going to go on doing the regulation they
21 already do.

22 JUDGE KAVANAUGH: From their perspective it's the
23 inevitable consequence, and I think they argue it's
24 unconstitutional, but they also argue, I think, and maybe
25 this has more roots as Judge Millett was saying in the case

1 law that at least there needs to be a clear statement, *Bond*
2 certainly suggests that when you are altering the
3 traditional functions of the federal state balance that
4 Congress needs to speak clearly. So, why, distinguish *Bond*
5 if you can for me.

6 MS. BERMAN: I'm sorry, I'm not prepared to
7 distinguish *Bond*. I did want to talk about *UARG* a little,
8 since you were taking us to the clear statement rule, if
9 that's okay? You know, I think that's their best case for
10 the idea that a clear statement rule should apply here
11 either in regard to the basic questions, or even the two
12 amendments question, but I think it's important to keep in
13 mind that that text that you read earlier from *UARG*, Judge
14 Kavanaugh, was in a very specific context. Justice Scalia,
15 he wrote EPA's interpretation is unreasonable, so this is a
16 *Chevron II* analysis, because it would bring about an
17 enormous and transformative expansion in EPA's regulatory
18 authority, and then down below he specified that this would
19 bring in millions of new sources. So, that was the context
20 in which a clear statement rule was found to apply, that's
21 not the context we're dealing with here, we're dealing with
22 an industry that's already regulated under multiple Clean
23 Air Act programs.

24 Now, on the sort of the other separation of powers
25 statutory issues that have been percolating back up, I did

1 want to briefly address the *AEP* footnote, because I think
2 this is an important point. You know, the footnote is
3 dicta, and I agree with my opponent --

4 JUDGE KAVANAUGH: It's Supreme Court dicta --

5 MS. BERMAN: It is, it's --

6 JUDGE KAVANAUGH: -- on a key subject, I mean --

7 MS. BERMAN: Yes. And I, but I agree with my
8 opponent --

9 JUDGE KAVANAUGH: -- that they can call it dicta,
10 we, yes.

11 MS. BERMAN: Well, I agree with my --

12 JUDGE KAVANAUGH: Keep going.

13 MS. BERMAN: -- opponent that, you know, we
14 certainly don't think the Supreme Court had these issues
15 before them about the two amendments, et cetera, but at the
16 same time as Judge Tatel noted, the Supreme Court talked,
17 and the way it phrased it it made the exclusion the same for
18 the criteria in the hazardous pollutant programs. So, as we
19 said in our brief if you read it the way Petitioners want
20 you to read it then the Supreme Court was half wrong because
21 the criteria pollutant program at the very least doesn't
22 work that way.

23 JUDGE KAVANAUGH: Yes, that's a misdescription,
24 right, of the NAAQS, that's what you're saying?

25 MS. BERMAN: Well, if you read it that way, but I

1 think you can very easily read it as just paraphrasing the
2 awkward language of the U.S. Code. I don't --

3 JUDGE KAVANAUGH: But that's --

4 MS. BERMAN: I don't, I think it's --

5 JUDGE KAVANAUGH: I think you're making an
6 important point I want to make sure you get it, which is
7 that the first part of the footnote, if existing stationary
8 sources of the pollutant in question are regulated under the
9 National Ambient Air Quality Standard Program, you're saying
10 that's incorrect phrasing?

11 MS. BERMAN: I'm saying if you read the second
12 half the way they want you to I think that, as with the
13 House amendment there is an implicit limitation to the
14 pollutants governed by the program you're talking about.

15 JUDGE SRINIVASAN: And are you saying this that if
16 you took out the NAAQS part of it and you only kept in the
17 HAP part of it, to use acronyms that are overused today --

18 MS. BERMAN: Yes.

19 JUDGE SRINIVASAN: -- that, and you bought their
20 reading, that when you add back in the National Ambient Air
21 Quality Standards part of it it falls apart because --

22 MS. BERMAN: Exactly.

23 JUDGE SRINIVASAN: -- the description doesn't
24 apply to the National Ambient Air Quality part of it?

25 MS. BERMAN: Yes, nobody disputes that as a

1 pollutant specific exclusion, and they talk about them as
2 though they're the same here. So, I don't think this really
3 actually supports Petitioners' argument all that much.

4 JUDGE TATEL: This is a good example of why courts
5 shouldn't express themselves on unbriefed issues, right?

6 MS. BERMAN: You know, the last thing I wanted to
7 say about, you know, separation of power issues, actual
8 separation of power violations are very rare, rarely found,
9 they're different in flavor than what we're dealing with
10 here today. You know, a classic example is *Clinton v. New*
11 *York*, where we're dealing with a line item veto which
12 allowed the President to strike down particular lines of
13 legislation. I think that case illustrates that separation
14 of powers doctrine is about tyranny, and preventing the
15 over-concentration, seismic shifts in the balance of power.

16 You know, EPA's use of its general long-existing
17 Clean Air Act authority that's been delegated to it to
18 address the major pollution problem of our day is not the
19 same kind of animal, it's our government working exactly how
20 I think it is supposed to.

21 JUDGE KAVANAUGH: Well, at its core all separation
22 of powers issues are who decides.

23 MS. BERMAN: True, I agree with that. But I think
24 here we have an answer, from, you know, the Clean Air Act
25 itself, *AEP*, EPA decides whether and how to regulate this

1 source category for this pollutant. And if --

2 JUDGE HENDERSON: All right. Thank you.

3 MS. BERMAN: Thank you.

4 JUDGE HENDERSON: Mr. Myers?

5 ORAL ARGUMENT OF MICHAEL J. MYERS, ESQ.

6 ON BEHALF OF THE STATE INTEVENORS

7 MR. MYERS: May it please the Court. I'm going to
8 address the Tenth Amendment issues. The rule faithfully
9 embodies the Act's cooperative federalism approach. There's
10 no commandeering because states that opt out of the rule
11 face no federal mandate to act, and there's no coercion
12 because states may opt out without sanction.

13 With respect to commandeering, the option of
14 direct federal regulation to limit power plant carbon
15 dioxide emissions defeats Petitioners' claim under the *Hodel*
16 line of cases. That's because EPA would regulate the power
17 plants directly, not states. Petitioner's assertion that
18 states would nonetheless be commandeered under a federal
19 plan because they would be implementing the rule by
20 approving power plant actions to comply with it fails for
21 several reasons. First, because state oversight over power
22 plant requests for rate recovery or new licenses is
23 independent of the rule, and it will be done to satisfy
24 preexisting state law requirements, not for the purpose of
25 ensuring compliance with a federal plan. By way of example,

1 states like Texas and Oklahoma have licensed a large amount
2 of wind generation in recent years due to favorable market
3 conditions. If those states were to opt out of the rule
4 their continued reviews of proposed wind projects under
5 states law would not suddenly morph into federal
6 commandeering. Indeed, by Petitioners' logic, as Judge
7 Kavanaugh noted, nearly every Clean Air Act regulation in
8 the power sector, and that would include the acid rain
9 program that was enacted by Congress, likewise would be
10 unconstitutional because state agencies have issued licenses
11 or heard rate-making requests related to those complying
12 with those laws, as well.

13 Petitioners' commandeering claim also fails
14 because states would retain independent authority under
15 state law to accept or reject power plant actions related to
16 a federal plan as evidenced in the examples in our brief at
17 pages 22 through 24 of state reviews concerning previous
18 Clean Air Act rules; and in a situation where a state
19 rejects a company's proposed compliance approach, such as
20 the retirement of a plant, the burden would fall to the
21 owner, not the state to come up with an acceptable
22 alternative. Petitioners' contention that the rule's
23 emission guidelines will dictate the outcome of such reviews
24 is also wrong. To be clear, the rule's emission
25 requirements are modest, and industry is continuing to move

1 to cleaner generation, even without the rule in effect,
2 providing a significant head start for compliance. So,
3 rhetoric aside, even under a federal plan, states will
4 continue to be able to exercise policy discretion concerning
5 licensing, rate recovery, and retirements.

6 JUDGE KAVANAUGH: What about the, I unfairly asked
7 Ms. Berman this question, but what about the *Bond* clear
8 statement rule? And maybe I'm unfairly asking you this
9 question, too, but if, I'm curious about the clear statement
10 rule in *Bond* that the Chief Justice articulated of when
11 legislation, in this case legislation, affects the federal
12 balance, the requirement of clear statement assures that the
13 body has in fact faced and intended to bring into issue the
14 critical matters involved in the judicial decision.

15 MR. MYERS: Well, two responses to that, Your
16 Honor. First of all, as I was mentioning, neither as a
17 matter of law, nor as a matter of fact does the rule dictate
18 any particular outcomes that a state has to come to as a
19 result of a company action that's proposed.

20 JUDGE KAVANAUGH: It's like the, you know, model
21 penal code, yes, the knowing, doing something knowing a
22 result is certain to occur is considered the same as
23 intending that result. And here, I think, the action is
24 taken knowing that the states are going to have to do quite
25 a bit, and we can argue about what quite a bit means in

1 particular contexts. And it seems that *Bond* reinforces the
2 idea that before Congress does that they should speak
3 clearly, different from the major questions issue, but
4 similar underlying constitutional kind of value that the
5 Court has set up a plain statement rule for to just make
6 sure before these values are invaded that we require
7 Congress to think about it and speak clearly, what about
8 that?

9 MR. MYERS: Well, I don't think so, Your Honor.
10 First of all, again, because I don't think state, the
11 outcomes of those state decisions are dictated because they
12 will have some room, certainly, they will have to do certain
13 things, Your Honor, but I would also point --

14 JUDGE PILLARD: So, just, just -- I'm sorry,
15 finishing answer that question.

16 MR. MYERS: I would also point Your Honor to the
17 *American Farm Bureau v. EPA* case out of the Third Circuit
18 from last year where the Third Circuit rejected a similar
19 argument where the Petitioners were arguing and challenging
20 an EPA water pollution rule that interpreted a similar
21 statutory term as the best system of emission reduction. In
22 that case it was a total maximum daily load was the rule
23 that was being challenged or interpreted that, and the
24 challengers were saying that EPA's interpretation was going
25 to impact state land use decisions, and that therefore

1 Congress had to have made a clearer statement before EPA
2 could interpret the rule that they had had. And the Third
3 Circuit rejected that argument, finding essentially that it
4 would, you know, that this was a *Chevron* question, given
5 that EPA was interpreting a technical term under the
6 statute.

7 JUDGE KAVANAUGH: Did they grapple with *Bond* in
8 that case? I haven't read that case.

9 MR. MYERS: I don't recall, Your Honor, whether or
10 not they specifically did, but they rejected a similar
11 argument as to the one that you raised from the *Bond* case.

12 JUDGE PILLARD: So, what's your answer if West
13 Virginia or its localities decides it doesn't want to do any
14 licensing of wind, or solar, or even natural gas because
15 it's a coal state, and there's a federal plan, and a state,
16 or a public utility commission decides we're not going to
17 license, what happens?

18 MR. MYERS: Well, Your Honor, we have not seen
19 that happen before because federal and state governments
20 typically work together on solving problems, but, you know,
21 I think the --

22 JUDGE PILLARD: But their implication is that at
23 some point that might happen, and that you're just counting
24 on everyone to go along?

25 MR. MYERS: Well, there is some point that states

1 will have to choose, you know, whether or not to continue to
2 exercise their authority in a certain way under state law.
3 But I think given the emission reductions here that we're
4 talking about are not particular stringent, that states will
5 have that discretion to be able to continue to implement
6 their state policy the way that they had previously. It's
7 not going to be a dramatic change.

8 JUDGE PILLARD: Is this, is the answer different
9 if, and maybe this is a question for the other side, but if
10 some smokestack regulation required a re-permitting, or some
11 kind of Commission approval, and the Commission were to
12 refuse, is there something different about the way those
13 things function in practice that would distinguish them for
14 federalism purposes?

15 MR. MYERS: I don't think there's a different for
16 purposes of the constitutional analysis, Your Honor. We've
17 seen, for instance, in the past that states have rejected
18 applications by power plants, we cite one in our brief where
19 the plant had a particular proposal to comply with a federal
20 plan, and the state rejected that, and that required the
21 plant to go back and come up with a different alternative.
22 So, too, that would be the situation here, and that's
23 perfectly within the confines of the Supreme Court's
24 constitutional law.

25 I see I've gone over, but if I just may very

1 quickly address the coercion issue, Your Honor?

2 JUDGE HENDERSON: All right.

3 MR. MYERS: As to coercion, that claim fails
4 because states face no financial sanction for opting out of
5 the rule. And Petitioners' alleged need to act to prevent
6 blackouts under a federal plan is refuted by the facts in
7 the record. EPA exhaustively studies reliability in
8 conjunction with agencies such as FERC, included that the
9 rule would not impact the nation's electricity supply, and
10 that conclusion dovetails with the experience in many of our
11 states. One of the approaches that EPA has proposed under a
12 federal plan, a mass-based trading approach, is similar to
13 the one used by the regional greenhouse gas initiative
14 states, power plants in that program have cut CO2 emissions
15 by 40 percent in eight years more stringently and more
16 aggressively than the rule would require without
17 experiencing any reliability problems.

18 In conclusion, the rule does not commandeer or
19 coerce states, there's no constitutional obstacle to EPA's
20 reasonable regulation of the largest source of pollution
21 causing the most urgent environmental and public health
22 threat we face today. Thank you, Your Honors.

23 JUDGE HENDERSON: Does Mr. Rivkin have any time?

24 THE CLERK: No, no time.

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

1 ON BEHALF OF THE STATE PETITIONERS

2 MR. RIVKIN: Thank you.

3 JUDGE HENDERSON: Why don't you take two minutes.

4 MR. RIVKIN: Thank you very much. EPA continues
5 to insist that we're talking about a routine permitting
6 action, and in fact, I heard EPA concede just a few minutes
7 ago that affirmative action would indeed be commandeering.
8 We have multiple affirmative actions, the difference here is
9 that the integration and planning of the affirmative actions
10 that only states that indispensable actors, not the RTOs,
11 not FERC that has limited authority, not the ISOs, only
12 states can carry it out. An apropos of questions asked by
13 both Judge Pillard and Judge Tatel, the fundamental
14 difference between the ADA situation, which EPA mentioned in
15 its briefs, is there you are engaging in permitting actions
16 that are driven consistent with federal law that is a simple
17 application of the supremacy clause. No effort to
18 commandeer you into affirmative action is required. We are
19 talking about affirmative actions, this is what makes CPP
20 different from ADA, and this is what makes it different from
21 this very routine picture portrayed by EPA. Point number
22 one.

23 Point number two, apropos of timing. EPA
24 recognizes that it takes years to perform those integrative
25 functions, which is why they extended by two years the

1 initial application date between the proposed and the final
2 rule.

3 If I may just read just two sentences from a
4 submission by Florida that dramatizes exactly the magnitude
5 of the changes. The proposed emission performance standards
6 set by EPA necessarily required complies in enforcement
7 activities that include changing displaced methodology,
8 efficiency measures, and type of generation to be
9 constructed, et cetera, et cetera. Fuel mix by the way has
10 always been an area of traditional state responsibility.
11 The Federal Government wanted to take it over, we heard many
12 references to *Hodel*, I wish I had more time, but just one
13 quick point, the full, the teaching of *Hodel* is if a state
14 does not wish to regulate consistent with the statute the
15 full regulatory burden would be borne by the Federal
16 Government. Plus, there can be no suggestion that the state
17 would be commandeered. The same point is mentioned in *New*
18 *York*, that is not what we have here.

19 And as far as *Mississippi* is concerned, the only
20 reference there in Title II and III of PURPA was to
21 consider, and that was not enough. So, this is
22 fundamentally irreconcilable, if EPA's approach in addition
23 to being unsound as a matter of reputation is to be
24 countenanced with insurmountable constitutional
25 commandeering and coercion problems, and therefore it ought

1 to be rejected under the cannon of constitutional avoidance.
2 Thank you.

3 JUDGE HENDERSON: All right. Why don't you take
4 two minutes, Professor.

5 ORAL ARGUMENT OF LAURENCE H. TRIBE, ESQ.

6 ON BEHALF OF THE NON-STATE PETITIONERS

7 MR. TRIBE: In a decision of several years ago in
8 the District Court by Judge Wilkins it was brought by Kids
9 Against Global Warning, there was an observation that I
10 think is particularly pertinent here, he said ultimately,
11 this case is about the fundamental nature of our government,
12 and our constitutional system, more than it is about
13 emissions, the atmosphere, or the climate. And that's why
14 when Judge Kavanaugh refers to *Bond* and the clear statement
15 requirement that sings to me because I think that's what
16 this case is about.

17 When the Supreme Court in *Bond*, even though the
18 language was as Justice Scalia pointed out in the dissent
19 hardly ambiguous, said that we are constitutionally obliged
20 to take into account the fact that a law will change the
21 federal/state balance if applied in a given way. He was
22 making a statement that's even more applicable here, there's
23 a reason there are 27 states on the Petitioners' side and 19
24 on the other, it's not normally the role of the EPA to
25 arbitrate among competing industries, competing states, yet

1 that is what the interpretation that they are proposing
2 would end up giving the EPA the power to do.

3 I think in this case a clear statement rule would
4 not be used as it arguably was in *Bond* to rewrite a law, or
5 introduce an ambiguity where there was none, rather, it is
6 being used to avoid serious set of problems. I mean, let's
7 talk --

8 JUDGE KAVANAUGH: What do you think the limiting
9 principle is to that *Bond* cannon? Because it is something
10 of a new appearance in the *Bond* case, at least as how it was
11 applied, and lots of federal legislation obviously affects
12 the states. So --

13 MR. TRIBE: Well, it's a matter, perhaps, of the
14 degree, but if you take a case very different from *Bond*,
15 *United States v. Windsor*, there too the idea was that
16 because it's customary for the Federal Government to defer
17 to the states in areas of family law, we look a lot more
18 closely than otherwise. Now, Judge Millett, you asked me
19 what if I do find ambiguity, and presumably you would be
20 finding it with the help of the Senate version. Let's
21 focus --

22 JUDGE MILLETT: No, I don't think I need the
23 Senate version --

24 MR. TRIBE: You wouldn't need --

25 JUDGE MILLETT: -- to find --

1 MR. TRIBE: -- the Senate version.

2 JUDGE MILLETT: -- ambiguity.

3 MR. TRIBE: Well, I think many people would need
4 it when otherwise you have to erase language from the House
5 version. It's really, it's like the legislative, the line
6 item veto that *Clinton v. New York* invalidated, that is if
7 the President cannot decide to excise part of legislation
8 surely the EPA cannot decide to just cross out in order to
9 create ambiguity.

10 JUDGE MILLETT: I mean, I don't need to return to
11 our statutory arguments from this morning, but the reality
12 is with those three ors there, if you actually read them
13 literally it actually requires coverage here.

14 MR. TRIBE: I'm sorry, I'm just saying --

15 JUDGE MILLETT: You know what, I didn't even want
16 to go backwards in time --

17 JUDGE KAVANAUGH: Yes.

18 JUDGE MILLETT: -- but I'm just telling you that I
19 don't think you have to, I don't think the excising is not
20 what I'm talking about, the literal construction of that can
21 be read 15 different ways.

22 MR. TRIBE: But for those who are interested in
23 the Senate version it seems to me we ought to notice that
24 all it is is six characters, four of which are parentheses,
25 it's like six characters in search of a meaning, it doesn't

1 mean anything, it purports to remove and renumber, very much
2 like the renumbering in Judge Tatel's opinion involved in
3 *American Petroleum Institute* three years ago, it renumbers a
4 section which doesn't exist anymore once the House version
5 is executed. Now, you would really open a Pandora's box if
6 you started saying that a provision which is called a
7 conforming amendment, which occurs 107 pages later, which
8 under the standard practice, not invariable, but
9 overwhelmingly followed, would be disregarded when it was
10 presented to the President for signature, you'd have to go
11 back, you'd be inviting a massive amount of litigation when
12 people go back through the U.S. Code to see where all of
13 these little glitches were. This is, it's not a scrivener's
14 error that's being corrected, it's a scrivener's error that
15 is being relied on, and I think just as in the *American*
16 *Petroleum Institute* case where this Court said that making
17 too much turn on what looks like a clerical mistakes take a
18 great risk of having the Court's own policy convictions
19 about what's a sensible approach to a problem replace what
20 Congress did. The bottom line for me is that I think under
21 the scheme of government we have a plan like the one
22 Congress almost enacted but didn't, the cap and trade plan,
23 is radically different from trying to shoehorn something
24 that Congress couldn't do into a little used provision that
25 for more than a quarter of a century has been understood

1 differently from the way the Government now asks you to
2 understand it. I think they are asking you to basically
3 bail out Congress and solve a problem that is beyond the
4 expertise either of the EPA or of the Federal Court. In the
5 concurring opinion in *City of Arlington* --

6 JUDGE HENDERSON: I heard you say bottom line, so
7 you need to wind it up.

8 MR. TRIBE: I will. Justice Breyer's concurring
9 opinion in *Arlington* lists criteria for *Chevron* deference,
10 expertise, a long history, and so on, all of them fail to be
11 met here. Thank you.

12 JUDGE KAVANAUGH: He's the godfather of the majors
13 questions doctrine, actually. 1986 article, right?

14 MR. TRIBE: Right.

15 JUDGE KAVANAUGH: It comes from Justice Breyer in
16 a 1986 article.

17 MR. TRIBE: That's right. Thank you.

18 JUDGE HENDERSON: All right. Next is the notice
19 issues.

20 **IV. Notice Issues**

21 JUDGE HENDERSON: Mr. Barker. Mr. Barker?

22 ORAL ARGUMENT OF THOMAS A. LORENZEN, ESQ.

23 ON BEHALF OF THE PETITIONERS

24 MR. LORENZEN: Good afternoon, Your Honors, Thomas
25 Lorenzen on behalf of all Petitioners. Mr. Barker from the

1 State of Texas will handle rebuttal on the notice issue.

2 Your Honors, I'd like to make two points today,
3 the first is that the chief regulatory requirement of EPA's
4 final rule as EPA itself calls it, the chief regulatory
5 requirement, which are the two uniform nationwide
6 subcategory specific rates, one for coal, one for gas, were
7 never proposed, they were entirely new creatures to the
8 final rule. That is unlawful. Second, time permitting I
9 want to address why Section 307(d)(7)(B)'s reconsideration
10 provisions do not apply to failure of notice.

11 Let me start with those chief regulatory
12 requirements, which, as I said, at J.A. 304 in the final
13 rule, EPA declares to be the final rule's chief regulatory
14 requirements, the subcategory specific rates for coal and
15 gas. These were never proposed. They not only were never
16 proposed, EPA never sought comment on them as an alternative
17 to the state specific blended rates it was proposing, it
18 never hinted at them, in fact, the only mention by EPA of
19 nationwide uniform subcategory specific rates prior to the
20 final rule was at J.A. 66 in the proposed rule where EPA
21 specifically disclaimed any intent to promulgate such rules
22 here.

23 Your Honors, there are plenty of cases that are
24 directly on point here, I would point you to, for instance,
25 the *International Union* case and the *Small Refiner* case,

1 which both say that where EPA makes a proposal and says in
2 the course of that proposal we don't intend to do X, they
3 cannot then finalize a rule that does precisely X unless
4 they then, unless they first propose it and give people a
5 proper chance to provide comment on it. Now, EPA --

6 JUDGE PILLARD: So, Mr. Lorenzen, your --

7 MR. LORENZEN: Yes?

8 JUDGE PILLARD: -- clients did not seek
9 reconsideration of the rule, did they?

10 MR. LORENZEN: They did. They did seek
11 reconsideration of the rule. There were four petitions for
12 reconsideration filed on the notice issue. Yes.

13 JUDGE PILLARD: And?

14 MR. LORENZEN: EPA has sat on those for over a
15 year.

16 JUDGE PILLARD: And so, you're invoking a futility
17 doctrine?

18 MR. LORENZEN: Well, I am invoking the futility
19 doctrine, but I do want to explore as well why I think that
20 the Court has actually been misreading 307(d)(7)(B) for
21 quite some time. If you want to approach that issue right
22 now I'd be delighted to dive in, and I think we can start
23 with, you know, there are three cases in 1981, '82, and '83
24 that show the muddle that the Court was dealing with. Let's
25 start with the *American Petroleum Institute v. Costle* back

1 in 1981. There the Court was dealing a report that was put
2 into the record one week before the final rule was published
3 or was signed, pardon me, and the API Court said well, you
4 can't raise it right now, you need to raise it in a petition
5 for reconsideration before EPA under 307(d)(7)(B), but is
6 specifically characterized that result as disturbing, that's
7 the precise word it used, but it felt compelled by the
8 language.

9 JUDGE SRINIVASAN: Can I just ask you to, not to
10 skip ahead too much, but are you, is what you're suggesting
11 that if we applied out decisions before we'd reach a
12 conclusion that you wouldn't like, but because we're sitting
13 as an *en banc* court we shouldn't apply those decisions, is
14 that where you're headed, or --

15 MR. LORENZEN: I think as an *en banc* court it is
16 time to clarify the law in 307(d)(7)(B), which is a muddle
17 right now. Because let me go to the next decision, which is
18 the *Kennecott* decision in 1982. Now, in *Kennecott* the
19 Petitioners did actually file petitions for reconsideration
20 having obviously read the decision in *API*. But again, it
21 was the same kind of information put into the docket one
22 week before the rule was finalized, and EPA denied the
23 petitions for reconsideration saying you had notice, or
24 we're not concerned about this. And what the Court said in
25 *Kennecott* was that a petition for reconsideration can never

1 be an adequate substitute for an opportunity to comment on a
2 proposed rule before the rule is finalized, because it is
3 only prior to promulgation of the final rule that that
4 comment can have any hope of influencing the trajectory of
5 the rule. So, it identified that it really makes no sense
6 to read lack of notice as being within the sorts of
7 procedures that are covered by 307(d)(7)(B).

8 Now, let's go to 1983, the *Small Refiner* decision,
9 which was cited by Counsel for EPA this morning on a
10 different point. In the *Small Refiner* case what the Court
11 was dealing with was, okay, you had a situation actually
12 very similar to here, EPA proposed a standard for lead and
13 gasoline, and they said in the proposal when we finalize our
14 rule we're going to finalize it with sufficient lead time
15 for everybody to comply. When they finalized the rule they
16 actually finalized an interim standard, as well, that
17 applied immediately. And what the Court in *Small Refiner*
18 said is no, you gave no notice of your intent to do that, in
19 fact, you specifically disclaimed it. Interestingly,
20 though, that rule is covered by 307(d) there is no mention
21 of 307(d)(7)(B) reconsideration. Why? Because the Court
22 said there that the sorts of procedures that 307's standard
23 of review is about, remember, you have to show that where
24 you're making an objection to procedure it must be arbitrary
25 and capricious, it must be central to the rule, and so

1 forth, are the procedures that EPA implements under 307(d).
2 In other words, EPA gives you 30 days for comment, you think
3 you need 60 or 90, you have to petition EPA for
4 reconsideration of that affirmative procedure provided by
5 EPA. If EPA says we'll have a hearing but we won't allow
6 witnesses and you want witnesses you must petition EPA to
7 allow those witnesses.

8 But what the Court also says in *Small Refiner* is
9 that lack of notice, failure to provide notice is a
10 violation of the Administrative Procedure Act, and something
11 that is a reversible error under the Procedure Act is also a
12 reversible error under Section 307(d)(8), and failure of
13 notice is such a reversible error. Thus, the Court was
14 never, didn't feel it even needed to deal with whether
15 reconsideration procedures under 307(d)(7)(B) apply.
16 Failure of notice is not a procedure, it's the complete
17 absence of procedure. So, that's the first point.

18 The second point is that I think that if you read
19 307(d)(7)(B) it makes no sense to apply it to lack of
20 notice. The first sentence of 307(d)(7)(B) says, Your
21 Honors, that only an objection to a rule or procedure which
22 was raised with reasonable specificity during the period for
23 public comment, including any public hearing, may be raised
24 during judicial review. Well, if EPA says you've got 30
25 days to comment, you can comment, you can object to that

1 procedure during the period for public comment, but by
2 definition, failure of notice is something you don't know
3 about until the rule is final. You simply cannot know. You
4 cannot predict that EPA will fail to give you notice of
5 something because it hasn't issued a final rule. You only
6 know after the fact when it's too late to avail yourself of
7 this provision.

8 Second, reading 307(d)(7)(B) this way turns that
9 section, or 307(d) entirely from a revision to the Clean Air
10 Act that was intended to expand upon the protections that
11 are given to commenters and regulated parties under the
12 Clean Air Act beyond those provided in the APA, into
13 something that can be used as a weapon by EPA to shield
14 rules that were never proposed, indeed, it kind of invites
15 that because, you know, the more egregious the violation of
16 307(d)(3)'s notice requirements, the more thoroughly that
17 rule is protected from judicial review, because according to
18 EPA's theory as it states in its brief, you may not
19 challenge this rule, it is in effect, and it applies to you
20 unless and until you file a petition for reconsideration
21 with us, and maybe someday we rule on it.

22 Third --

23 JUDGE ROGERS: What about the notice --

24 MR. LORENZEN: Yes, Judge Rogers?

25 JUDGE ROGERS: What about the notice of data

1 availability?

2 MR. LORENZEN: Well, the notice of data
3 availability, let's go back to EPA's defenses, they say we
4 had notice, that this is a logical outgrowth somehow of the
5 proposal. The nota to which EPA refers said to the public
6 we're thinking about using regional renewable energy data to
7 inform the state specific blended rates. What is lacking
8 from the nota again is any mention of an idea of
9 establishing subcategory specific rights. Remember that the
10 only mention by EPA of subcategory specific rates in this
11 entire rule-making, until the final rule, was at J.A. 66 of
12 the proposal where they said we're not doing them here. How
13 can anyone comment on what those rates should look like,
14 what methodology EPA ultimately adopted, what the BSER was,
15 what the numbers are when they simply never proposed them
16 and never even proposed a number? Your Honors, this is
17 exactly like the *International Union* case. Now, that's an
18 MSHA case, different statute, MSHA was promulgating air
19 ventilation standards for mines. And MSHA said we're going
20 to promulgate a minimum air velocity standard of 300 feet
21 per minute, but we don't think it's necessary, in fact, we
22 think it would counter-productive to promulgate a maximum
23 air velocity standard, so we're not doing it. And during
24 the public comment period some commenters said you know
25 what, we think you should promulgate a maximum air velocity

1 standard, as well, and low and behold in the final rule
2 there was a maximum air velocity standard of 500 feet per
3 minute. And what the Court said in *International Union* is
4 uhn-uh, you can't promulgate a rule that you said you
5 weren't going to do, you've got to propose it at some point,
6 you've got to propose how you would do it, you've got to
7 propose a number at least, because EPA itself is required to
8 publish the notice of what it intends, and direct comments
9 towards what it is intending. It cannot bootstrap notice
10 from a comment, as this Court said in *Fertilizer Institute*.
11 What EPA is trying to do here is bootstrap notice from the
12 fact that a few comments said EPA, your state specific
13 blended rates were unlawful, you should consider proposing
14 subcategory specific rates as you've traditionally done.
15 That comment doesn't obligate those commenters then to then
16 spell out for EPA exactly what the subcategory specifically
17 should look like, that's EPA's job.

18 JUDGE ROGERS: Let me ask you --

19 MR. LORENZEN: Yes, Judge Rogers?

20 JUDGE ROGERS: -- under the Clean Air Act there
21 are a number of requirements normally that have to be made
22 to excuse your failure. So, you say none of those apply
23 here for the reasons you suggest, but haven't we held that
24 once you do know what the final rule says then you have to
25 ask EPA to reconsider giving you an opportunity to comment

1 on the final rule before you come to the court?

2 MR. LORENZEN: Well, let's talk about what the
3 provision is about. Let's remember that as the Court --

4 JUDGE ROGERS: No, I want to talk about what this
5 Court has said --

6 MR. LORENZEN: In *UARG*, and *Mexican* (phonetic
7 sp.), and recent cases, yes.

8 JUDGE ROGERS: And you say we're all wrong --

9 MR. LORENZEN: I do.

10 JUDGE ROGERS: -- of course in the --

11 MR. LORENZEN: Yes.

12 JUDGE ROGERS: -- *en banc* we have this authority
13 to overrule, but I just wonder what is the rationale here,
14 now we're sitting *en banc* on a final rule, you've had notice
15 as to what the final rule said, you could have gone back to
16 EPA, I mean, to --

17 MR. LORENZEN: Yes, to EPA, and in fact, we did --

18 JUDGE ROGERS: -- and said we didn't get notice
19 and comment, and that's a violation, and EPA might have said
20 we agree, let's set up a notice and comment period on this
21 precise issue. Or it might have disagreed with your
22 position that this was not a logical outgrowth.

23 MR. LORENZEN: And it would be wonderful, Your
24 Honor, if EPA had done that, because four --

25 JUDGE ROGERS: Had done what?

1 MR. LORENZEN: -- four petitions for
2 reconsideration on the notice issue, at a minimum, were
3 filed --

4 JUDGE ROGERS: And they're pending.

5 MR. LORENZEN: -- around a year ago, and EPA has
6 sat on them for a year, all the time we are subject to a
7 rule that we never had notice of, we don't know if EPA is
8 going to tell us we get reconsideration or not, but I will
9 tell you that in their brief their first argument --

10 JUDGE ROGERS: So, your argument, though, is not
11 this is undo agency delay, you're arguing that this Court
12 has for generations misread this provision of the statute.
13 So, I'm wondering aren't you a little premature?

14 MR. LORENZEN: No, I don't think so, Your Honors.
15 First of all, I think EPA has -- we filed petitions for
16 reconsideration, I think in EPA's brief they argue that,
17 it's their very first argument, we had notice. They've
18 effectively resolved those petitions, they just sit on the
19 petitions for reconsideration in order to argue here --

20 JUDGE ROGERS: Well, you heard Judge Kavanaugh
21 say, you know, sometimes three years can become 22 years.
22 Here, we're just talking about petitions that were filed a
23 year ago.

24 MR. LORENZEN: But petitions on a very simple
25 issue, which is did you tell us about the final rule before

1 you promulgated, or did you not? This is not an issue that
2 requires the exercise of EPA's expertise, and this --

3 JUDGE MILLETT: Were the petitions for
4 reconsideration filed before or after the petitions were
5 filed here for review?

6 MR. LORENZEN: Some of them were filed before.
7 Some of them were filed before. I think the earliest --

8 JUDGE MILLETT: The petitions for review were
9 filed the same day the final rule came down.

10 MR. LORENZEN: Oh, I'm sorry, you're right. Yes.

11 JUDGE KAVANAUGH: Before the final rule.

12 MR. LORENZEN: No, they were filed before
13 because -- good point, Your Honor, and I'll come back to
14 that. No. All right. They were filed after the petition,
15 or the rule was signed, and the rule was signed in August,
16 even though it wasn't published until late October. So,
17 yes, some of them were filed in September, even though
18 petitions for review weren't filed until October 23rd. Now,
19 EPA could have very easily resolved those, as I said, in its
20 brief it argues we had notice, what more does it need to do
21 with those petitions on that point? It has effectively
22 resolved them.

23 But I want to go back to 307(d)(7)(B) for a moment
24 because I think this is important, not just for this case,
25 but generally for Clean Air Act. 307(d)(7)(B) as the Court

1 explained in the *API* case is merely the codification of *Al*
2 *Hato* (phonetic sp.). I don't know if Your Honors all
3 remember *Al Hato v. Trade* (phonetic sp.). *Al Hato v. Trade*
4 was about when can you present late evidence to the Court,
5 because remember, 307(b)(1) says that you can petition for
6 review based on grounds arising solely after the sixtieth
7 day. New evidence arising after the sixtieth day seems to
8 meet that requirement. And what the Court said in *Al Hato*,
9 and *Al Hato* is pre-307(d)(7)(B), of course, it's 1975, is
10 even though the statute says you can bring that to us as a
11 new grounds, we don't really have a record on which to
12 evaluate it because that new evidence that you've got is
13 stuff on which EPA should first opine so that we have a
14 record on which to review that question. So, take it to EPA
15 first, if EPA considers it your problem is solved. If EPA
16 denies your request for reconsideration, or for
17 consideration of that evidence then you can bring that
18 denial to us. What *API* says, what the House Report
19 accompanying 307(d)'s amendments say is that this provision,
20 307(d)(7)(B) is merely the codification of the rule in *Al*
21 *Hato*, it is about presentation to the Agency of evidence
22 that you couldn't present during the rule-making because it
23 was impracticable to do so, for instance, let's say EPA
24 gives you 30 days to comment on a rule, but you're doing --

25

JUDGE HENDERSON: Mr. Lorenzen --

1 MR. LORENZEN: Yes, Judge Henderson?

2 JUDGE HENDERSON: -- you're way over your time, so
3 you need to wrap it up.

4 MR. LORENZEN: I will wrap it up. I will wrap it
5 up. But you couldn't present that information because it
6 either takes too long to develop it, or it didn't exist yet.
7 And what 307(d) said --

8 JUDGE GRIFFITH: Did you ask us in your briefs to
9 overturn our precedent? Maybe I missed it. I thought you
10 said the precedent didn't apply?

11 MR. LORENZEN: When we wrote that brief we were
12 before a three-judge panel that has no authority to overturn
13 opinions of prior panels. I am now before you. Thank you,
14 Your Honors. I think, Your Honors, that really concludes my
15 argument, unless you have further questions. The rule
16 should be vacated because the central regulatory requirement
17 of the subcategory specific rates was never proposed, and
18 307(d)(7)(B) was never intended to act as a bar to claims
19 that EPA simply didn't provide notice of the rule. Thank
20 you, Your Honors.

21 JUDGE HENDERSON: Mr. Rave.

22 ORAL ARGUMENT OF NORMAN L. RAVE, JR., ESQ.

23 ON BEHALF OF THE RESPONDENTS

24 MR. RAVE: Good afternoon, Your Honors, may it
25 please the Court, Norman Rave for Respondent, EPA. With me

1 at counsel table are Chloe Coleman (phonetic sp.) from DOJ,
2 and Matthew Marks from EPA's Office of General Counsel.

3 The Clean Air Act imposes three statutory
4 requirements that Petitioners must meet before this Court
5 can act or can find that the rule is defective for lack of
6 notice. First, the lack of procedure must be arbitrary and
7 capricious. The -- and I'll get to this in a minute, but
8 the Petitioners claims of the difference between the
9 proposed and the final rule are greatly exaggerated, and
10 Petitioners did have adequate notice, and they did have an
11 adequate opportunity for comment. It's important to
12 recognize, Your Honors, that the amount of public
13 participation and comment --

14 JUDGE GRIFFITH: But why is it your lead argument
15 that there's a petition for reconsideration pending that
16 hasn't been ruled on, and that we have a whole bunch of
17 cases that say end of matter, why isn't that your argument?
18 Am I missing something?

19 MR. RAVE: Well, Your Honor, I agree that that,
20 that is in fact the case, and we made that case in our
21 brief, and believe that the Court can in fact dismiss this
22 claim on those grounds. I also think that the Court could
23 dismiss the claim on the grounds that they have completely
24 failed to even address the requirement in the Clean Air Act
25 that they must demonstrate that their objection is of

1 central relevance, and that there is a substantial
2 likelihood that the rule has been, would have been changed.

3 JUDGE KAVANAUGH: The provision is not
4 jurisdictional then, you agree?

5 MR. RAVE: It may not be jurisdictional, Your
6 Honor, but it is a prerequisite, and it is a central element
7 of their claim.

8 JUDGE KAVANAUGH: No, I'm talking about the rule
9 that requires EPA to wait until EPA considers it, that's not
10 jurisdictional?

11 MR. RAVE: Yes, Your Honor, the Supreme Court has
12 decided that that's not jurisdictional, but it is mandatory.
13 And so, the Agency, the Court in fact can reject their
14 claim, and should reject their claim. And if I -- the Court
15 is precluded from vacating the rule on notice and comment
16 grounds until EPA completes its reconsideration process.

17 JUDGE GRIFFITH: When will that be?

18 MR. RAVE: Well, Your Honor, the Agency is working
19 on them, it does not have a specific time frame. The Agency
20 received 38 petitions for reconsideration, many of which
21 raise many, many issues, so there are hundreds and hundreds
22 of issues being raised, most of them they were filed in the
23 fall, some of them up till December. In that same time
24 frame the same personnel who work on this rule have
25 addressed the reconsideration petitions on the new source

1 rule, they've been heavily involved in this litigation,
2 there was extensive stay briefing, there was the expedited
3 merits briefing, and preparation for oral argument. So, the
4 Agency's count, the Agency is working on them, they're
5 working diligently, but they have not been able to establish
6 a timeline for completing them.

7 And Your Honor, I think another point that's very
8 important, Mr. Lorenzen asserts that well, it's just a
9 procedural issue, you can just dismiss it, but there is no,
10 the distinction between procedural and substantive is
11 illusory. If you're objecting that you didn't have notice,
12 you have to be objecting that you didn't have to have notice
13 of something, of some specific aspect of the rule that
14 you've objecting to. So, when you're asking the Agency for
15 reconsideration what you're saying is I object to these
16 particular parts of the rule, I wasn't given an opportunity
17 to comment on them, and this is the information that I would
18 have provided you, 307(d)(7) specifically says that that's
19 one of the requirements for the Agency to grant
20 reconsideration is that the Petitioners must show that there
21 was substantial likelihood that the rule would have been
22 different. And I don't believe, as we've argued in our
23 briefs, that they have not presented that evidence, they
24 certainly have not presented that evidence to this Court.
25 The lack of notice they claim is greatly exaggerated, Your

1 Honors. The Agency did not --

2 JUDGE KAVANAUGH: There were a lot of switches, I
3 mean, there were a lot of switches, which is to your credit,
4 actually.

5 MR. RAVE: There are a lot of changes to the rule,
6 Your Honor.

7 JUDGE KAVANAUGH: And those were touted by the
8 Administrator when the final rule came out, again, to your
9 credit, you listened, but it was significantly different.

10 MR. RAVE: There are significant differences.
11 But, you know, there is a lot of case law saying that the
12 fact that a rule is different, even if a rule does something
13 completely different --

14 JUDGE KAVANAUGH: I mean, I agree with you on
15 that. I'm just saying --

16 MR. RAVE: The Supreme Court, unanimous Supreme
17 Court decision in *Long Island Care*, this Court's decision in
18 *Arizona Public Service*, and I think what the Court said in
19 that case is very apropos here, the proposal raised a highly
20 visible and controversial issue, and elicited responses from
21 both tribal and industry commenter. Furthermore, any
22 reasonable party should have understood that EPA might reach
23 a different conclusion after considering public comments.
24 The Agency --

25 JUDGE MILLETT: What's your best cite for notice

1 of the national rates?

2 MR. RAVE: Your Honor --

3 JUDGE MILLETT: When they were on notice that
4 national rates were raised?

5 MR. RAVE: They were on notice that EPA would set
6 a national standard, or a standard that applied uniformly.
7 In fact, the Agency specifically asked for comments, the
8 Agency, the citation that they've given on J.A. 66 is not a
9 statement by the Agency that it's not going to do national
10 rates, it's simply a statement of what it was doing. And in
11 a separate part of the proposal on J.A. 71 the Agency
12 specifically stated that it was considering alternatives to
13 its methodology. The methodology EPA used to establish the
14 proposal was based on small multi-state regions, and what
15 the Agency did was it looked at what the states, whether
16 they had plans, or how much effort they had put into
17 developing renewable energy, and then they applied that rate
18 of increase based on not on what they were capable of doing,
19 but on what they had planned, what was in their regulations
20 to the existing level in each state, and that resulted in a
21 state by state, excuse me, state by state set of rules that
22 EPA expressed as a uniform blended rate.

23 I should point out, Your Honors, that the final
24 rule also contains as one option for state plans a uniform
25 blended rate that is exactly in form the same thing as what

1 was in the proposal, it is calculated differently, and the
2 reason EPA changes its approach was that it was inundated
3 with comments objecting to that state by state approach
4 because it gave, it meant that states that had done little
5 or nothing to address CO2 emissions has much less stringent
6 rates than states that had already taken substantial efforts
7 because of the way it was set up, and that created an uneven
8 playing field in the market for electric power. Utilities
9 in states with the more stringent standards would have
10 higher costs, which would disadvantage them in the market
11 for electricity, and would also disadvantage their customers
12 who had to pay higher rates. For instance, this Petitioner,
13 State of Texas' comments at J.A. 1709 to 10 objected very
14 strongly to that. And so, states and utilities objected to
15 the state by state approach, asked the Agency to have rates
16 that were uniform and national, and the Agency then issued
17 the notice of data availability once again asking for
18 comments on an alternative approach. And it said, it
19 pointed out that it had received all of these comments
20 objecting to the unique state by state setting of standards,
21 and saying that it was going to look at instead of effort it
22 was going to look at capacity, and the ability of renewable
23 energy to be developed, and gas plants to be used on a
24 regional basis, and use that to develop the standard. It
25 then received comments on that, and then in fact comments

1 that clearly demonstrate that the regulated community
2 understood what EPA was doing. For example, the comments at
3 J.A. 2295 from the LG&E and KU, which are Kentucky
4 utilities, recognized that EPA was establishing a standard,
5 calculated it, gave us a, reported a calculated rate, a
6 blended rate standard that had been calculated by the State
7 of Kentucky, which was, and complained that it was going to
8 be too stringent, it was in fact more stringent than what
9 was promulgated, but it, and the Agency received other
10 comments that indicate that the utilities knew what EPA was
11 doing, it knew how it was recalculating them, and that's
12 what the final rule does, it looks at, uses the same
13 building blocks, it takes the same approach, it uses three
14 building blocks instead of four, but as we, I think we've
15 talked about earlier building block four had a number of
16 issues that commenters objected to and they dropped it. But
17 building block one was efficiency, which was looked at on a
18 regional basis; building block two is increased utilization
19 of existing gas combined cycle plants, which was now done on
20 a regional basis, and the region that was chosen was the
21 interconnects, which are the large regions over which
22 electricity moves and are connected, and regulated; and
23 building block three was the amount of developable renewable
24 energy. It based all of those, and it calculated two
25 separate rates, and then it used those two separate rates to

1 also calculate mass-based goals by each state, which is just
2 a matter of taking each rate and multiplying it by the
3 amount of that generation, and then it calculated a rate-
4 based goal, which is a blended rate for gas plants, and
5 fossil fired, and, excuse me, and steam plants, and those
6 are the, and states can use any one of those three options.

7 So, it's not that the states, the regulated
8 community knew what EPA was doing in developing a standard.
9 EPA had hundreds and hundreds of meetings with stakeholders,
10 over 600 meetings with stakeholders; it had four public
11 hearings over eight days; there were millions of comments
12 filed; the amount of public opportunity, the amount of
13 outreach by the Agency, the opportunity for stakeholders to
14 comment on the rule was massive. They had the opportunity
15 to comment. And I think the fact that they have not come
16 here in their briefs, even after we raised this issue in our
17 brief, and identified a single piece of factual information,
18 a single piece of data that they could have presented to the
19 Agency but didn't have the opportunity to speak a lot, it
20 says that they don't have anything, they didn't know what
21 was going on, they don't have any information, there is no
22 reason why the rule would be substantially different. And I
23 think that the Court could rule on that ground because it is
24 a threshold requirement that they have to make. The Court
25 could also, of course, find that they have not met the

1 reconsideration problem, which is a statutory requirement,
2 it's an exhaustion requirement, it's intended to, as I said
3 much earlier its distinction between procedural and
4 substantive is essentially illusory because they're always
5 late, they're always complaining about something in the rule
6 that you want EPA to get, and that Congress clearly
7 intended, as this Court has recognized, EPA to get the first
8 opportunity to look at whatever information that the
9 Petitioners claim that they didn't get, have an opportunity
10 to present, and make a decision on it. And therefore, I
11 think the Court could rule on that, as well.

12 JUDGE HENDERSON: All right. Thank you. Mr.
13 Barker.

14 ORAL ARGUMENT OF JOHN CAMPBELL BARKER, ESQ.

15 ON BEHALF OF THE PETITIONERS

16 MR. BARKER: May it please the Court. In
17 defending its unprecedented claim of Executive power to
18 issue a cap and trade system that Congress refused to pass,
19 EPA is wrong in arguing that this Court cannot even resolve
20 whether this rule was issued with proper notice, and it was
21 not. I'd like to first turn to the exhaustion arguments,
22 and then turn to the notice arguments.

23 To rule for us on exhaustion and consider the
24 merits of our notice and comment claim the Court need not do
25 any more than recognize the reasoning of its earlier *Small*

1 *Refiner* case in 1983. We do agree that later decisions in
2 *UARG* and *Mexican* went the other way and interpreted 307(d)
3 to apply to a notice and comment claim, but as early as
4 *Small Refiner* in 1983 the Court walked pretty exhaustively
5 through the legislative history of Section 307(d)(7), and
6 explained, in fact, held there that it should not be
7 interpreted to bar judicial review of a procedural claim
8 that is also claim of procedural error under the APA, such
9 as a fundamental failure of notice and comment. And for all
10 the reasons there this Court, 307(d) is not a bar. If you
11 look at what happened in *UARG* the 307(d) argument there was
12 almost an afterthought, it was addressed at oral argument,
13 and there wasn't any extensive consideration of the
14 legislative history of 307(d)(7), or how it fit together.
15 And the provisions --

16 JUDGE KAVANAUGH: The *UARG* decision from 2014? Is
17 that what you're talking about?

18 MR. BARKER: Yes.

19 JUDGE KAVANAUGH: Our Court? That wasn't an
20 afterthought.

21 MR. BARKER: No, it was the Court's basis for
22 resolving the notice claims there, but the question there of
23 whether the (d)(7) exhaustion should be applied to
24 procedural issues was not addressed extensively in the
25 briefs, the Court didn't walk through the reasoning of *Small*

1 *Refiner* and try to grapple with it. So, all I'm suggesting
2 is that the Court's cases are in conflict.

3 JUDGE KAVANAUGH: It's a pretty thorough opinion.
4 I didn't write it, just for the record.

5 MR. BARKER: The overall opinion is thorough --

6 JUDGE ROGERS: Neither did I.

7 MR. BARKER: -- but *Small Refiner* is also
8 thorough, and all I'm suggesting is that *Small Refiner* has
9 the better reasoning on this because it does actually
10 grapple with not only the text of 307(d)(7), but its
11 structure, as well as the legislative history, and I'd
12 encourage the Court to look at that as it considers the
13 issue, because 307(d)(7) is not a good fit for notice
14 issues. If the EPA's reading of that was write, then EPA
15 could propose a final rule saying we propose to do not X,
16 and then it could have a final rule that does X, that final
17 rule could be stayed for only three months, that's what
18 (d)(7) provides, and judicial review of that rule would be
19 barred under their reading so long as EPA sat on a petition
20 for reconsideration, as long as it wanted. So, the Agency
21 could without any notice --

22 JUDGE TATEL: There's always *mandamus*, a lot of
23 people use that.

24 MR. BARKER: Could you repeat your question?

25 JUDGE TATEL: I said there's always *mandamus*,

1 that's what that's for.

2 MR. BARKER: Perhaps there is, but there's also
3 the futility doctrine --

4 JUDGE TATEL: What do you mean perhaps? I mean,
5 that's what *mandamus* is for.

6 MR. BARKER: Well, even if the Court disagrees
7 with us on that argument, our second argument on exhaustion
8 is the futility doctrine, we cite that at page six of our
9 brief, and after EPA has sat on our petition for over a
10 year, but told us in its merits brief here exactly what it
11 thinks of our notice claim, the futility doctrine is
12 triggered, because there is no reasonable chance that EPA --

13 JUDGE MILLETT: You filed your, when did you file
14 your brief raising this futility argument? It wasn't a year
15 after the petitions for reconsideration were pending, it
16 would have been a few months?

17 MR. BARKER: The delay is part of our futility
18 argument, but the stronger part of our futility argument is
19 that we know from EPA's merits brief here exactly what it
20 thinks of our notice claim.

21 JUDGE MILLETT: But when you filed your opening
22 brief you didn't get no, you hadn't yet seen EPA's merits
23 brief, so I'm really trying to figure out what your futility
24 argument is, it can't be that we think their merits brief
25 will answer this, and so we therefore have an argument, and

1 if they don't, maybe they'll wait a really long time.

2 MR. BARKER: Well, our lead argument is that
3 307(d)(7) is not a good fit for this, and as *Small Refiner*
4 held, if procedural error is reversible under the EPA --

5 JUDGE MILLETT: Not a good fit for this adequate
6 notice problem.

7 MR. BARKER: If that's rejected as page six of our
8 reply brief we raise the futility argument and point out
9 that the waiting for EPA to rule on the administrative
10 reconsideration petition would be futile. It sat on it for
11 over a year, and we know exact, from its merits brief here
12 exactly what it thinks. There is no reasonable chance it's
13 going to reach a different conclusion, so the Court should
14 reach the merits of our notice and comment claim here, and
15 the final rule was not issued with proper notice because EPA
16 specifically said that it was not proposing a subcategory
17 specific emission rate, but instead was proposing source
18 specific rates.

19 JUDGE PILLARD: But Mr. Barker what about the part
20 of our test where you're supposed to show a substantial
21 likelihood that the rule would come out differently? I
22 haven't heard anything from either of you on that.

23 MR. BARKER: Right, the prejudice prong. And in
24 *Small Refiner* the Court held that if procedural error is
25 reversible under the APA it's also reversible under

1 307(d)(7), so we think that those two elements are really
2 just one prejudiced prong that is the same as the EPA's
3 prejudice test. And as the Court knows, we don't have to
4 convincingly show that EPA would have reached a different
5 result.

6 JUDGE PILLARD: But I just want to hear the
7 substance of it, because we've heard from the EPA that
8 they've had millions of comments, they've had hundreds of
9 meetings, that this, you know, a lot of what they did that's
10 different is stuff that was proposed by industry, and so,
11 you know, can you give us your counterpoint to that?

12 MR. BARKER: The high level picture on this is
13 that regulating a state's energy grid is an intricately
14 detailed process, and that we need notice of, with some
15 specificity what EPA is proposing to do. And I think this
16 is captured at J.A. 1706, which is a comment by the Texas
17 Commission on Environmental Quality, where it was perhaps a
18 bit prescient in thinking ahead to the notice and comment
19 issue and said if the EPA intends to deviate substantially
20 from the state goals included in the proposed rule, then the
21 EPA should withdraw and re-propose the rule to allow states
22 and other affected parties adequate opportunity to provide
23 meaningful comment, and the rest of that comment explains
24 why.

25 JUDGE PILLARD: But can you point to specific

1 things you would have, or categories, or types of things
2 that you would have liked to be able to say to them about
3 what they've done that you were unable to say to them?

4 MR. BARKER: First of all, there was no number for
5 subcategory specific rules, 1305 for coal plants, 771, I
6 guess, there was no number at all, so this is not a case
7 where it was just a binary decision.

8 JUDGE PILLARD: So, you would have said to them we
9 don't want that number?

10 MR. BARKER: Some Petitioners would have explained
11 why that was too high, for example, the State of Wyoming
12 under the proposed rule it could largely go on with how it
13 was doing things with some adjustments because it didn't
14 have a lot of potential for new energy, but under the final
15 rule it got much stricter. And EPA acknowledges at page
16 J.A. 224 that the rates got much stricter for many of the
17 Petitioner states. But even apart from that there's just a
18 question of, and you're going to hear in a little bit in the
19 record based argument about some of the flaws in EPA's
20 methodology in a final rule, some of the assumptions it
21 makes aren't well founded. The record as it exists now
22 shows that that is reversible error, but if that had been
23 issued in the proposed rule we would have had even more
24 opportunity to put on affirmative evidence, Now, of course,
25 it's EPA's burden to show adequate demonstration, and that's

1 all going to be addressed in the next part of the argument,
2 but those are the sorts of issues.

3 JUDGE PILLARD: Yes, but that's helpful. That's
4 responsive to what I was asking.

5 MR. BARKER: Right. And then my final point on
6 notice and comment is that it is usual and normal for an
7 agency when it realizes that the approach in this proposed
8 rule is not going to work to republish the rule, that is
9 what EPA did here with the new source rule, it originally
10 had a new source rule proposing a statewide goal, much like
11 the proposed rule here, but then when it decided to switch
12 it republished its rule, that's all that we're asking be
13 done here.

14 JUDGE HENDERSON: All right. Thank you. So,
15 we've come to the last issues, which are the record-based
16 issues.

17 **V. Record-Based Issues Not Submitted on Briefs**
18 **(Petitioners' Opening Brief, II, IV. C-D, V, A, D)**

19 JUDGE HENDERSON: Good afternoon.

20 ORAL ARGUMENT OF WILLIAM BROWNELL, ESQ.

21 ON BEHALF OF THE NON-STATE PETITIONERS

22 MR. BROWNELL: Judge Henderson, may it please the
23 Court, William Brownell on behalf of the Non-State
24 Petitioners.

25 Let me take just a minute to explain how my

1 colleague from Wisconsin, Mr. Tseytlin, and I are going to
2 handle the argument. In this last portion of the argument
3 today we're going to focus on EPA's failure to satisfy its
4 statutory burden to show that even if it's generation
5 shifting system can ever be used under Section 111(d) that
6 system must be demonstrated to work in the real world in all
7 of the states to assure that the national performance rates,
8 and electric demand can be met. I'm going to begin with a
9 brief explanation of the rule, and then focus on why this
10 demonstration cannot be based on national performance rates
11 that are derived from projections of total region-wide
12 building block capacity.

13 My colleague will then explain why the extreme
14 reductions in coal fired energy that are derived from the
15 regional analysis cannot be met by many states in the
16 regions, as the statute requires, and also, he's going to
17 address the practical problems that result for states from
18 EPA's heavy reliance on a shift to renewable energy.

19 Now, because this was discussed this morning no
20 individual unit can achieve these national performance rates
21 with any emission control system that can be applied at the
22 unit. EPA created a system of emission reduction that is
23 based on what is called in the rule emission rate credits
24 that are derived from a vast expansion in alternative
25 generating capacity across three vast geographic regions.

1 In the case of the eastern region, for example, this region
2 includes all or part of 38 states that vary greatly in their
3 renewable energy capacity. The rule establishes a formula
4 that appears at Joint Appendix 490 at 60.5790(c) of the
5 rule, but this formula must be used by existing fossil units
6 to calculate compliance with the national performance rates.
7 Under the rule each existing fossil unit must hold enough
8 emission rate credits to calculate a fictional, or what EPA
9 calls an effective average megawatt hour rate that's
10 equivalent to the national performance rates. Now, these
11 emission rate credits are the only best system of emission
12 reduction based compliance method that's available to fossil
13 units to calculate compliance. So, as a result, a shortfall
14 of available emission rate credits is going to prevent
15 fossil units from generating the megawatt hours that they're
16 being relied upon to supply, and a shortfall in emission
17 rate credits is also going to reflect a shortfall in
18 replacement generation which then increases the need for
19 fossil megawatt hours that cannot be supplied due to a lack
20 of ERCs, or emission rate credits.

21 For three reasons, the rule's requirement of what
22 is in effect a megawatt hour by megawatt hour authorization
23 to operate each fossil unit based on regional projections of
24 as of yet to be constructed alternative generation to
25 provide both emission rate credits, and to meet electric

1 demand has not been demonstrated, nor shown to be
2 achievable. First, this system to create the emission rate
3 credits that fossil units must have in order to operate does
4 not exist now. To meet the rates this regional system
5 requires across each of --

6 JUDGE KAVANAUGH: For purposes of this argument
7 we're assuming arguendo that EPA has legal authority.

8 MR. BROWNELL: Absolutely, Your Honor.

9 JUDGE KAVANAUGH: So, of course it hasn't happened
10 yet, I mean, how could we, I'm trying to figure out how we
11 could say what you're talking about. I guess I'm trying to
12 understand the nature of your argument, what would we be
13 saying, it's arbitrary and capricious?

14 MR. BROWNELL: Okay. The first point goes to
15 whether the system is demonstrated, Your Honor. And under
16 the case law of this Court to be demonstrated a system has
17 to be something that's more than speculative, or
18 experimental, or theoretical, there has to be actual
19 historical experience.

20 JUDGE KAVANAUGH: Well, and on that don't they
21 have the practice that's gone on first with other programs
22 which are similar, but not identical, obviously, and then
23 state efforts, they're relying on those, as well. And I
24 agree, it's not all a perfect fit, but this is the idea of
25 administrative practice is to come up with a program that

1 hasn't been used before, but that doesn't mean it's not
2 adequately demonstrated, necessarily, does it? If they're
3 relying on --

4 MR. BROWNELL: Your Honor, if I can --

5 JUDGE KAVANAUGH: -- similar proven programs?

6 MR. BROWNELL: If I can break that down into two
7 points, because it really covers the first point I want to
8 make about whether this system of replacement generation to
9 create emission rate credits is demonstrated; and the second
10 point about whether regardless of that whether the rates are
11 achievable with that system.

12 On the first point I'd start by analogizing to
13 what went on in this Court's *Sierra Club* decision with SO2
14 scrubbers. In that case the Court found that SO2 scrubber,
15 they were out there, they existed, there was a database, and
16 the Court said you can project based on that system that's
17 demonstrated that the system can achieve a higher level of
18 reduction in the future. But what the Court did not say,
19 and could not have said is that if scrubbers do not then
20 exist it could not have said that they were demonstrated
21 based on a prediction that they would develop at some point
22 in the future. And that's what we have here with this
23 system, EPA says in the record at Joint Appendix 222 that
24 the location of generating resources and loads matter,
25 first, and second, at Joint Appendix 3895 that local

1 reliability conditions are critical to the functioning of
2 the system. Therefore, they say at that page, as well, that
3 there's no, that any reliable analysis of electric
4 reliability cannot be undertaken until the rule is
5 implemented when we know what the system looks like, because
6 you need to know where the generating resources are located.
7 Recall we're talking about a vast region, all or part of 38
8 states, you don't know where the generating resources are
9 located, you don't know where the infrastructure is
10 required, you don't know what the flow of ERCs, emission
11 rate credits or megawatt hours looks like, and as a result
12 EPA says at the 3895 that a realistic assessment of
13 reliability is not possible yet. This system does not exist
14 now, has to be developed in the future, system that must be
15 created for the future, and that can't even be realistically
16 assessed now is not a system that's demonstrated under this
17 Court's case law. It's theoretical.

18 JUDGE KAVANAUGH: But this language, the statutory
19 language here which the Administrator determines has been
20 adequately demonstrated, that which the Administrator
21 determines, this give you extra boost at deference, this
22 seems the classic example of a situation where of course
23 they're making predictive judgments about the future, and
24 those will be, turn out, some of them will turn out to be
25 not true, that's how it works when you're doing things like

1 this. But does that mean, and how would you do the first
2 time you were trying something would that always be not
3 adequately demonstrated.

4 MR. BROWNELL: Let me answer that in this way,
5 Your Honor, that EPA's demonstration here never goes beyond
6 projections of total region-wide building block capacity, so
7 they look at building block one, two, and three, and say
8 across this vast eastern region this is what we project for
9 building block two, this is what we project for building
10 block three, the disconnect comes that they never take it
11 down from this vast regional projection of total building
12 block capacity to what this system actually looks like,
13 where do the generation resources go, where do the loads go,
14 what do the flows of electricity look like? Without that
15 you can't really assess adequacy, reliability --

16 JUDGE PILLARD: Why not?

17 MR. BROWNELL: -- or availability of emission rate
18 credits.

19 JUDGE PILLARD: Why not?

20 MR. BROWNELL: Because if you don't know, Your
21 Honor, where the generating resources are located --

22 JUDGE PILLARD: Your argument --

23 MR. BROWNELL: -- you don't know where the
24 infrastructure goes, you can't assess what the impacts are
25 going to be, what the perimetering difficulties are going to

1 be, what the electricity flows are going to have to be from
2 those renewable rich areas to the fossil areas that is going
3 to be critical both to meet the rates for ERCs --

4 JUDGE PILLARD: I don't, I'm not sure that I'm
5 following your point. You don't have to control which kind
6 of energy comes into your jurisdiction, do you?

7 MR. BROWNELL: Absolutely you do, Your Honor.

8 JUDGE PILLARD: This goes onto the grid.

9 MR. BROWNELL: Absolutely you do, and that's my
10 point that because the only way a fossil unit can comply
11 under this compliance formula at Joint Appendix 430, you
12 need emission rate credits. We know, and you will hear more
13 from my --

14 JUDGE PILLARD: Those don't have to be for units
15 in your state, do they?

16 MR. BROWNELL: No, they don't have to be for units
17 in your state, and that's where the problem comes in because
18 there are many states that do not have the in-state building
19 block capacity, and that's one of the big changes from the
20 proposal to the final rule. A state like Kentucky, for
21 example, EPA assessed in the proposed rule in-state building
22 block capacity and came up with a state goal of 1935 pounds
23 per megawatt hour for Kentucky. When they went to this
24 region-wide approach in the final rule they changed that to
25 the national performance rate of 1305. The only way a state

1 like Kentucky and many other states that are rich in fossil
2 resources can make up for that is to acquire emission rate
3 credits from areas that are rich in renewable capacity.

4 JUDGE PILLARD: They didn't pull this out of thin
5 air, this is a situation where they studied for some time
6 trends that had already been happening within the industry,
7 and then projected forward based on existing trends. Now, I
8 know there's debates about those types of things, but this
9 isn't just sitting back and speculating, this was, we did a,
10 you know, we looked at this for a period of time, here's
11 what's going on in the industry, I haven't heard you, anyone
12 dispute that in fact these generating shifting, and the
13 capacity to switch to gas, and all of these things are going
14 on out there, it's just they projected forward, and people
15 are fighting about the lines they drew and the projections
16 they made. Does that matter?

17 MR. BROWNELL: Your Honor, if I can respond to
18 that. The generating shifting that's been going on is that
19 the balancing authority area, the sub-regional area, and
20 it's designed to ensure the least cost supply of electricity
21 to consumers in that sub-regional area. What EPA is talking
22 about in this generating shifting, or generation
23 replacement, or emission rate credit creation system is
24 something that is entirely different in terms of magnitude,
25 and character. Not one emission rate credit is created by

1 any of the existing generation shifting, as EPA
2 characterizes it. What they are projecting --

3 JUDGE KAVANAUGH: One of the thoughts, thinking
4 about *EME Homer* is is this the right time to consider
5 something like this, because you're raising points that I
6 think are hard to know whether they're going to prove out to
7 be true or not in the future, but *EME Homer* suggests as-
8 applied challenges to particular problems could happen in
9 the future, as opposed to vacating the entire rule based on
10 something like this.

11 MR. BROWNELL: Yes, Your Honor, in contrast to *EME*
12 *Homer*, which dealt with EPA's decision to disapprove
13 specific state implementation plans, and issue federal
14 implementation plans for those states, once the Supreme
15 Court clarified what the law was that applied to those
16 determinations with respect to state specific plans, they
17 then directed that those plans be reviewed and evaluated in
18 accordance with that law. We're dealing here with the
19 national performance standard --

20 JUDGE TATEL: Mr. Brownell --

21 MR. BROWNELL: -- which either rises or falls
22 based on the demonstration and achievability.

23 JUDGE TATEL: -- this morning we heard from
24 intervenors on the side of EPA, intervening power companies
25 that the generation shifting that EPA is talking about is, I

1 think he called it business as usual, he said this is the
2 way the grid works now, that it is a generating shifting
3 machine, and because of the way it works with constrain
4 least cost dispatch that, that the economic system and the
5 way the grid worked is in the process of shifting already
6 from more expensive, higher emission fuels to lower cost
7 renewable fuels, and they said that's the way they do their
8 business, now, is that all wrong?

9 MR. BROWNELL: Your Honor, it's perhaps right with
10 respect to the states, where they're located, there are
11 states on both sides of this case, and there are states that
12 are rich in renewable resources, and there are states that
13 are rich in fossil resources, and we have a national
14 performance that requires for those states that cannot meet
15 the national performance rates, or for states with sources
16 that cannot meet national performance rates to go out --

17 JUDGE TATEL: Which states --

18 MR. BROWNELL: -- and do something different that
19 has never been done before.

20 JUDGE TATEL: -- can't meet it? Do we know?

21 MR. BROWNELL: Fossil rich states, such as
22 Kentucky, and Montana, and Wyoming, and North Dakota. And I
23 think there are about 18 or 19 states in all that had at the
24 time of proposal when EPA focused on what is in-state
25 building block capacity, emission rates that are higher than

1 the national performance rates that came out in the final
2 rule.

3 The second point I wanted to make in response to
4 Judge Kavanaugh's earlier question --

5 JUDGE ROGERS: Yes, but what I'm trying to
6 understand is EPA had this data over a decade of what was
7 it, 884 coal steam plants, which account for 96 percent of
8 the carbon dioxide emissions from such plants nationwide.
9 And so, it took that data and did all kinds of scientific
10 and analytical things, and expert things, and so, it looked
11 at what was going on. It's not as though, as Judge Millett
12 says, it just came up with this sort of out of thin air.
13 And then when it finally got all these figures together it
14 chose the lowest, and I don't understand why Judge
15 Kavanaugh's point isn't correct here? It's simply too early
16 in the game to address these very state-specific objections
17 since EPA has yet to receive the state proposed plans to see
18 what might be required, and what's doable and not doable,
19 and that's a whole negotiation that will start at the state,
20 and then, as we heard, and then come to EPA. And so, unless
21 EPA was totally arbitrary and capricious in using this as a
22 data source to identify the best system for emissions
23 reduction based on what was going on, and the statutory
24 factors, aren't your arguments foreclosed at this point?

25 MR. BROWNELL: No, Your Honor, I don't believe so,

1 and let me make one point in response to that, and then I'll
2 come back to my second point. That EPA did make these
3 national and regional projections based on all of the data
4 you talk about regarding building block capacity. So, they
5 projected that with respect to renewable energy, renewable
6 energy would develop to provide the needed power and
7 emission rate credits --

8 JUDGE ROGERS: And develop.

9 MR. BROWNELL: -- at a rate, at the maximum rate
10 for the maximum year it had ever developed in the past, and
11 that rate would be applied going forward year after year.
12 They assumed that every gas fired unit could increase its
13 operations to 75 percent capacity factor, even though
14 historically only 15 percent could operate at that level,
15 and they assumed that every coal fired steam generating unit
16 could operate at its highest historic efficiency, even
17 though that had not been attained on a sustained basis by
18 any unit in the past. That was all to come up with region-
19 wide capacity numbers which doesn't answer the question that
20 needs to be answered for the states that need to implement
21 this. Is that, that doesn't, that projection of total
22 region-wide capacity doesn't tell you what each state can do
23 with respect to its units, its in-state capacity, and that
24 brings me to the second point. The rule for compliance for
25 those states that lack in-state building block capacity

1 depends on the availability of an interstate system for
2 acquisition and transfer of emission rate credits. A
3 system, basing the system on regional averages works on if
4 alternative generation anywhere in the region is available
5 to all of the individual units in the region. But EPA's
6 rule provides no program that is going to make emission rate
7 credits transferable to and available in each state.
8 Rather, and this comes to Judge Rogers' points about the
9 state plans, it provides a whole range of mutually exclusive
10 state plan options derived from the national rates, each
11 subject to different programmatic requirements and
12 potentially different state requirements. Collectively,
13 these programs assure that there is going to be no uniform
14 interstate method to acquire and to transfer emission rate
15 credits. And EPA recognizes that these multiple options
16 cannot be relied upon to establish that its system is
17 demonstrated to assure a reliable supply of electricity in
18 each state.

19 JUDGE MILLETT: How would you get to, get through
20 building block one, you get to building block two, and then
21 it turns out that things are not materializing as
22 anticipated, states plans can't work, or the federal plan if
23 that's what's being used just isn't working, is there not a
24 mechanism, almost to get Judge Kavanaugh's ripeness point,
25 if that's what I can label it, is there no mechanism under

1 the rule for state, I thought there was a mechanism in which
2 you could go to the EPA and say this isn't working and we
3 can revisit it then. It just seems a little hard now to
4 predict that they're wrong about the trends. You're not
5 injured yet, you can fix this if and when you get to that
6 point, can you not go to the EPA and then re-jigger it then?

7 MR. BROWNELL: Your Honor, the point is that we
8 are injured now, EPA is promulgating a rule that companies
9 must comply with --

10 JUDGE MILLETT: I don't mean in any Article III
11 sense or anything like that, I'm really just talking about,
12 you know, we don't know what's not going to be there until
13 we get somewhat closer in time and see what happens through
14 the other building blocks. So, isn't it better to wait and
15 deal with, you know, the processes that are available to go
16 back to an agency at the time when it's pretty clear it's
17 not going to work and deal with it then, and if they don't
18 deal with it then come back to the Court and say look, this
19 is not working, their projections were wrong and they will
20 not be flexible about this, or work with us on this.

21 MR. BROWNELL: It would be nice if we did not have
22 any compliance options, obligations in the interim and could
23 come back and have the Agency fix problems. With respect to
24 your comment, it recognizes at 407 of the Joint Appendix
25 that there's no reasonable certainty right now regarding

1 implementation of any planning measure at any location, so
2 we don't have any reasonable certainty regarding what is
3 going to develop with respect to trading, with respect to
4 generating capacity, and that is a problem under a statutory
5 provision that requires EPA to demonstrate that it, that
6 established that its system is demonstrated, and that its
7 national rights that impose compliance obligations are
8 achievable with that system.

9 My third point is that in response to comments on
10 achievability problems with the rates, EPA repeatedly
11 asserts throughout the rule that well, the rule is
12 achievable because it's flexible. The Agency's obligation
13 is to establish that the rates can be met, and electricity
14 demand can be met with its best system of emission
15 reduction. The flexibility mechanisms include, first,
16 measures that are not a Section 111 best system of emission
17 reduction by EPA's own admission, demand side energy
18 efficiency, for example. Second, measures that restrict the
19 regional availability of the emission rate credits on which
20 the system depends, that's the multiple states plan options.
21 Third, measures that do not provide generating shifting,
22 even EPA agrees that electricity does not flow freely
23 between interconnects, yet their whole headroom analysis is
24 based on investing, relying on renewable energy, and other
25 interconnects. And finally, it's based on measures that do

1 not even yet exist, and I'm thinking of the clean energy
2 incentive program that's still out for public comment. So,
3 anytime EPA says flexibility it's merely highlighting that
4 its generating shifting system is not demonstrated now.

5 JUDGE HENDERSON: All right. Let me let your
6 colleague have some time.

7 MR. BROWNELL: Okay.

8 JUDGE HENDERSON: Thank you.

9 MR. BROWNELL: Thank you, Your Honor.

10 ORAL ARGUMENT OF MISHA TSEYTLIN, ESQ.

11 ON BEHALF OF THE STATE PETITIONERS

12 MR. TSEYTLIN: Thank you, Your Honor. Misha
13 Tseytlin on behalf of State Petitioners. I'd like to make
14 two points, one is about the unachievability of the state
15 goals, and second is about renewable energy.

16 But before I do that I'd like to address the
17 questions from Judge Kavanaugh and Judge Millett, because
18 they I think rest upon an incorrect assumption of what we
19 are trying to decide here with regard to the record-based
20 issues. This is from this Court's decision in *National Lime*
21 *Association*. At this point we need to determine whether EPA
22 has affirmatively shown that the rates that it set, the
23 1305, 771 are going to be achievable under the, quote, most
24 adverse circumstances which can reasonably be expected.
25 That decision has to be made now, not an as-applied basis

1 later. That is unquestionably the question before the
2 Court.

3 Now, with regard to the unachievability of the
4 state rates, there is only two propositions this Court needs
5 to accept --

6 JUDGE KAVANAUGH: Is it the, and this blends into
7 the statutory authority argument, they're not going to be
8 achievable by certain plants, you're talking about
9 achievable by, in the states as a whole, for the whole
10 system, or what are you exactly talking about?

11 MR. TSEYTLIN: There's two potential statutory
12 arguments with regard to achievability, one would be with
13 the, with utilities, and that's not the argument that I'm
14 making.

15 JUDGE KAVANAUGH: Right.

16 MR. TSEYTLIN: My making the argument is that the
17 state goals that EPA set they blended 1305, 77 rate, those
18 numbers are not achievable by the states. And the test
19 again is EPA must affirmatively show now --

20 JUDGE KAVANAUGH: How do we know that? How do we
21 know they're not going to be achievable?

22 MR. TSEYTLIN: Well, Your Honor, if I could I'll
23 walk through my analysis, it involves two steps, and it's
24 ultimately pretty simple. There needs to be two
25 propositions the Court would accept for the rule to be

1 vacated on this basis and this basis alone now, first, that
2 EPA has not affirmatively shown that many states can meet
3 these national blended rates within their own borders,
4 that's proposition one. Proposition two, that EPA has not
5 affirmatively shown that there will be sufficient intrastate
6 measures for these short fall states to achieve these rates.

7 Now, let me talk about the first part, this point
8 should really be undisputed, and undisputable, and I'd like
9 to illustrated the scope of this problem by turning the
10 Court's attention to J.A. 27, 2878, which is the, one of the
11 charts that I submitted in my letter yesterday, and I'll
12 kind of walk through one state example to show the scope of
13 this problem. Now, at the proposal stage EPA told the world
14 what it thinks each state could obtain from each building
15 block within its own borders. This chart that I submitted
16 yesterday and it's the J.A., that is those numbers. The
17 reason this chart is so important for purposes of this
18 discussion --

19 JUDGE ROGERS: This chart?

20 MR. TSEYTLIN: Yes, that's correct. The reason
21 this chart is so important for purposes of this discussion
22 is this is EPA's latest word on what the states could do
23 within their own borders on a block by block basis, but I
24 will just caution the Court that this chart grossly
25 understates the real problem for the states because at the

1 proposal stage EPA was giving states credit for existing
2 renewable energy, which they don't get. But in any event,
3 the problem will be illustrated by just taking the chart's
4 understated problem at their word. And in order for
5 illustration I'd like the Court to please look at the
6 Montana numbers. Now, with regard to Montana, the third
7 number there is 2114 --

8 JUDGE SRINIVASAN: So, just as a framing question,
9 is this part of your argument? Are you arguing that EPA
10 cannot look beyond a state's borders?

11 MR. TSEYTLIN: No, Your Honor. As I mentioned at
12 the beginning, I have two parts to my argument, one is it's
13 not achievable within the state's borders; two, once I
14 establish that that there's, EPA has not provided that the
15 shortfall, which you will see is extremely --

16 JUDGE SRINIVASAN: So, this is just a factual
17 predicate, it's not a legal point, it's a factual.

18 MR. TSEYTLIN: So, they're both necessary legal
19 points for me to prevail. And I guess it's factual, too.
20 They're both factual points for me to prevail, so I would
21 have to establish both.

22 So, the first number I'd like to point to is the
23 third number in the Montana chart, which is 2114, that's
24 what EPA set at the proposal stage Montana could obtain just
25 from block one. The next number I'd like you to look at is

1 the very next number in the chart, 2114, again, that is what
2 EPA is saying Montana can achieve from blocks one and blocks
3 two. Now, the reason those numbers are exactly the same is
4 that block two relies on increase in natural gas capacity
5 usage. Montana has no natural gas capacity, so it can't get
6 anything from block two within its borders. Now, the third
7 number, and this is the critical number, is 1936, that is
8 what EPA told the world Montana could achieve by applying
9 blocks one, block two, and block three within its borders.
10 Now, with regard to that number, when we go to the final
11 rule, Montana's goal is 1305, that is 600 more reduction,
12 600 more pounds per megawatt hour, that is an incredibly big
13 gap. To be absolutely clear, there is no way, there is no
14 way Montana can make up that gap by resources within its own
15 borders. And the easiest way to understand that is that
16 1305 number involves Montana achieving a national average
17 from natural gas, from block two, Montana has no natural
18 gas, it can't possibly achieve that 1305 numbers, and that's
19 just the tip of the iceberg. States from North Dakota, West
20 Virginia, Wyoming, Wisconsin, my home state, Kentucky,
21 Indiana all have similar problems, there's not enough time
22 to talk about those states now, but if the Court wants to
23 see the scope of the problem just please compare line F,
24 column F from this chart that I talked about, with the other
25 chart that I inserted into my letter, which is J.A. 442,

1 you'll see the massive scope of this problem.

2 Now, before I move on from this chart I'd like to
3 make one more point. The Court will notice in column F,
4 which is the 123 block column, there's a lot of, a couple of
5 states with really no numbers, states like California,
6 Washington, Massachusetts, New York, those are the states --

7 JUDGE ROGERS: Could I just ask you, I'm looking
8 at your chart and I don't --

9 MR. TSEYTLIN: Yes.

10 JUDGE ROGERS: -- see the 1305 number for Montana.

11 MR. TSEYTLIN: Your Honor, the chart --

12 JUDGE ROGERS: Is that on, it's on the first page
13 effected EGU, the interim rate and the final rate, is that
14 Montana?

15 MR. TSEYTLIN: Yes, Your Honor. If you look at
16 the Montana number for the final rate it's 1305.

17 JUDGE ROGERS: Okay.

18 MR. TSEYTLIN: So, last what I'd like to make
19 before moving on from the chart that I've been discussing is
20 you'll see some states with low numbers, California,
21 Massachusetts, New York, et cetera, those are the states
22 that by their word can over-comply. So, what do we have
23 here? We have a bunch of states, Montana, Wyoming,
24 Wisconsin, Kentucky, that can't possibly comply within their
25 borders; then you have a bunch of other states,

1 Massachusetts, California, New York, Washington that can
2 over-comply. And now, the other part of my presentation,
3 Judge Srinivasan, EPA has failed to affirmatively show that
4 its only answer to this problem, the interstate imbalance,
5 will occur in the, quote, most adverse circumstances that
6 can reasonably be expected. EPA has not mandated interstate
7 trading or cooperation, indeed, it specifically said at J.A.
8 147 that, quote, each state can do it on its own. That
9 means that the states that can easily over-comply,
10 California, Massachusetts, New York, Washington, retain the
11 authority to lock out Montana, Kentucky, North Dakota, West
12 Virginia, who need their credits and cooperation to comply.
13 That lock out scenario is the most adverse circumstances
14 which can reasonably be expected, and there is no way those
15 states can beat those rates under that most adverse
16 circumstances. And it's not even --

17 JUDGE ROGERS: Any evidence of that? This is a
18 regional system where the grid is, you know, a single
19 entity, as it were, it's not a state by state matter.

20 MR. TSEYTLIN: Your Honor --

21 JUDGE ROGERS: The states cooperate in so many
22 different ways.

23 MR. TSEYTLIN: Your Honor, with respect, state
24 compliance is a state by state matter, and state --

25 JUDGE ROGERS: So, you're saying there's no way

1 Montana can comply if the surrounding states, as I
2 understood your point, block them --

3 MR. TSEYTLIN: Yes, and we have --

4 MR. TSEYTLIN: -- from getting natural gas?

5 MR. TSEYTLIN: No, no. Your Honor, that's, it's
6 not blocking, it's a very important point, to kind of
7 correct something Judge Pillard said earlier.

8 JUDGE ROGERS: Credit.

9 MR. TSEYTLIN: For getting the credits, because
10 you can get the gas without getting the credits, and the
11 most adverse scenario is exactly this lock out scenario. We
12 have the most compelling possible --

13 JUDGE TATEL: Is there any reason to believe that
14 the over-complying states won't cooperate?

15 MR. TSEYTLIN: There is, Judge Tatel, there is
16 every reason to believe that.

17 JUDGE TATEL: Well, would you -- what is the
18 reason?

19 MR. TSEYTLIN: There is every reason to believe
20 that --

21 JUDGE TATEL: Why would they not cooperate?

22 MR. TSEYTLIN: California law, the biggest state,
23 sixth largest economy of the world, the world, one of the
24 world leaders in renewable energy, their state law by their
25 own admission they will not link with Montana or any other

1 state except if Montana surrenders authority to California,
2 and sets rules that are significantly more stringent than
3 the clean power plan requires. This is not just the most
4 adverse circumstance possible, this is a likely scenario. I
5 will note that California in its letter to the Court
6 yesterday did not disclaim it's state law, it just said
7 we'll link to a state if --

8 JUDGE TATEL: So, if Montana agreed to that could
9 it then meet its emission goals?

10 MR. TSEYTLIN: Sorry?

11 JUDGE TATEL: I said if Montana agreed to
12 California's conditions could it then meet its performance,
13 its standards?

14 MR. TSEYTLIN: Right, Your Honor, I don't take EPA
15 to be arguing that it is constitutional or legal for it to
16 put Montana or the following choice, either be governed by a
17 federal plan, or surrender their sovereignty to California
18 by over-complying with the rule. That cannot possibly be
19 the regime.

20 JUDGE ROGERS: You see what I'm getting at --

21 JUDGE SRINIVASAN: So, even if we take this -- go
22 ahead.

23 JUDGE ROGERS: -- we have this letter from the
24 Attorney General of California that says you're
25 misrepresenting the California situation. Now, I don't want

1 to get into the issues because all of this stuff is coming
2 to us sort of after the fact, but are we going to get into
3 this fight now when at least even the data you're submitting
4 to us says this is an unlikely worst case scenario?

5 MR. TSEYTLIN: Your Honor, as I said at the
6 beginning of my presentation, the legal standard now is
7 whether EPA has affirmatively shown that this will be, which
8 will be by the states in the most adverse circumstances
9 which can reasonably be expected. The only way this Court
10 can uphold the rule here is to determine that the very thing
11 that California told you is likely to happen in that state
12 statute, and in that letter, that letter, Your Honor, I
13 would ask the Court to read it very carefully, it does not
14 say California will waive its state law that prohibits it
15 from linking to any other state that doesn't establish a
16 regime as stringent as California.

17 JUDGE ROGERS: With all due respect, Counsel, this
18 doesn't say quite what you say. So, if this is the type of
19 evidence that EPA had before it why couldn't it proceed?

20 MR. TSEYTLIN: Your Honor, this is very important,
21 it is EPA's burden, not our burden, EPA's burden to
22 affirmatively show that the --

23 JUDGE ROGERS: California says our proposal
24 explicitly anticipates multi-state trading --

25 MR. TSEYTLIN: Yes.

1 JUDGE ROGERS: -- consistent with California's
2 long-standing support from multi-state collaboration to
3 reduce emissions, et cetera, et cetera.

4 MR. TSEYTLIN: Your Honor, I don't have --

5 JUDGE ROGERS: So, my point is if this is what the
6 record is before the Agency, why hasn't it met its burden?

7 MR. TSEYTLIN: Your Honor, if you --

8 JUDGE ROGERS: You're positing things that seem to
9 be outside the record.

10 MR. TSEYTLIN: No. Well, Your Honor --

11 JUDGE ROGERS: Yes?

12 MR. TSEYTLIN: -- if you read on in that letter,
13 California then references its own state law, and its state,
14 and this is completely, completely undisputed, its state law
15 says we will not link with another state unless the other
16 state rations off its program to as stringent as ours, which
17 is indisputably more stringent than the clean power plan.

18 JUDGE SRINIVASAN: Can I just ask this question?

19 Let's just assume for present purposes that we get passed
20 all the threshold issues and we actually focus on this
21 question, notwithstanding what Judge Rogers raised. If
22 California has its provision and it works in the way that
23 you posit that it works, it's not true that California
24 wouldn't give credits to any state, right? There's at least
25 some states to whom California would give credits?

1 MR. TSEYTLIN: Well, Your Honor, and those states
2 can comply with the rule.

3 JUDGE SRINIVASAN: And then can those states then
4 turn around and give them to a third state?

5 MR. TSEYTLIN: No, Your Honor, in order to get a
6 credit from California, Montana has to enter into an
7 agreement with California, that's the only way that works.

8 JUDGE SRINIVASAN: No, but I mean if there's some
9 other state that enters into an agreement with California
10 and therefore gets a credit, I don't, this is just a factual
11 question, I don't know the answer to this, if some other
12 state enters into an arrangement with California and gets a
13 credit, and then that other state doesn't have the same rule
14 that California does, is there then a secondary market for
15 the credits?

16 MR. TSEYTLIN: No, Your Honor, once the two states
17 enter an agreement they're treated like a pool. So, they
18 can't work with another state unless both states now agree
19 with the third state. And so, and then this is another
20 point, and this is, goes to EPA's burden to affirmatively
21 show, if California withdraws, just with California, and
22 that's very likely to happen, but it's probably going to
23 happen with some other states, as well, if that happens all
24 of EPA's numbers break. The whole point of the national
25 average rate, especially on the renewables, is based on what

1 happened in the whole nation in certain years between 2010
2 and 2014. Once California is removed from that assumption
3 all of the numbers that EPA, and all of the insufficient
4 modeling it did completely, completely falls apart.

5 Now, I would like to move on to my second point
6 about renewable energy. Even if EPA could set its national
7 rates at rates that some states could not possibly achieve,
8 then the rates that it set, 1305, 771, are not achievable by
9 just the three building blocks, and I would like to focus on
10 renewable energy and the specific wind energy, and the
11 reason that this is so important is renewable energy is the
12 biggest building block, and wind energy is the majority of
13 that building block. How did EPA get its wind number? What
14 it did is it took one year, 2012, which is a year what
15 everyone agrees that the amount of wind energy increase was
16 astronomically spiked by the expiration of a massive federal
17 tax credit. And what EPA did is they took that year and
18 they said that expanded year is going to happen for seven
19 straight years, year over year. Now, what's amazing about
20 this is if the Court looks at that year there was a huge
21 amount of wind growth, the very next year the wind growth
22 was one-thirteenth, let me repeat that again, one-thirteenth
23 of what happened in 2012. We were given assurances earlier
24 that the reason this is not an unbounded is because there's
25 all these other important constraints on EPA, including

1 showing it achievability. If EPA can take a year where the
2 very next year was one-thirteenth the rate, and project that
3 completely unsustainable year for seven straight years,
4 there is no way this does anything but become completely
5 unbounded. And I would also like to point out that EPA's
6 wind number is not the product of any modeling, it's not the
7 product of any reasoned analysis, and it's not the product
8 of any economic analysis. EPA just kind of picked this
9 number. It could have just as easily discounted the obvious
10 outlier year, which was 2012, and EPA failed to demonstrate
11 this entirely unrealistic wind number will provide a
12 reliable supply of energy.

13 Now, the biggest single challenge with adding a
14 huge amount of wind to your power grid is that wind is not
15 controllable, the wind blows when it blows, and that energy
16 must be consumed at that time, which means that if it's not
17 windy on a hot summer day in Texas you're not going to get
18 much wind energy, and you've got to ramp up your natural gas
19 capacity all the way up in order to fill that gap. That is
20 undisputed. And this is a striking point that I really
21 didn't understand until I began preparing for this argument,
22 EPA never modeled any situation where wind is that high, and
23 also, natural gas is running at the rate that's required
24 under block two. EPA never did that analysis because those
25 numbers don't work. What EPA did in its modeling was that

1 it took just wind at that level, and it let anything happen
2 with natural gas that it wanted to happen, and of course, at
3 that point natural gas was running at only 48 and then it
4 was able to ramp up. But EPA has never shown a model which
5 achieves wind at that incredibly high rate, but also has
6 natural gas at the block two level. That is a fatal defect
7 in the rule, and that's not a technical judgment, that's
8 just an error in fact. Thank you, Your Honors.

9 JUDGE HENDERSON: All right. Mr. Lynk.

10 ORAL ARGUMENT OF BRIAN LYNK, ESQ.

11 ON BEHALF OF THE RESPONDENTS

12 MR. LYNK: Good afternoon, Your Honors, my name is
13 Brian Lynk from the Department of Justice representing EPA.
14 Let me briefly explain how I'm dividing this segment with my
15 colleague, Mr. Rave. I'm prepared to address record issues
16 concerning the determination that the building blocks are
17 the best system, achievability of rates, and costs; Mr. Rave
18 will address reliability and transmission adequacy, trading
19 issues, and specific state objections not submitted on the
20 briefs.

21 In this case EPA made the reasonable determination
22 that the best system of emission reduction of carbon
23 emissions from power plants consists of measures that power
24 plants already widely use to reduce carbon, and can do so
25 cost effectively, and more cost effectively than the other

1 measures EPA considered. EPA took in the final rule a
2 regional approach reflecting the regional nature of the
3 interconnected electricity system, and the region-wide scope
4 of opportunities available for affected plants to access
5 emission reduction measures. It quantified the building
6 blocks at a level that did not project their maximum
7 possible level of emission reduction, but rather did so at a
8 reasonable level of stringency, and there were multiple ways
9 in which in constructing those building blocks EPA was
10 conservative. In building block one EPA used three
11 different statistical approaches to calculate heat rate
12 potential and picked the lowest one. In building block two
13 EPA looked at the ability of gas plants to increase their
14 rates of utilization, and set a target that was well below
15 what gas plants, so owners themselves report as their
16 availability. Availability typically 87 to 92 percent, the
17 target was 75 percent to be met gradually by 2030, not in
18 the first year of compliance. In building block three EPA
19 projected levels of renewable growth that were middle of the
20 road, not at the high end, and EPA documented that
21 extensively in the record in showing how industry estimates,
22 the estimates of the national renewable energy laboratory
23 and other sources had all concluded that similar levels of
24 growth, or even higher levels of growth were likely, and
25 that the grid could support that.

1 EPA then set emission limits not at the rate, not
2 at the level that equaled full implementation of these
3 conservatively constructed building blocks, but at the least
4 stringent level after applying them to sources in each
5 region. So, this meant, this even further assured the
6 achievability of the rates by leaving headroom, as EPA
7 called it, because it's not necessary to implement fully the
8 building blocks in all three regions.

9 JUDGE KAVANAUGH: They're basically arguing that
10 the whole thing, or parts of it, not the whole thing, parts
11 of it are going to fall apart in a couple of years, if not
12 sooner, and I don't know how we assess that, but support it
13 does start falling apart in parts, are there avenues, legal
14 avenues open to them? I'd like to know the extent we were
15 to on this issue agree with you and uphold the rule on this
16 issue, depending on what happens on the other issues, but
17 uphold the rule are there avenues to bring future challenges
18 if all these predictions turn out to be wrong?

19 MR. LYNK: Well, and I don't know how we answer
20 that. Let me start by saying the Court has always
21 understood there would be a degree of uncertainty in any
22 standard under this section, as in other regulations.

23 JUDGE KAVANAUGH: Yes. Yes, that's right.

24 MR. LYNK: The Court's upheld rules based on test
25 data from just representative plants, as in the *Essex* case,

1 whereas here, as the Court noted earlier, EPA had data from
2 the entire coal and gas industry. The Court has upheld the
3 standard that extrapolated from the performance of utility
4 boilers to set limits for industrial boilers, in the *Lignite*
5 *Energy Council* case. Here there was no extrapolation, EPA
6 looked at what this industry is doing. There is, of course,
7 the state planning process --

8 JUDGE KAVANAUGH: My question, I appreciate --

9 MR. LYNK: Yes.

10 JUDGE KAVANAUGH: -- all that, and I --

11 MR. LYNK: That's fine.

12 JUDGE KAVANAUGH: -- gave you that for there, but
13 my question was what happens if things start unraveling?

14 MR. LYNK: Well, I mean, the state planning
15 process is obviously the first outlet, but if there were
16 actually new significant information, changed circumstances
17 that somehow demonstrated EPA should reach a different
18 conclusion about what's achievable, someone could still
19 petition for a new rule, there's nothing stopping that, and
20 obviously, the question would be are those the facts, will
21 those facts emerge?

22 JUDGE KAVANAUGH: And then the denial of that
23 would be judicially reviewable?

24 MR. LYNK: The denial of that petition in that
25 circumstance would be --

1 JUDGE KAVANAUGH: Just making sure how this --

2 MR. LYNK: -- a judicially reviewable action.

3 JUDGE KAVANAUGH: I mean, I know everything always
4 has uncertainties, but they're saying the uncertainties in
5 this case are quite significant, and --

6 MR. LYNK: I think, again, the way that, given the
7 robustness of the record the extent of its consultation with
8 all the other agencies that have expertise in the grid and
9 energy markets and renewable energy, the enormous
10 unprecedented public outreach in response to comments, I
11 mean, no one can ever say there's no uncertainty, but it's
12 hard to imagine what more in any one rule the Agency could
13 do to meet its obligation as defined in *Small Refiner*.

14 JUDGE MILLETT: I just want to follow up on that,
15 though, because I think it's important. Instead of someone
16 petitioning for a new rule imagine it's pretty much working
17 for 47 states, but, or I know two of them aren't in, so I
18 guess 46 states, and there's two of them, two of the 48 for
19 which it's not the alternative sources of power just aren't
20 showing up there, who's now to be capable. Short of
21 petitioning for a new rule can you explain to me how the
22 state planned process works in a way that would allow, if it
23 would, allow EPA to work with that state to address its
24 particular concerns and needs? Are these state rules
25 updated each year, or is there ongoing dialog about this?

1 Would you have the capacity to alter emission limitations,
2 or adjust them at least temporarily for a particular state
3 that had a need?

4 MR. LYNK: Well, one of the reasons the state
5 planning process would help is that, and obviously, on the
6 legal side of the case there are different views about
7 what's permissible and what's not, but from a record
8 perspective one of the things EPA did here to assure
9 achievability is there is a far broader array of measures
10 that a state could include in its plan that would qualify
11 for compliance beyond the building blocks, you know, energy
12 efficiency measures, just to give one example; to give
13 another example, distributed renewable generation
14 technology, which EPA noted at 201 of the Joint Appendix
15 there is preliminary analysis from NREL from DOE suggesting
16 that alone could potentially achieve a third to one-half of
17 the building block three stringency. But that wasn't
18 counted --

19 JUDGE MILLETT: But I get that you're --

20 MR. LYNK: -- in setting the building blocks. So,
21 the point being that the state when it devises a plan has so
22 many more options available, often even more cost effective.

23 JUDGE MILLETT: My question is about if they try
24 their best, the state is doing its darnedest and it just
25 doesn't get there for some sort of, you know, either the

1 nature of resources within that state, what can be --
2 don't -- because I didn't want --

3 MR. LYNK: I am sure there would be
4 opportunities --

5 JUDGE MILLETT: I appreciate the answer, but I
6 don't, the fact that they could meet it some other way, if
7 it just can't be met in good faith then what happens to that
8 state?

9 MR. LYNK: I have no doubt that EPA would be
10 available to consult with the state in this process as it
11 went on. And, you know, to give an example of that, the
12 preamble, for example, on the reliability issue, which I
13 prefer mostly to leave to my colleague, but notes that EPA
14 explicitly plans to continue consultation on that front.
15 So, there's no reason why it wouldn't also continue to
16 consult with state who encounter stumbling blocks in the
17 process of developing an approval of a plan, same thing
18 happens under the SIP process, which of course this is an
19 analog to.

20 There were some --

21 JUDGE MILLETT: Is this done year by year, or are
22 they adjusted year by year, or are they done, are the state
23 plans supposed to project out for 15 or 20 years, as well?
24 I just don't know mechanically how it works.

25 MR. LYNK: As a factual question I actually don't

1 know how often a state plan would have to be updated in the
2 course of a compliance time frame. I think maybe my
3 colleague may be able to answer that one.

4 You did have a question earlier about is there a
5 place in the record that actually says most of the industry
6 is cross-invested. Joint Appendix 277 says that 77 percent
7 of coal fired generation in the country is co-owned with
8 natural gas, and that 80 percent of the modeled shift in
9 building block two could be achieved just by those cross-
10 invested entities. And again, of course, the emission rates
11 were not set at the full level of the model shift. Joint
12 Appendix 286 says that 82 percent of the fossil fuel
13 capacity in the country, coal and gas is co-owned, co-
14 invested, cross-invested with renewable energy. So, again,
15 most of this industry already has a diversity of generation
16 sources. So, again, when we talk about uncertainty and
17 difficulties and implementation we shouldn't overstate that.

18 Now, EPA --

19 JUDGE KAVANAUGH: I wouldn't understate it either,
20 it's going to be quite a burden, I mean --

21 JUDGE ROGERS: Who knows.

22 JUDGE KAVANAUGH: -- who knows. I agree. Who
23 knows. Yes.

24 MR. LYNK: And EPA did not in this rule-making
25 ignore --

1 JUDGE KAVANAUGH: Our record of predictive
2 judgments as a country on big things is not ideal over the
3 last generation.

4 MR. LYNK: I should not, too, that, you know,
5 *Massachusetts v. EPA* itself recognized the idea that look,
6 when you regulate typically you do it incrementally, you
7 don't necessarily answer every question in the first fell
8 swoop, and that's just the same thing as a legislator,
9 agencies are the same way.

10 EPA did not ignore the compliance needs of smaller
11 entities, it documented again in the record 286, for
12 example, that coops are amongst those entities cross-
13 invested between technology. So, again, it's not as if this
14 is a rule that only some entities can implement and not
15 others. Even if for some reason a source didn't want to
16 choose the most cost effective measures available, there are
17 other ways that a source, even without acquiring emission
18 rate credits, even without shifting to another source could
19 implement, or could meet the standards. EPA, for example,
20 documented in the proposal that the more stringent proposed
21 coal emission limit could be met just by conversion to
22 natural gas at the source. So, again, if you're talking
23 about other hypotheticals, yes, that's possible, as well,
24 could meet the limit that way, could meet the limit with on-
25 site renewable investment, again. Of course, EPA expects

1 that sources will where they have these opportunities to
2 implement these measures that were identified as the best
3 system because they are cost effective, and it anticipates
4 reasonably that states, many states will likely engage in
5 trading because some have already said they want to do it,
6 some are already doing it under the state RGGI program, so
7 it was reasonable to assume that those things will emerge
8 here. But again, the rule isn't dependent on that, it is
9 achievable even without those things, they just make it even
10 more cost effective.

11 JUDGE TATEL: What's the answer to the argument
12 that Counsel made about the 2012 wind power calculation,
13 that that was based on a year that, where wind power was, or
14 are you not, is that your colleague's question?

15 MR. LYNK: I guess there's an argument that that
16 was unrepresentative. I mean, first of all --

17 JUDGE TATEL: And he said it was based on a year
18 when it was excessively, there was huge amounts of wind
19 power because it was the last year of a tax credit.

20 MR. LYNK: There was actually a renewal of a tax
21 credit that supports investment of renewable energies
22 recently, which means it will extend through the rest of
23 this decade. So, to that extent, then, circumstances
24 haven't changed. We also addressed in our brief regarding
25 building block two the argument that 2012 was

1 unrepresentative, and the counter to that is EPA didn't just
2 look at that year, it looked at long term trends, gas
3 utilization has grown almost every year since the early
4 1990s, renewable energy has been growing at incredibly, at
5 an incredibly rapid pace in recent years. It's not that
6 aggressive to assume that 15 years from now it might grown
7 at the maximum rate observed in the early part of this
8 decade, considering the continuing decline in its price, its
9 cost of construction, and the increase in its
10 competitiveness. It's a new technology, that's what new
11 technologies general do when they're successful, they become
12 more competitive.

13 JUDGE KAVANAUGH: Would you want to speak to the
14 standard of review the Solicitor General of Wisconsin argued
15 that this burden was on you to affirmatively demonstrate, do
16 you disagree with that?

17 MR. LYNK: I think that the *Small Refiner* case
18 continues to be an authoritative articulation of what EPA's
19 burden was, and that was to consider the factors required by
20 the statutory provision, in this case Section 111, and show
21 a reasonable connection between the facts on the record and
22 the policy choices EPA made. But importantly, this Court
23 has long recognized that a rule can be reasonable even if
24 the Court itself would not necessarily have made the same
25 policy choices, assuming they're lawful. And so, for that

1 reason I don't think, I think that the notion that there is
2 a burden of persuasion, or proof is not quite right, and
3 doesn't fit the administrative context.

4 If I can briefly address, as well, I know my time
5 is running short, but just to make the point, one more
6 point, that the cost here, if costs were the criterion for
7 determining what rule is transformative, this is not it. We
8 showed in McCade (phonetic sp.) declaration attached to our
9 opposition to the stay motion, paragraph 43, that the costs
10 of this rule were less than or at most comparable to, for
11 example, CAIR, the NOx SIP Call, and the 1979 new source
12 performance standards for power plants. So, if this rule
13 were transformative then you'd have to say they all were.
14 We also showed that the costs here are not in the same
15 league with MATS. MATS was estimated to cost \$10 million
16 within four years of implementation, within the first 10
17 years this rule is only estimated to cost one to three
18 million, and even that estimate is conservative for reasons
19 EPA explained in the record. Thank you, Your Honors.

20 JUDGE HENDERSON: All right. Mr. Rave.

21 ORAL ARGUMENT OF NORMAN L. RAVE, ESQ.

22 ON BEHALF OF THE RESPONDENTS

23 MR. RAVE: Good afternoon, again, Your Honor,
24 Norman Rave from the Department of Justice representing
25 Respondent. Judge Millett, to answer your question about

1 state plans, the rule provides that states will do one, do
2 an initial, do a one plan that will cover, you know, the set
3 up of the system that is designed to achieve the interim and
4 final goals. However, there are a number of mechanisms
5 available for both EPA to work with the states, and to, for
6 the plans to be revised. The EPA specifically put in the
7 final rule, or the preamble of the final rule at J.A. 213,
8 footnote 37 where it specifically stated that if a state is
9 having trouble developing its plan, and having trouble
10 finding partners to coordinate with, or has some other
11 difficulty that it anticipates in being able to implement
12 the rule that EPA will work with the state. And also, going
13 forward, EPA, DOE, and FERC have reached, have an agreement
14 where they will meet regularly, and they have been meeting
15 regularly, and will monitor the implementation of the rule
16 to address any reliability issues that might come up. The
17 rule itself requires that state plans address the question
18 of reliability, and includes a specific provision that
19 allows states to come in to modify their plans if there are
20 reliability issues. So, the rule does contain a number of
21 mechanisms, and EPA has committed to working with the
22 states, to working with the other federal agencies that are
23 associated with the regulation of the electric utility
24 industry to ensure achievability and reliability of the
25 grid.

1 JUDGE MILLETT: And which of those if the state
2 said it didn't get the cooperation it needed would be
3 judicially reviewable, would that latter one where they
4 could come in and try to amend the state plan, if that was
5 denied would that be judicially reviewable? Because this
6 cooperation and working together is a great thing, I'm not
7 dismissing it, that's a wonderful thing to do, but if we
8 needed later to be able to revisit the question, whether in
9 a particular region, particular state these predictions had
10 just collapsed, they didn't work, and it wasn't working, how
11 would that happen?

12 MR. RAVE: Well, it would depend on the situation,
13 Your Honor. For instance, if a state submits a revision to,
14 and states can always revise their plans, but if a state
15 submits a revision to its plan, and EPA denies the decision
16 that is reviewable. If a state or any other entity
17 petitions EPA for rule-making to monitor, to change the
18 rule --

19 JUDGE MILLETT: They have to petition for rule-
20 making, and then a whole new rule, as opposed to just
21 getting a change or an adjustment to our obligations under
22 this rule?

23 MR. RAVE: Well, I'm talking, I'm not talking
24 about -- I mean, I'm talking about outside the state plan
25 process. The state plan process the states can modify their

1 plans, they can submit a modification --

2 JUDGE MILLETT: They can change their plans, but
3 what if they cannot meet the emission targets as predicted
4 because things have gone awry, or they haven't turned out
5 the way predicted, at least for that state, or for that
6 portion of a region --

7 MR. RAVE: Well, again --

8 JUDGE MILLETT: -- what then?

9 MR. RAVE: -- EPA has committed to working with
10 states in that situation, they can certainly come in, they
11 could, I assume, perhaps bring another, an action based on
12 newly arising grounds if that qualifies. I mean, there
13 certainly are mechanisms by which either, that EPA will act,
14 or that if absolutely necessary can come to the Court. But,
15 however, we certainly don't think that there is any reason
16 to believe that --

17 JUDGE MILLETT: Just to be clear, so EPA agrees
18 that if somebody was really in a pickle and they said to EPA
19 help, we need to adjust our plan, we can't make the targets,
20 we're going to need another five years, or 10 years, and you
21 said no, we think you haven't done enough to reduce consumer
22 demand, that could come to court?

23 MR. RAVE: I believe there'd be, I'm sure there'd
24 be a mechanism by which that could come to the court, Your
25 Honor. But of course, we don't believe that that is likely

1 to occur. The rule provides numerous options and ways for
2 states to comply, they can utilize a rate-based plan which
3 would be based on emission rate credits, and there are
4 numerous ways that facilities in a state can obtain credits.
5 They can obtain it through a trading program, or they can
6 obtain it by direct interactions with renewable sources in
7 other states, you know, even if two states do not have a
8 trading agreement, a state, say Georgia, a renewable,
9 somebody who develops renewable energy in Texas or Georgia
10 that wants to sell emission credits to a utility in another
11 state can go to the second state, Ohio, or Montana, or
12 whatever, and that state can issue, states can issue their
13 called ERCs, emission reduction credits, to sources in,
14 renewable sources in other states. They don't, it doesn't
15 have to be in their own state. There are some restrictions
16 to ensure that emission credits meet the same, you know,
17 speak the same language, it's the same currency, but there
18 are flexible options so that even if two states are not in a
19 trading arrangement that a state in I think a utility, an
20 affected utility in one state can access emission credits
21 for resources in other states. So, this rule has a lot of
22 flexibility.

23 JUDGE MILLETT: I thought there was an issue,
24 though, if you have a mass based program, mass based rate
25 program that almost it doesn't translate into credits that

1 you could get from a rate-based program.

2 MR. RAVE: There are actually, in some
3 circumstances it does, Your Honor, and I have to look this
4 up because this is a complicated part of the statute. But
5 states can, there are mechanisms for states in rate-based
6 states to obtain credits for renewable resources in mass
7 space states, where the rate-based state can issue the
8 credit directly to that facility. You don't have to, if
9 you're a renewable energy source in building one you don't
10 have to get the credit issued by your own state, you can go
11 to another state and have it issue the credit and then
12 facilities in that state can utilize it. So, even if one
13 state is a mass-based state renewable energy sources in that
14 state can provide credits to utilities in other, in rate-
15 based states.

16 JUDGE KAVANAUGH: We were presented an example of
17 Montana and California, can you respond to that?

18 MR. RAVE: Yes, Your Honor. A number of
19 misstatements, I believe, in that analysis. The first is it
20 misrepresents how EPA applied building block three in the
21 proposal. EPA did not analyze how much capability each
22 state had to develop renewable energy. Building block three
23 in the proposal was based on state renewable performance
24 standards that states had, in other words, what if any goals
25 states had already had developed in a region, not, you know,

1 it happened in certain sub-regions, what goals they had for
2 developing renewable energy, and then applied that to the
3 amount of renewable energy already in the state, so that,
4 and that was as I talked about in the notice section of the
5 argument, this was the big complaint that many people had.
6 That system because it was based on what states had already
7 done, or what states hadn't already done in the case of
8 states like Montana, it meant that states that had done
9 nothing to address CO2 emissions had less, much less
10 stringent rates than states that already had done. So, it
11 basically said, you know, if you were out, working out every
12 day, and running really hard, and training, you're going to
13 have to do more than somebody that sat on a couch in order
14 to get fit would have to do, you know, walk out to their
15 refrigerator or something, you know, it was, it was not a
16 system, and the system generated many negative comments, and
17 that's why EPA switched to a system that is based on what is
18 achievable on a regional basis using the least stringent of
19 the three interconnects, so that it's not true to say that
20 the column that he's referring to in his chart, J.A. 2878 to
21 79, reflects some determination by EPA of what could be
22 achieved in Montana. Montana has a lot of wind resources
23 and can develop renewable energy if they can, so that it's
24 based on a false premise, you can't compare the numbers in
25 this to the numbers in the final rule, because they're

1 calculated on a different basis.

2 Secondly, it misstates California, as I think
3 California pointed out in its own letter it misstates what
4 California requires. Yes, California requires if it's going
5 to enter into a trading program that there be a common
6 currency that the, in other words that a rate, you know, a
7 unit of rate in one state represents the same thing as a
8 unit of rate or reduction in the other, that they have the
9 same, no, excuse me, that a quantity of generation in one,
10 in the state it's linking with represents the same amount of
11 reduction reductions as a quantity of generation in
12 California, but that's just the inter, necessary for any
13 trading system to work. And it has applied that system
14 very, very flexibly, California has taken the lead in trying
15 to reach out to other states, it's already established some
16 linkages with other states, and even into Canada to set up a
17 system for trading, the rule as the state's letter that I
18 filed yesterday indicated, its proposed rule is very open to
19 state trading, so it's simply not the case that California
20 wants to lock itself away, it's just the opposite.

21 And we also point out, Your Honor, that nine
22 northeastern states on their own, the regional greenhouse
23 gas initiative states set up a nine-state trading block to
24 deal with greenhouse gas emissions, and as Mr. Myers stated,
25 it has resulted in 40 percent reduction in CO2 emissions in

1 eight years. There's simply no reason to believe that
2 trading programs are not going to develop, utilities ask for
3 them, the states ask for them, every time EPA has set one up
4 and made NOx SIP Call, for instance, the CAIR rule, the
5 CSAPR rule, and Congress set one up in Title IV, successful
6 trading programs have developed, and there's absolutely no
7 reason to believe it won't happen here, one of the state,
8 EPA received reams of comments saying we want to be able to
9 use trading, make the rule trading-friendly, and that's what
10 EPA has done here, it provides for your emission-based
11 trading credits, or rate-based trading credits, it also
12 provides mechanisms for states to exchange or utilize units
13 as I was speaking earlier, even if they're not specifically
14 trading.

15 And it is important to understand what we mean by
16 trading, because Petitioners particularly in their briefs
17 have used it a couple of different ways, they've used
18 trading to some extent to talk about any interstate
19 interactions, so even if it is a one to one, you know, State
20 A buys credits directly from a, or arranges for renewable
21 energy in State B and gets credits, that's not what EPA
22 considers to be trading. Trading is some sort of
23 marketable, fungible, not fungible, you know, freely
24 tradable emission credit or reduction, some sort of
25 instrument that's used for compliance that's traded on

1 market, you know, the difference being between, you know,
2 contracting with a farmer to buy, you know, whatever his one
3 apple trees produces, as opposed to buying apples at the
4 grocery store. So, it's important to remember what we're
5 talking about.

6 And EPA did do modeling to show that, that states,
7 that the rule could be achieved even without trading, it did
8 involve some back to back interstate --

9 JUDGE PILLARD: Mr. Rave, you're drifting a little
10 bit from your speaker, I think --

11 MR. RAVE: I'm sorry. Sorry, Your Honor.

12 JUDGE PILLARD: -- it's going to be hard for
13 people to hear in the overflow.

14 MR. RAVE: So, EPA has demonstrated that the rule
15 is achievable without trading, there are many things states
16 can do in their plans to achieve reductions, they can use
17 demand reduction, and energy efficiency measures, they can,
18 there's this local type solar, solar panels on people's
19 roofs and things that reduce demand, there's, there are many
20 things states can do, power, coal plants can meet their
21 limits simply by changing to gas but not necessarily
22 building a new plant, just repowering to gas. So, there are
23 many things states can do, they have many options, there is
24 a lot of flexibility built into the rule, but as I think it
25 was Judge Kavanaugh or Judge Millett said earlier, the

1 record is trading programs have developed, they've been very
2 successful, and there's simply no reason to believe they
3 won't here, they won't be here.

4 JUDGE HENDERSON: If there are no more questions
5 your time is up.

6 MR. RAVE: Okay. Thank you, Your Honor.

7 JUDGE HENDERSON: All right. Mr. Poloncarz.

8 ORAL ARGUMENT OF KEVIN POLONCARZ, ESQ.

9 ON BEHALF OF THE POWER COMPANY INTERVENORS

10 MR. POLONCARZ: Good afternoon, Your Honors, Kevin
11 Poloncarz for Power Company Intervenors. My time is short,
12 and it's late, so I will quickly cover a few points.

13 We've heard a number of arguments challenging
14 EPA's technical determinations of whether the best system is
15 adequately demonstrated and achievable, I'm just going to
16 respond to points regarding building blocks two and three,
17 and the role of trading in the rule.

18 With respect to building block two, Petitioners
19 contend that a 75 percent utilization rate for the existing
20 gas fleet can't be maintained over time, or will result in
21 excessive wear and tear on their equipment. My clients
22 include the operator of the largest gas fired fleet in the
23 country, based on my client's collective experience a 75
24 percent utilization rate is eminently reasonable, and the
25 record demonstrates that even higher rates can be achieved.

1 The fact that the existing fleet was operated at a lower
2 rate in the past reflects nothing more than the failure of
3 the system to factor the cost of carbon emissions into
4 dispatch decisions. This rule would cause utilities to
5 start accounting for those costs in those decisions aligning
6 well with the market shift away from coal and to gas, and
7 with the way the power sector works.

8 Petitioners also argue that building block three
9 is unachievable, but the record reflects incremental
10 renewable generating capacity well in excess of the amounts
11 needed to comply. EPA assumed that the amount of new
12 renewable capacity added to the grid will never exceed the
13 rates at which it was added between 2010 and 2014. The
14 reality is as technology advances and prices decline an even
15 more rapid penetration of renewables is inevitable, but EPA
16 conservatively capped its projections at rates the grid has
17 already successfully demonstrated it can integrate, so from
18 the perspective of my clients its rates are modest and
19 reasonable.

20 On the role of trading --

21 JUDGE ROGERS: Could I just ask you regarding
22 building block number two, you had a sentence in there about
23 the only reason more hasn't happened is because of something
24 of conservation, or --

25 MR. POLONCARZ: The only reason it hasn't happened

1 in the past is because the current system as it exists
2 doesn't factor the cost of carbon emissions into dispatch
3 decisions.

4 On the role of trading, Petitioners don't come out
5 and say trading is unlawful, they can't, that's because many
6 of them advocated for EPA to include trading within the
7 rule, and because trading enjoys mere universal support
8 within the power sector as the most cost effective means of
9 achieving emissions reductions. So, to avoid contradicting
10 themselves, Petitioners don't argue that trading is per se
11 unlawful, instead they make a series of claims that all boil
12 down to the central contention that the rule's goals are
13 inadequately demonstrated, or can't be achieved in the
14 absence of a federally mandated trading program. These
15 claims are meritless. First, trading isn't necessary to
16 achieve the rule's emission performance rates. Utilities
17 can invest directly in lower emitting generation, and
18 thereby generate the credits their own fossil units need to
19 comply. While Petitioners say that's not possible, the
20 record and experience of my clients demonstrates otherwise.
21 My clients operate in over 20 states, and nearly as many
22 different markets, the one thing they have in common is that
23 they've all managed to reduce emissions in their generation
24 portfolios by investing in lower emitting generation.
25 Petitioners have no good answer for why they can't do the

1 same. All that trading does is it allows utilities to void
2 making those direct investments themselves, and let somebody
3 else who might have more experience building something like
4 a wind farm do it instead. This has consistently resulted
5 in the required reductions being achieved at least cost to
6 consumers, and that's the reason so many states and
7 utilities, including both my clients and many Petitioners
8 alike advocated strongly for EPA to include trading within
9 the rule, and EPA gave us all exactly what we asked for,
10 with a final rule that makes it simple for states to
11 incorporate trading into their plans.

12 Petitioners contend that EPA had to show sources
13 in each state could comply using only those credits
14 generated in their own state, nothing in the statute
15 commands EPA to take such a vulcanized approach and pretend
16 each state would function as an island. Electricity doesn't
17 observe state boundaries, and transactions for power and
18 renewable energy credits regularly cross state lines. So,
19 Petitioners attempt to suggest EPA had a burden to
20 demonstrate the system would work if credits never crossed
21 state lines is a fabrication that makes no sense, and has no
22 basis in the statute.

23 As a final point, I'd simply like to remind the
24 Court that the strategies on which this rule is based are
25 exactly those my clients have been implementing through

1 their investments in lowering main generation, and they've
2 done so while continuing to provide reliable and affordable
3 power to their customers. Their collective experience doing
4 so, and our very presence here today demonstrates the
5 reasonableness and achievability of the rule. Thank you.

6 JUDGE HENDERSON: All right. Mr. Brownell, how
7 about two minutes?

8 ORAL ARGUMENT OF F. WILLIAM BROWNELL, ESQ.

9 ON BEHALF OF THE NON-STATE PETITIONERS

10 MR. BROWNELL: Okay. Thank you, Your Honor. I
11 just have three points I'd like to make. The first point is
12 that under the statute it's EPA's burden to show that its
13 system has demonstrated, and that its rule is achievable
14 with its best system of emission reduction, not with non-
15 best system measures that have not met the best system
16 criteria. Under the case law of this Court that
17 demonstration takes place under must show that the rates are
18 achievable under the variable conditions that confront the
19 industry, and as my colleague said, under the most adverse
20 reasonable conditions, those include things like electric
21 utility system includes municipal utilities and rural coops
22 that may only have one electric generating station that
23 serves one load demand, and that has very little opportunity
24 for replacement generation. That's discussed at 3345 to 46
25 of the Joint Appendix.

1 The other thing about trading, coming back on the
2 point that I think Judge Millett and others raised earlier,
3 the rule makes interstate trading optional, that's 60.58-
4 10(c), and provides a variety of interstate trading options
5 that states can adopt that don't communicate with each
6 other. As Judge Millett raised, there are restrictions
7 between, on trading between rate-based and mass-based plans,
8 one of the restrictions is that the power has to follow the
9 emission rate credit, that is there has to be a power
10 purchase agreement, or a production agreement. And that's a
11 real problem for this headroom analysis because power
12 doesn't flow across interconnect, so that investing in
13 renewable energy in California is not going to provide the
14 power that's needed to meet demand while complying with the
15 rates. Multi-state plans don't communicate with states
16 outside the multi-state plans. Under the proposed federal
17 plan, a federal rate plan doesn't communicate with a state
18 mass plan, and vice-versa, we don't even know what federal
19 plan is going to be adopted yet because it's still out for
20 proposal.

21 The second point goes to what happens if things
22 unravel. The only way fossil units comply, as I said
23 earlier, is with emission rate credits. Emission rate
24 credits are defined in the rule at Joint Appendix 441 as a
25 tradable compliance instrument. One creates in some other

1 jurisdiction, or acquires from some other jurisdiction this
2 tradable compliance instrument. If emission rate credits
3 cannot be obtained, or if they're not available one can't
4 operate the fossil unit because you have to backup each
5 megawatt hour of fossil generation with an emission rate
6 credit. And if one doesn't have an emission rate credit
7 that means that megawatt hour that was needed to generate an
8 emission rate credit isn't being generated, so you lose that
9 to generation, as well.

10 Under this regional system that EPA has created of
11 generation shifting, achievability must take into account
12 the ability to satisfy electricity demand, as well as the
13 national rates, there must be enough emission rate credits
14 so that enough fossil units can operate in compliance with
15 the national rates. That together with the renewable energy
16 megawatt hours can meet the demand.

17 My final point is that my friend from EPA
18 mentioned costs. EPA considered costs, not benefits, they
19 concede they didn't do any cost-benefit analysis. Under the
20 Supreme Court's decision in *Michigan* no regulation is
21 rational if it substantially, does substantially more harm
22 than good. The failure to consider cost-benefit analysis
23 here is another reason to set aside the rule. Thank you,
24 Your Honor.

25 JUDGE HENDERSON: All right. Mr. Tseytlin, take

1 two minutes.

2 ORAL ARGUMENT OF MISHA TSEYTLIN, ESQ.

3 ON BEHALF OF THE STATE PETITIONERS

4 MR. TSEYTLIN: Thank you. Just four very quick
5 points. On the standard of review, Counsel cited *Small*
6 *Refiner*, that's a 211(c) case that was generic arbitrary,
7 capricious review. The standard here is sufficiently higher
8 on EPA, it's the *Lime Association* case, the Excess (phonetic
9 sp.) case, and the *Portland* case, it's a hard luck standard,
10 and EPA has the burden, that's undisputable.

11 Second, on the question of what happens if it's
12 not working for states, there is no mechanism in the rule to
13 fix that problem. Period. There's a footnote that Counsel
14 cited in the preamble, the preamble is not binding, does not
15 provide any legal authority. The actual rule has no
16 mechanism, if a state can't comply it's going to be forced
17 into a federal plan, which takes away Montana's legal right
18 to be governed by a state plan instead of a federal plan.

19 JUDGE MILLETT: Would that be something, would
20 that moment of force of giving up on your state plan and
21 being forced into the federal plan be a judicially
22 reviewable action or point?

23 MR. TSEYTLIN: Yes, Your Honor, you could
24 challenge the federal plan. But again, the burden is for
25 EPA to show achievability now, that's undisputed.

1 The third point, the wind number, Judge Tatel.
2 The wind number in 2012 was 13,131, the wind number in 2013
3 was 1,087. EPA is telling the Court that it can base a rule
4 on assuming that higher number happens for seven straight
5 years.

6 JUDGE TATEL: Well, is Government Counsel wrong
7 that the tax credit has been renewed?

8 MR. TSEYTLIN: The tax credit expired.

9 JUDGE TATEL: He told me, he said it's been
10 renewed.

11 MR. TSEYTLIN: No. Right, Your Honor. Let me
12 please explain. So, what happened is the tax credit
13 expired, so everyone knew it was expiring, so they took all
14 the 2013 wind and blew it into 2012. If the tax credit
15 keeps running then it will be back at the average rate,
16 around 6,000. The problem is the 2012 year is inflated by
17 the expiration of the tax credit. I'm not saying that you
18 can't --

19 JUDGE PILLARD: But I think the record reflects
20 that that wasn't the only data that they used, they used a
21 lot of other data to come up with that figure.

22 MR. TSEYTLIN: Your Honor, no, that's not
23 accurate, that was the only basis, the only basis. And I
24 urge Your Honor to look for choosing that number, it was the
25 only basis. There's nothing, there's no, it's not the

1 product of a model, it's not the product of economic
2 analysis, that was the only, only basis in the rule.

3 And then the final point on trading, Montana and
4 states like it absolutely need California, they need it for
5 trading, and even for this notion that if you don't have
6 trading you need cooperation, but you can't get reductions
7 from existing renewables. You need new renewables, you have
8 to get California's permission to cite the renewables in
9 California's jurisdiction under a sovereign authority.
10 You're not going to get that unless California is
11 cooperating, and that's what this rule creates, it creates a
12 situation where the states that can over-comply, California,
13 Massachusetts, Washington, et cetera, are given significant
14 power and leverage over states like Montana, like West
15 Virginia, like Wyoming, and this is a really big problem in
16 this particular area because those states, California,
17 Massachusetts, Washington, think that we're laggards, they
18 think that we, that the clean power plan does not go far
19 enough, they think it should go further. So, what the
20 states are going to do, and this is a natural economic
21 incentive is they're going to follow California's example,
22 they're going to say hey, Montana; hey, Wisconsin; hey,
23 Wyoming, if you don't want to be governed by a federal plan
24 which is really bad, this is what you need to do, this is
25 your price of admission. You've got to comply with what we

1 are doing in California, not what the EPA has mandated, that
2 is the system the clean power plan creates. That is
3 patently unlawful. Thank you very much.

4 JUDGE HENDERSON: All right. Let me just say on
5 behalf of the whole Court, I feel like we've all been
6 through a marathon today. You all have done your part. All
7 of you have, I can't imagine the hours and days and weeks
8 you've put into this case, and you have given us all we need
9 and more, probably, to work on it, so it's now up to us.
10 But I just want to thank you on behalf of the Court for all
11 of your efforts, and all of your time.

12 THE CLERK: Stand please. This Honorable Court
13 now stands adjourned until Wednesday, October 5th at 9:30
14 a.m.

15 (Whereupon, at 5:49 p.m., the proceedings were
16 concluded.)

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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

Paula Underwood

October 10, 2016

Date

DEPOSITION SERVICES, INC.